THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No.: 2014-CP-07-02670
Appellate Court Case No. 2016-001113

Benjamin C. Gecy, River City Developers, LLC and River City Real Estate, LLC .....Appellants,

v.

Somerset Point at Lady's Island Homeowners Association, Inc., f/k/a Coosaw River Estates Homeowners Association, LLC, Hilton C. Smith, Jr., Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc. of South Carolina, and Manorhouse Builders of South Carolina, LLC .....Defendants,

Of which Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina are .....Respondents.

RESPONDENTS HILTON C. SMITH, JR., COOSAW INVESTMENTS, LLC, AND HILTON C. SMITH, JR., INC. OF SOUTH CAROLINA'S INITIAL BRIEF

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STATEMENT OF THE CASE

This matter involves claims for abuse of process and malicious prosecution arising out of an underlying civil action pending in Beaufort County, South Carolina, captioned River City Developers, LLC v. Coosaw Investments, LLC, et al., Case Numer 2011-CP-07-03945 ("Underlying Action"), related to property River City Developers, LLC ("River City Developers") owned in Somerset Point at Lady's Island Subdivision. R. at ____ (Pl. Complt. ¶¶ 11, 16–18). River City Developers asserted three (3) causes of action in the Underlying Action. Appellants in the present appeal now allege that in response to the complaint filed in the Underlying Action, Somerset Point at Lady's Island Homeowners Association, Inc. ("SPLIHOA") filed an answer, counterclaim, and cross-claim asserting a claim for injunctive relief. Id. Furthermore, the complaint alleges that SPLIHOA named as additional parties Benjamin C. Gecy ("Gecy") and

[1] Respondents diverge from what Appellants have set forth as four (4) issues on appeal because Respondents do not argue that the filing of a *lis pendens* cannot support a subsequent malicious prosecution cause of action, provided that the plaintiff bringing the malicious prosecution action can prove each and every element of the claim as required by law.

River City Real Estate, LLC ("River City Real Estate") to the Underlying Action and filed a *lis pendens* against a lot owned by River City Developers. Id.

Plaintiffs in the Underlying Action moved to have the *lis pendens* removed, and the Honorable Marvin H. Dukes III issued an order dated February 15, 2012, which ordered "that the *lis pendens* . . . shall be and is hereby stricken and removed and shall henceforth be of no further force or effect." R. at _____ (Order Grant Mot. To Strike Lis Pendens at 3). Shortly before Judge Dukes' order striking the *lis pendens*, SPLIHOA also filed an assessment lien. R. at ____ (Notice and Certificate of Lien, February 10, 2012).

SPLIHOA filed a motion to reconsider on February 17, 2012, in response to Judge Dukes' order striking the *lis pendens*. See generally R. at ____ (SPLIHOA Mot. to Reconsider). SPLIHOA argued in its motion to reconsider that Judge Dukes misinterpreted the Court of Appeals' opinion in Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), in three important respects: (1) Defendants' "underlying declaratory judgment action was to 'affirm and validate restrictive covenants and enforce thereof,' not interpret them"; (2) the Court of Appeals in Pond Place did not hold that a *lis pendens* "must involve or affect 'title' to property, but rather wrote that a *lis pendens* may be filed '. . . in conjunction with an underlying complaint involving an issue of property'"; and (3) the Court of Appeals "was not ambiguous when it found the *lis pendens* appropriate in the case" and wrote "[r]estrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land." Id. at 2. On the same date SPLIHOA filed its motion to reconsider, River City Developers filed a motion to strike certificate of lien seeking to have the assessment lien removed. See generally R. at _____ (River City Developers' Mot. to Strike Certificate of Lien).

After a hearing on the motion to reconsider and the motion to strike the assessment lien on March 5, 2012, an order was entered by Judge Dukes on April 6, 2012, wherein he denied both SPLIHOA's motion to reconsider and River City Developers' motion to strike the assessment lien. See R. at _____ (Order Den. SPLIHOA's Mot. to Reconsider and Den. River City Developers' Mot. to Strike Certificate of Lien at 4). In the order, Judge Dukes also clarified his reasoning in striking the *lis pendens*, stating the following:

> In my opinion, leaving the Lis Pendens in place benefits neither party. River City is unable to complete its project which could result in the property being foreclosed. Somerset is certainly not benefitted by having an unfinished house in its community. . . . I find that the harm to River City in granting Somerset's Motion to Reconsider outweighs the benefit to Somerset if the Lis Pendens remains in place. . . . I find that the balancing of the equities in this case is appropriate. Now therefore IT IS HEREBY ORDERED . . . that Somerset's Motion to Reconsider my Order striking its Lis Pendens is denied . . . .

