

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Appellate Case No. 2016-001113

Trial Court Case No. 2014-CP-07-02670

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SC Court of Appeals

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., of South Carolina are Respondents.

APPELLANTS' FINAL BRIEF

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November 20, 2017

Hilton Head Island, South Carolina.

STATEMENT OF ISSUES ON APPEAL

(QUESTIONS PRESENTED)

1. Will the favorable termination of a Notice of Pendency of Action (herein "*lis pendens*") support the bringing of an action for malicious prosecution?

2. Must the party who obtains the favorable termination of the *lis pendens* also obtain the favorable termination of the cause of action for which the *lis pendens* was ostensibly issued before and in order to bring an action for malicious prosecution based on the wrongful filing of the *lis pendens*?

3. Was there a favorable termination of the *lis pendens* in this case, meaning that it was substantive and final?

4. Should novel questions of law have been decided without the opportunity to develop the facts fully?

TABLE OF CONTENTS

Statement of Issues on Appeal (Questions Presented)	ii
Table of Contents	iii
Table of Authorities	v
I. STATEMENT OF THE CASE	1
II. STATEMENT OF THE FACTS	5
III. ARGUMENT	16
A. Standard of Review.	16
B. Prologue.	21
C. The Restatement (Second) of Torts Is the Best Authority which Authorizes the Bringing of a Malicious Prosecution Action.	23
D. The Court Of Appeals Invited those Aggrieved by an Unlawful <i>Lis Pendens</i> to Pursue a Malicious Prosecution Action.	25
E. The Filing of a <i>Lis Pendens</i> is an Ancillary Proceeding.	27
F. The Plaintiff Need Not Prevail in the Underlying Case in order to Attack the Validity of an Unlawful <i>Lis Pendens</i> .	29
G. The Termination of the <i>Lis Pendens</i> in favor of the Appellants Was Final, Substantive and on the Merits.	32
H. The Decision, if Reached on Equitable Grounds, such as a Balancing of the Equities, Was Substantive and on the Merits.	37
I. If Ambiguity Exists in the Master's Orders, the Appellants Were and Are Entitled To Prevail.	39
J. The Striking of the <i>Lis Pendens</i> Became Final when Appeal Was Not Timely Taken.	39
K. The Dismissal of the Appeal Made the Master's Decision To Strike the <i>Lis Pendens</i> Final and Incontrovertible for All Purposes.	40
L. The Law of the Case Doctrine Precludes Re-Litigation of the Striking of the <i>Lis Pendens</i> in the Instant Case as Well.	40

M. The Novel Questions of Law in this Case Should Not Have Been
Decided without Full Factual Development

41

IV. CONCLUSION

42

TABLE OF AUTHORITIES

I. Cases:

<i>Bone v. U.S. Food Service</i> , 397 S.C. 566, 733 S.E.2d 200, <i>adhered to on rehearing</i> 404 S.C. 67, 744 S.E.2d 552 (2012)	[40]
<i>Buffington v. T.O.E. Enterprises</i> , 383 S.C. 388, 680 S.E.2d 289 (2009)	[36]
<i>Byrd v. Irmo High School</i> , 468 S.E.2d 861, 864 (1996)	[31]
<i>Catawba Indian Tribe v. State</i> , 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)	[16,17]
<i>Cisson v. Pickens Sav. & Loan</i> , 258 S.C. 37, 186 S.E.2d 822 (1972)	[24, 25]
<i>Collins v. Sigmon</i> , 299 S.C. 464, 385 S.E.2d 835 (1989)	[33]
<i>Dawkins v. Fields</i> , 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)	[20]
<i>Ferguson v. Charleston Lincoln Mercury, Inc.</i> , 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002)	[19]
<i>Ferraris v. Levy</i> , 223 Cal.App.2d 408, 411 (1963)	[32]
<i>Flexon v. PHC-Jasper, Inc.</i> , 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015)	[40]
<i>Froneberger v. Smith</i> , 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013)	[18]
<i>Gardner v. Mozingo</i> , 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987)	[17]
<i>Gaar v. North Myrtle Beach Realty Co.</i> , 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986)	[24]
<i>Hancock v. Mid-South Mgmt. Co., Inc.</i> , 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)	[18]
<i>Hawkins v. Greenwood Dev. Corp.</i> , 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)	[17]
<i>Hyde v. Southern Grocery Stores, Inc.</i> , 197 S.C. 263, 15 S.E.2d 353 (1941)	[25]
<i>I'ON, LLC v. Town of Mount Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	[16]