Id. at 3–4.

On July 2, 2012, Coosaw Investments, LLC ("Coosaw"), Hilton C. Smith, Jr. ("Smith"), and SPLIHOA filed a Notice of Appeal of the aforementioned orders. See R. at ____ (Notice of Appeal at 1). On August 8, 2013, Coosaw, Smith, and SPLIHOA filed a motion to withdraw the appeal because "[t]he property ha[d] since been sold to a third party, and the issue presented by the appeal [became] moot." R. at _____ (Mot. to Withdraw Appeal at 2). On August 12, 2013, an order was entered by the Court of Appeals dismissing the appeals pursuant to the aforementioned order. R. at _____ (Order Dismiss Appeal at 1).

On October 23, 2014, Gecy, River City Developers, and River City Real Estate filed the instant action in the Court of Common Pleas for Beaufort County, in which they assert against SPLIHOA, Smith, Coosaw, Hilton C. Smith, Jr., Inc. of South Carolina ("Smith Inc."), and Manorhouse Builders of South Carolina, LLC ("Manorhouse") (collectively "Defendants") two

causes of action: one for malicious prosecution and the other for abuse of process, with both predicated upon the filing of the aforementioned *lis pendens* by SPLIHOA in the Underlying Action. See generally R. at _____ (Pl. Compl.). Smith, Coosaw, and Smith Inc. ultimately moved for summary judgment as to Plaintiffs' cause of action for malicious prosecution, wherein the grounds for said motion were that there had been no termination of the previous action in Plaintiffs' favor since the Underlying Action was still pending, and, therefore, an action for malicious prosecution was premature. See R. at _____ (Mot. for Summ. J. at 1).

By order dated November 10, 2015, the Honorable Carmen T. Mullen granted summary judgment in favor of Smith, Coosaw, and Smith Inc. because "the underlying action that gives rise to the claim for malicious prosecution is still pending, and because there was no termination of the *lis pendens* in favor of Plaintiffs." Id. Plaintiffs filed and served a motion to reconsider pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure, which was denied by Form Four order dated April 18, 2016. R. at ____ (Order Den. Mot. to Reconsider); see generally also R. at ____ (Trans. of Hrg. on Pls. Mot. to Reconsider).

Plaintiffs Gecy, River City Developers, and River City Real Estate (hereinafter "Appellants") appealed from the order granting summary judgment and the order denying reconsideration pursuant to a Notice of Appeal dated May 23, 2016.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639 (2002). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland County Sch. Dist. One, 341 S.C. 307, 311 (2000). "In ruling on a motion for summary judgment, the evidence and

the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Id. "When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." Singleton v. Sheer, 377 S.C. 185, 197 (Ct. App. 2008).

"The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. State-Record Co., 330 S.C. 562, 566 (Ct. App. 1998). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'—that is, pointing out to the . . . court—that there is an absence of evidence to support the nonmoving party's case." See id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." Richardson, 330 S.C. at 566; see Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 481 (1994) (noting that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton, 377 S.C. at 197–98. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Thompkins v. Festival Centre Group. I, 306 S.C. 193, 194 (Ct. App. 1991).

ARGUMENT

As conceded by Appellants' counsel, the malicious prosecution claim arose only out of the resolution of the *lis pendens*, and nothing else. See R. at ____ (Trans. of Hrg. on Pls. Mot. to Reconsider 9:21–24). To the extent Appellants attempt to argue anything to the contrary, Appellants are judicially estopped from doing so. See Hawkins v. Bruno Yacht Sales, Inc., 353

S.C. 31, 42 (2003) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.").

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." E.g., Pallares v. Seinar, 368 S.C. 424, 435 (2006). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause." Id.

Respondents do not contend that the alleged wrongful filing of a *lis pendens* can support a cause of action for malicious prosecution, provided that all elements of the cause of action are established as required by law. See Pond Place, 351 S.C. at 31 ("The jurisdictions are in agreement that the proper action against a maliciously filed *lis pendens* is under abuse of process or malicious prosecution."); see also Ashley River Props. II, LLC v. Ashley River Props. One, 2015WL1546294 at *1 (Ct. App. April 8, 2015). However, as noted above, an action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including the "termination of [original judicial] proceedings in [the] plaintiff's favor." See Pallares, 368 S.C. at 435. For the reasons stated below, Appellants cannot, as a matter of law, meet their burden of establishing that original judicial proceedings were terminated in their favor, and, therefore, this Court should affirm the Circuit Court's grant of summary judgment.

I. The Circuit Court properly granted summary judgment because the termination of the *lis pendens* was based on equitable, not substantive, grounds, and, therefore, there was no favorable termination of the *lis pendens* in favor of Appellants.

"Although it is not essential to the maintenance of an action for malicious prosecution that the prior proceeding be favorably terminated following a trial on the merits, for the termination of the underlying action to be deemed favorable to the defendant in the underlying action as an element of malicious prosecution, the termination must, generally, either be on the merits of the underlying action or reflect the merits." 54 C.J.S. *Malicious Prosecution* § 60; see Rusakiewicz v. Lowe, 556 F.3d 1095, 1106 (10th Cir. 2009) ("[T]ermination must reflect on the merits of the underlying action."); see also 52 Am.Jur.2d *Malicious Prosecution* § 29 ("There must be an adjudication on the merits in the previous action in order to establish a malicious prosecution claim."). "[A] favorable termination does not occur merely because a party complained against has prevailed in an underlying action." Hudis v. Crawford, 125 Cal. App. 4th 1586, 1590 (Cal. Ct. App. 2005). "If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged conduct—the termination is not favorable in the sense that it would support a subsequent action for malicious prosecution." Id. (citing examples of termination of proceedings not relating to the merits, including the statute of limitations, a settlement agreement, and the *equitable defense* of laches). In other words, if the resolution of the underlying action leaves some doubt as to the defendant's liability, it is not a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff (or, in this case, a defendant asserting a counterclaim). See Eells v. Rosenblaum, 36 Cal. App. 4th 1848, 1855 (Cal. Ct. App. 1995).

To determine whether it was a favorable termination of the proceedings on the merits, "a court must look to the circumstances and nature of the prior disposition," and "whether the

favorable termination requirement is met is to be determined not by the form or title given to the disposition of the prior proceedings but by the circumstances under which that disposition is obtained." 54 C.J.S. *Malicious Prosecution* § 60; see also Hewitt v. Rice, 154 P.3d 408, 416 (Colo. 2007) ("[W]hen there has been no adjudication on the merits, the existence of a 'favorable termination' of the prior proceeding generally must be found in substance rather than the form of the prior events . . . .").

Pursuant to the above, Respondents urge this Court to require that, in order to support a claim for malicious prosecution, there must have been a favorable termination on the merits of the underlying proceedings giving rise to the cause of action. The *lis pendens* at issue that was addressed by Judge Dukes should not be considered a final termination on the merits because Judge Dukes' ruling striking the *lis pendens* was based on equitable, and not substantive, grounds. Judge Dukes ordered the *lis pendens* stricken in his February 15, 2012 order, see R. at ____ (Order Grant Mot. To Strike Lis Pendens at 3) ("February Order"), and clarified his ruling in his April 26, 2012 order, see R. at ____ (Order Den. SPLIHOA's Mot. to Reconsider and Den. River City Developers' Mot. to Strike Certificate of Lien at 4) ("April Order").

In the February Order, Judge Dukes held that SPLIHOA's declaratory judgment claim asserted in the underlying action did not affect title to real property, and ordered that the *lis pendens* be stricken. See R. at ____ (February Order at 3).In response to the February Order, SPLIHOA filed a motion to reconsider. Judge Dukes then entered the April Order clarifying his basis for striking the *lis pendens*. In the April Order, Judge Dukes noted that the *lis pendens* was filed minutes prior to the filing of the construction mortgage on the property, and stated that "[b]ecause of the timing of the filing of [SPLIHOA's] *lis pendens*, it had priority over River City's mortgage on its property." R. at ____ (April Order at 3). Judge Dukes also noted that the assessment lien

filed by SPLIHOA was recorded after the mortgage, and was "subordinated to the mortgage and [did] not affect or impair [the mortgage company's] security interest." Id. Judge Dukes continued, stating that "[i]n [his] opinion, leaving the *lis pendens* in place benefits neither party," and that "[e]quity should always act on a case-by-case basis." Id. Judge Dukes then stated that "once a party establishes an equitable right, the Court may dispense with pure formalities which would otherwise defeat the equity . . . ." Id. He concluded by finding that "the harm to River City in granting [SPLIHOA's] Motion to Reconsider outweighs the benefit to [SPLIHOA] if the *lis pendens* remains in place." Id. It is clear from the April Order that Judge Dukes explicitly struck the *lis pendens* on equitable grounds.