<i>In re Thames</i> , 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001)	[40]
<i>Isobe v. Sakatani</i> , 127 Hawaii 368, 387, 279 P.3d 33, 52 (2012)	[27, 28, 29, 30]
<i>Lebovitz v. Mudd</i> , 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986)	[27, 39]
<i>Lee v. Kelley</i> , 298 S.C. 155, 378 S.E.2d 616 (Ct App. 1989)	[20]
<i>Levy's Store, Inc. v. Endicott-Johnson Corp.</i> , 272 N.Y. 155, 162 (1936)	[33]
<i>Lochner v. LaCroix</i> , 25 Cal.3d 747, 602 P.2d 393, 159 Cal. Rep. 693 (1979)	[33]
<i>Lumpkin v. Friedman</i> , 131 Cal.App.3d 450, 452, 182 Cal Rep. 378 (1982)	[32-33]
<i>McLaughlin v. Williams</i> , 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008)	[18]
<i>Mears v. Mears</i> , 287 S.C. 168, 337 S.E.2d 206 (1985)	[39]
<i>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</i> , 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct. App. 1995)	[19, 24, 40]
<i>Pallares v. Seinar</i> , 407 S.C. 359, 756 S.E.2d 128 (2014)	[18, 20, 42]
<i>Parrott v. Plowden Motor Co.</i> , 246 S.C. 318, 143 S.E.2d 607	[25]
<i>Pond Place Partners v. Poole</i> , 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002)	[22, 26, 28, 34, 35]
<i>Prince Manufacturing Inc. v Jus' Tennis, Inc.</i> , 287 S.C. 499, 339 S.E.2d 871 (1986)	[28]
<i>Redwend Ltd. Partnership v. Edwards</i> , 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003)	[20]
<i>Regions Bank v. Wingard Properties, Inc.</i> , 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)	[38]
<i>Ross v Medical University of South Carolina</i> , 328 S.C. 51, 492 S.E.2d 62 (1997)	[41]
<i>Sanders v. Rollinson</i> , 33 S.C. Law (2 Strob.) 447 (1848)	[26]

<i>Schmidt v. Courtney</i> , 357 S.C. 310, 592 S.E.2d 326, (Ct. App. 2004)	[18, 19, 20, 23, 39, 42]
<i>Sea Pines Plantation Co. v. Wells</i> , 294 S.C. 266, 363 S.E.2d 891 (1987)	[36]
<i>Shadwell v. Craigie</i> , 361 S.C. 492, 501-02, 605 S.E.2d 567, 572 (2004)	[19]
<i>South Carolina Dep't of Natural Resources v. Town of McClellanville</i> , 345 S.C. 617, 550 S.E.2d 299 (2001)	[17]
<i>South Carolina Public Interest Foundation v. Greenville County</i> , 401 S.C. 337, 737 S.E.2d 532 (Ct. App. 2012)	[41]
<i>Thames, In re</i> , 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001)	[40]
<i>Town of Summerville v. City of North Charleston</i> , 378 S.C. 107, 662 S.E.2d 107 (2008)	[17]
<i>Turner v. McMillan</i> , 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)	[18]

II. Constitutions:

S.C. Const. art. 5 §§ 5 and 9	[17]
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III. Statutes:

S.C. Code Ann. §15-11-10	[2, 9, 22, 34]
S.C. Code Ann. §§ 14-3-320 and 330 (1976 and Supp. 1999)	[17]
S.C. Code Ann. §14-3-330 (1976)	[27]
S.C. Code Ann. § 14-8-200 (Supp. 1999)	[17]