Although South Carolina courts have not specifically addressed whether a finding on substantive grounds is necessary for a ruling to be considered a termination in favor of a plaintiff asserting a claim for malicious prosecution, the general rule is that "termination of the underlying civil proceedings, in order to constitute a favorable termination for the purposes of a malicious prosecution claim, must be consistent with a finding for defendant on substantive grounds and must not be based solely upon technical or procedural considerations." 30 A.L.R.4th 572 (citing Lumpkin v. Friedman, 131 Cal. App. 3d 450 (Cal. Ct. App. 1982) (holding that for the termination of a civil proceeding of a lesser quality than one on the merits to be considered favorable to the defendant, the termination must be such as to reflect the lack of merit and to suggest that the proceedings, if pursued, would have resulted in a judgment for the defendant); Ferraris v. Levy, 223 Cal. App. 2d 408 (Cal. Ct. App. 1963); Levy's Store, Inc. v. Endicott Johnson Corp., 5 N.E.2d 74 (1936); Rounds v. Humes, 7 RI 535 (R.I. 1863).

If the rule were otherwise (which Appellants maintain), see R. at ____ (Trans. of Hrg. on Pls. Mot. to Reconsider at 12:14–21), a malicious prosecution claim could go forward without the

assurance, for example, that a *lis pendens* was stricken because it was improvidently and maliciously filed. This could potentially result in a situation where a court could compel Respondents to pay damages for doing a thing they had a *legal* right to do, simply because it was more equitable to strike the *lis pendens* than to allow it to remain in place. Judge Dukes stated in his April Order that he "dispense[d] with pure formalities which would otherwise defeat the equity," and found that the "*lis pendens* benefits neither party." See R. at ____ (April Order at 3–4). Again, because Judge Dukes based his decision on equitable grounds, he never ruled that SPLIHOA did not have a legal right to file the *lis pendens*. The striking of the *lis pendens* on equitable grounds leaves doubt as to Respondent's liability, and should bar Appellants from bringing a malicious prosecution action based upon the *lis pendens*. See Eells, 36 Cal. App. 4th at 1855.

This Court should find that Judge Dukes' resolution of the *lis pendens* was based on equitable, and not substantive grounds, and thus cannot be a termination in favor of any party. Accordingly, this Court should affirm the Circuit Court's grant of summary judgment.

II. Regardless of the above, the Circuit Court still properly granted summary judgment because the underlying action giving rise to the filing of the *lis pendens* is still pending, and, therefore, those proceedings have not been terminated in favor of Appellants.

A. The expungement of a *lis pendens*, standing alone, does not establish the favorable termination element in a cause of action for malicious prosecution.

The purpose of a *lis pendens* is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. Pond Place, 351 S.C. at 16. Moreover,

> The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, a *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, *i.e.*, the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title

> to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Id. at 17 (quoting 51 Am.Jur.2d *Lis Pendens* § 2 (2000)). As this Court noted in Pond Place, "a *lis pendens* filed in conjunction with an action involving the same real estate is merely another form of pleading." 351 S.C. at 30. A *lis pendens* is merely a "republication of the pleadings" that is purely incidental to the action wherein it is filed, and refers specifically to, and has no existence apart from, that action. Id. at 25.

If a *lis pendens* is simply a "republication of the pleadings," then this Court must look to the applicable pleadings in the underlying action. As stated above, upon filing an Answer, SPLIHOA also filed a cross-claim and counterclaim, in addition to naming Gecy and River City Real Estate as parties to the action. See generally R. at ____ (SPLIHOA Cross-Claim and Counterclaim). The claims propounded by SPLIHOA in its Answer and the allegations contained therein are still pending in the Circuit Court. Allowing Appellants to move forward on a malicious prosecution claim based on the filing of a *lis pendens*, which merely gives notice of the pendency of the action as outlined in the pleadings, would in effect permit Appellants to circumvent the requirement that the proceedings be terminated in the plaintiff's favor. Not only would their claim then become a cause of action for abuse of process (which is currently pending in the Circuit Court), it could also ultimately result in a court compelling Respondents to pay damages for doing a thing it was later determined they had the legal right to do.[2] In essence, there is no way of knowing whether the *lis pendens* could give rise to a malicious prosecution action until the underlying action giving rise to the filing of the *lis pendens* is resolved on the merits. Until then, any cause of action for malicious prosecution is contingent, hypothetical, and abstract.

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[2] See Food Lion, Inc. v. United Food & Comm. Workers Int'l Union, 351 S.C. 65, 71 (Ct. App. 2002) ("A plaintiff alleging abuse of process in South Carolina must assert two essential elements: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the conduct of the proceeding.") (internal quotations omitted).

Respondents point to the following authorities which recognized the folly of allowing a malicious prosecution action to go forward while the underlying proceedings were still pending: Klass v. Frazer, 290 F.Supp.2d 425, 427 (S.D.N.Y. 2003) (noting that while the underlying litigation giving rise to the present malicious prosecution claim remains unresolved, "Plaintiffs in this case cannot successfully maintain a lawsuit for malicious prosecution . . . ."); Hewitt, 154 P.3d at 415 ("Therefore, we hold that a malicious prosecution action based upon the filing of a *lis pendens* requires that the action underlying the *lis pendens* be terminated in favor of the plaintiff."); Brown v. Bethlehem Terrace Assocs., 136 A.D.2d 222, 225 (N.Y. App. Div. 1988) ("It is the underlying action for specific performance that casts doubt on defendant's title, but the remedy for such an action brought in bad faith is a suit for malicious prosecution, which in this instance is not yet ripe because the *sine qua non*, a favorable termination of a prior prosecution, is lacking."); McMurray v. U-Haul Co., 425 So.2d 1208, 1211 (Fla. Dist. Ct. App. 1983) (holding that a malicious prosecution cause of action "will not accrue until the ultimate disposition of [plaintiff's] complaint"); WM Capital Partners v. BBJ Mortgage Servs., Inc., 2010WL6428509 (E.D. Mich. 2010) ("Were the rule otherwise, [the plaintiff] . . . might recover for malicious prosecution, yet be convicted, or have a judgment rendered against him, in the former suit."); Peckham v. Hirschfield, 1986WL714243 (R.I. 1986) ("In [a malicious prosecution] action the plaintiff has no claim until the action of which the *lis pendens* gives notice has been terminated adversely to the defendant."). Additionally, with regard to the same, the New York Supreme Court stated the following:

> The counterclaim for malicious prosecution based on plaintiff's filing of a *lis pendens* should, however, have been dismissed for failure to allege an essential element, i.e., that the underlying action complained of has been terminated in favor of the plaintiff . . . . Defendant [asserting the counterclaim] has yet to prevail in the underlying action. In interposing its malicious prosecution

> counterclaim before a favorable resolution of the action for specific performance, defendant has proceeded prematurely.

Laval Realty, Inc. v. Shell Realty Co., 151 A.D.2d 321, 321 (N.Y. App. Div. 1989).

Based on the foregoing, this Court should reject Appellants' argument that expungement of a *lis pendens*, standing alone, establishes the favorable termination element in a malicious prosecution action. Appellants' arguments concerning the law of the case doctrine and *res judicata* are similarly misguided, as the action underlying the filing of the *lis pendens* is still pending regardless of whether or not the striking of the *lis pendens* can be litigated or appealed. See R. at ___ (Trans. of Hrg. on Pls. Mot. to Reconsider at 15:2–8). There still must be termination of the action underlying the filing of the *lis pendens* before a claim for malicious prosecution can be brought.

B. A *lis pendens* is not an "ancillary proceeding" or "ex parte proceeding" such that it is unnecessary to show favorable termination of the main action.

In asking this Court to ignore the firmly established and well-reasoned principle that there must be termination of the proceedings in the plaintiff's favor before a malicious prosecution claim can be brought, Appellants point to Isobe v. Sakatani, 279 P.3d 368 (Hawaii Ct. App. 2012). See R. at ___ (Trans. of Hrg. on Pls. Mot. to Reconsider at 9:18–23). In Isobe, the Hawaii Court of Appeals addressed whether the filing of a *lis pendens* in a foreclosure action could support a malicious prosecution claim while the foreclosure action remained pending. Id. at 387. The Court ultimately held that it is unnecessary to show a favorable termination of the main action because the filing of a *lis pendens* is an "ancillary proceeding." Id.