III. Court Rules:

Rule 65(c), SCRCP	[8]
Rule 65(e), SCRCP	[8]
Rule 56, SCRCP	[17, 18, 19]
Rule 56(c), SCRCP	[18]

IV. Learned Treatises:

Restatement (Second) of Judgments § 27	[41]
Restatement (Second) of Torts §552	[24]
Restatement (Second) of Torts § 674	[22, 23, 24, 34]
Restatement (Second) of Torts § 674, Comment <i>d</i> , at 453	[24]
Restatement (Second) of Torts § 674, Comment <i>e</i> , and 681A (American Law Institute 1977)	[18]
Restatement (Second) of Torts § 674, Comment <i>f</i> , at 455	[23, 24, 29, 32]
Restatement (Second) of Torts §552	[24]
Restatement (Second) of Torts § 674	[22, 23, 24]
Restatement (Second) of Torts § 674, Comment <i>d</i> , at 453	[24]
Restatement (Second) of Torts § 674, Comment <i>e</i> , and 681A (American Law Institute 1977)	[18]
Restatement (Second) of Torts § 674, Comment <i>f</i> , at 455	[23, 24, 29, 32]
Prosser and Keeton, <i>The Law of Torts</i> §120 at 892 (5 th Ed. 1984)	[29, 30, 31]

V. Legal Anthologies:

30 A.L.R. 4 th 572	[32, 33]
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I. STATEMENT OF THE CASE

This case was commenced on October 23, 2014, in the Court of Common Pleas for Beaufort County, South Carolina, by the filing and subsequent service of the summons and complaint (herein sometimes “the instant action” or “the new case”), in which the Plaintiffs alleged two causes of action—one for malicious prosecution and the other for abuse of process, with both being predicated upon the wrongful filing of a Notice of Pendency of Action (herein “*lis pendens*”) against real property owned and/or under construction by the Plaintiffs, Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC. (R. pp. 171-78). The Plaintiffs are described herein below collectively either as “the Plaintiffs” or as “the Appellants.”

The *lis pendens* had been filed by the Defendants in a previous action still pending in the Court of Common Pleas for Beaufort County, namely, River City Developers, LLC v. Coosaw Investments, LLC, et al. (Case No. 2011-CP-07-03945)(herein after referred to as “the underlying case”). The Defendants in the underlying case were the developer of a residential subdivision now known as Somerset Point (Coosaw Investments, LLC), the homeowners’ association of and for that subdivision (Somerset Point at Lady’s Island Homeowners Association, Inc., formerly known as Coosaw River Estates Homeowners Association, LLC), and Hilton C. Smith, Jr., who was named individually and as the managing member of the developer and as the president of the homeowners’ association.

The Defendants in the instant action were the same as those named in the underlying case, except that the Plaintiffs also named two additional Defendants, Hilton

C. Smith, Jr., Inc., of South Carolina (herein "Smith, Inc.") and Manorhouse Builders of South Carolina, LLC (herein "Manorhouse"), both of which were alleged to be general contractors that had built houses in the subdivision and that were wholly owned and/or controlled by Hilton C. Smith, Jr. (R. p. 172-73).

In due course, the Defendants answered setting up multiple affirmative defenses. (R. pp. 179 and R. p. 181). All of the persons and entities named in the Plaintiffs' action are sometimes described collectively herein below as "the Defendants."

On or about March 30, 2015, Defendants Hilton C. Smith, Jr., Hilton C. Smith, Jr., Inc., of South Carolina and Coosaw Investments, LLC (herein "the Moving Defendants" and/or "the Respondents"), filed a motion to amend their answer essentially to set up the additional defense of advice of counsel. The Moving Defendants also filed, with no affidavit or sworn testimony, a "Motion for Partial Summary Judgment as to Malicious Prosecution and in the Alternative, a Motion to Stay and to Amend." (R. p. 189). The grounds for the partial summary judgment were that "there has been no termination of the previous action in the Plaintiffs' favor." (R. p. 189).