In so holding, the Court relied on the following provision from Prosser & Keeton, Law of Torts § 120 at 892 (5th ed. 1984):

> Ordinarily, the plaintiff must prove the termination of the former proceeding in his favor. But there are necessary

> exceptions where . . . the proceeding is an ex parte one and relief is granted without opportunity for the party against whom it is sought to be heard. This is also true as to proceedings ancillary to a civil suit, such as attachment or arrest under civil process, as to which, if they are themselves unjustified, it is unnecessary to show a favorable judgment of the main action. It is usually held, however, with a little authority to the contrary, that if an opportunity has been given to contest the facts, the plaintiff must show a favorable termination of the ancillary proceeding itself.

Id.

It is important to note that the only authority cited by Appellants that states that a *lis pendens* is an ancillary proceeding is the Hawaii Court of Appeals in Isobe—Prosser & Keeton did not even go this far. This Court should determine that a *lis pendens*, in and of itself, is not an ancillary proceeding. The Prosser & Keeton quote outlined above cites "attachment" and "arrest under civil process" as examples of ancillary proceedings. However, unlike the drastic remedies of attachment[3] and arrest under civil process[4], which both involve the actual seizure of a person or property, a *lis pendens* is simply a notice that indicates pending litigation. As this Court noted in Pond Place, a *lis pendens* simply restates what is already in the public record, namely, that there exists a lawsuit involving a particular property. 351 S.C. at 30. It is "merely another form of pleading" that is purely incidental to the action wherein it is filed, and refers specifically to, and has no existence apart from, that action. A *lis pendens* is manifestly different from attachment or arrest under civil process proceedings, and this Court should determine that the filing of a *lis pendens* is not an ancillary proceeding.

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[3] See Scratch Golf Co. v. Dunes West Res. Golf Props., Inc., 361 S.C. 117, 122 (2004) ("[T]he purpose of attachment generally is to take a defendant's property into legal custody so that it may be applied to the plaintiff's debt, when established."); see also Brewer v. Graydon, 233 S.C. 124, 126 (1958) ("Attachment is an extraordinary remedy . . . .").

[4] See Huntington v. Shultz, 16 S.C.L. 452, 453 (Const. Ct. App. of S.C. 1824) (defining "arrest" in civil arrest as a "corporal seizing of the defendant's body" and explaining that it is synonymous with actual detention of the person of the party arrested, and not merely a summons or citation).

Furthermore, the filing of a *lis pendens* lacks the characteristics of an ex parte proceeding as that term is used above. A *lis pendens* does not result in relief being granted without an opportunity for the opposing party to be heard. Rather, again, it is merely a "republication of the pleadings." See Pond Place, 531 S.C. at 30. While a *lis pendens* may render title to property unemarketable, it is merely designed primarily to protect unidentified third parties, and it is not a tactic to be used as an ex parte remedy.

By seeking to apply the above-quoted provision from Prosser & Keeton, Appellants are actually making a veiled attempt to redefine South Carolina's malicious prosecution elements into the tort of abuse of process (which, coincidentally, is still pending in the Circuit court), by dropping the requirement of favorable termination.[5] Respondents submit that abuse of process is a more appropriate cause of action while the Underlying Action remains pending.

Accordingly, this Court should determine that a *lis pendens* is not an ancillary or ex parte proceeding such that is unnecessary to show a favorable termination of the action underlying the filing of the *lis pendens*.

III. A malicious prosecution action based upon the filing of a *lis pendens* does not present novel questions or law, and further inquiry into the facts is not warranted.

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify application of the law." Brockbank v. Best Capital Corp., 341 S.C. 372, 377 (2000). However, "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11 (2005).

[5] See Food Lion, Inc., 351 S.C. at 71 ("A plaintiff alleging abuse of process in South Carolina must assert two essential elements: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the conduct of the proceeding.").

Here, this case does not present a novel issue of law. Respondents simply argue that Appellants cannot prove an essential element of their claim for malicious prosecution: that there was no termination of the proceedings in the plaintiff's favor. As noted above, Pond Place establishes that the alleged malicious filing of a *lis pendens* can support a claim for malicious prosecution. . See Pond Place, 351 S.C. at 31 ("The jurisdictions are in agreement that the proper action against a maliciously filed *lis pendens* is under abuse of process or malicious prosecution."). Furthermore, South Carolina law is well-established that an action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence. Id. Therefore, this case presents no novel issue of law that would preclude summary judgment.

Regardless of the above, the mere fact that a case involves a novel issue does not render summary judgment inappropriate. See Houck, 366 S.C. at 11. Appellants argue that novel issues operate as an absolute bar to summary judgment. See R. at ___ (Trans. of Hrg. on Pls. Mot. to Reconsider at 18:12–17). However, their argument only stands for the proposition that summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify application of the law. See Brockbank, 341 S.C. at 377; see also ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 153 (Ct. App. 1995), rev'd on other grounds, ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238 (1997) (noting that all issues of novel impression require a trial is misguided and that this proposition merely "represents a particular application of the well-established law of summary judgment [ ] concluding that further inquiry into the facts [is] warranted"). Here, further inquiry into the facts of the case is unnecessary. It is undisputed that a *lis pendens* was filed, that Judge Dukes struck the *lis pendens*, and that Appellants now bring the present malicious prosecution action based on the filing of the *lis pendens*. The

issues presented in this appeal are purely questions of law, upon which the facts have no bearing. Therefore, further inquiry into the facts is not warranted.

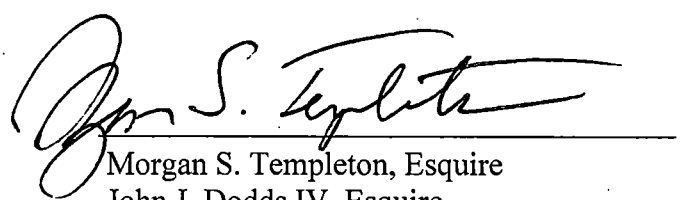
Accordingly, based on the above, deciding this case on summary judgment was appropriate.

CONCLUSION

For the foregoing reasons, Respondents Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina respectfully submit that the Court should affirm the ruling of the Circuit Court granting Respondents' motion for summary judgment.

Dated this 31st day of August, 2017.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No.: 2014-CP-07-02670
Appellate Court Case No. 2016-001113

Benjamin C. Gecy, River City Developers, LLC and River City Real Estate, LLC .....Appellants,

v.

Somerset Point at Lady's Island Homeowners Association, Inc., f/k/a Coosaw River Estates Homeowners Association, LLC, Hilton C. Smith, Jr., Coosaw Investments, LLC, Hilton C. Smith, Jr., Inc. of South Carolina, and Manorhouse Builders of South Carolina, LLC .....Defendants,

Of which Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina are .....Respondents.

PROOF OF SERVICE

I, Morgan S. Templeton, of Wall Templeton & Haldrup, do hereby certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on counsel for Appellant, by depositing the same in the United States Mail, properly posted on August 31, 2017 addressed as follows to counsel of record:

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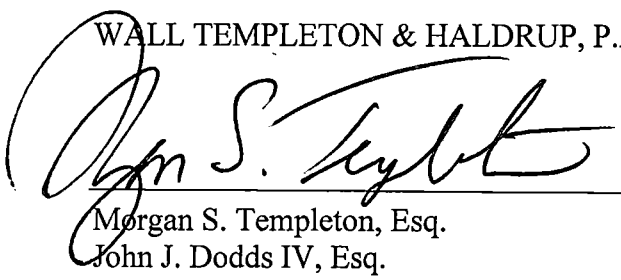

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August 31, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Benjamin C. Gecy v. Somerset Point at Lady's Island HOA, et al*
Civil Action No.: 2015-001238

Dear Madam Clerk:

Enclosed for filing, please find an original and two copies of Respondent's Initial Brief, along with Proof of Service and Respondent's Designation of Matter to be Included in the Record on Appeal. Please return a file-stamped copy to this office in the enclosed, self-addressed, stamped envelope.

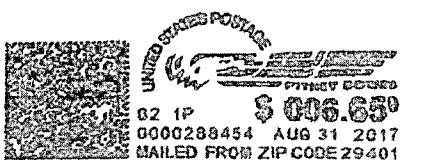
Thank you for your assistance.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton

MST/sjs
Enclosures
cc: William G. Jenkins, Jr., Esquire (*w/ encl*)
Duke R. Highfield, Esquire (*w/ encl*)
E. Mitchell Griffith, Esquire (*w/ encl*)



FIRST CLASS MAIL

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