On the other hand, The Plaintiffs had not pleaded in the instant action that any cause of action in the underlying case had been favorably terminated. Instead, they expressly alleged, in paragraph 20 of the Complaint:

Pursuant to the Order of . . . [Judge] Dukes dated . . . February 15, 2012, the Lis Pendens was determined to be unlawful, and it was ordered to be canceled and released of record because no cause of action in the [Defendant's] Counterclaim and Cross-claim 'affect[ed] the title to real the title to real property,' as is required by S.C. Code Ann. § 15-11-10. (R. p. 175).

In addition, the Plaintiffs had pleaded that the invalidation of the *lis pendens* was upheld when the motion to reconsider the Order dated February 15, 2012, was denied, and that, if any effective appeal from that order was taken, that appeal was dismissed by the Court of Appeals. Complaint ¶¶ 21 and 22, at 5. (R. p. 175). Finally, the Plaintiffs also alleged, "With respect to the unlawful Lis Pendens . . . , the proceedings have been terminated in the Plaintiffs' favor." *Id.* ¶ 30, at 7. (R. p. 177).

Between the filing of the motion for summary judgment by the Moving Defendants, and the hearing of that motion, most, though not all, of the Defendants served Interrogatories and Requests for Production on the Plaintiffs.

The argument of the Moving Defendants' motions was heard by Judge Carmen T. Mullen on or about August 4, 2015. (R. pp. 103-30). A proposed order was sought by the trial judge and submitted by the Moving Defendants, after which further argument ensued about the content of that order.

In the interim, a motion for summary judgment which had previously been filed by Defendant Manorhouse was heard and decided by Judge R. Lawton McIntosh. Upon a factual showing, he granted summary judgment to Manorhouse on grounds unrelated to those raised by the Moving Defendants. (R. p. 218).

Judge McIntosh, however, denied the motion for summary judgment dated August 3, 2015, that had been filed and served by Defendant Somerset Point at Lady's Island Homeowners Association, Inc. (R. p. 216). Somerset Point's motion was predicated upon grounds identical to those raised by the Moving Defendants to obtain the order now on appeal.

Ultimately, Judge Mullen entered an order dated November 10, 2015, awarding summary judgment to the Moving Defendants. (R. p. 225). However, notice of the entry of that order was not received by the parties until December 14, 2015.

On December 24, 2015, the Plaintiffs filed and served a motion for reconsideration under Rules 52 and 59, SCRCP. (R. pp. 232-41). A hearing was held before Judge Mullen on March 31, 2016. (R. pp. 131-170). However, she denied the motion in an order entered on April 22, 2016. (R. p. 242).

The Plaintiffs then appealed from both orders pursuant to a Notice of Appeal dated May 23, 2016.

II. STATEMENT OF THE FACTS

The facts set forth in the Statement of the Case above are hereby adopted and incorporated into this Statement of the Facts.

The River City entities, River City Developers, LLC, and River City Real Estate, LLC (herein, sometimes, with Mr. Gecy, "the River City Interests" or simply "River City"), were among the earliest builders in Coosaw River Estates, and its successor, the renamed Somerset Point Subdivision. They had built three houses before the Architectural Review Committee (herein sometimes "the ARC") was even formed. After it was organized, Benjamin Gecy, the managing member of River City Developers, LLC, and River City Real Estate, LLC, began to notice and point out how the developer, Coosaw Investments, LLC, and the construction companies owned and/or controlled by Hilton C. Smith, Jr., were deviating from, and often modifying, the design and construction standards that had been announced, if not recorded, for the community.

Mr. Smith, on the other hand, as an officer or agent of the Somerset Point at Lady's Island Homeowners Association, Inc., and as an apparent managing member of Coosaw Investments, LLC, insisted that the developer had the right under the covenants to assign the so-called declarant or developer rights created by the covenants to other developers and/or construction companies, specifically, to those owned and/or controlled by him, thereby exempting them from the application of the covenants. He also accused River City of having deviated from the design standards that he was issuing for the Somerset Point Architectural Review Committee, a committee just recently organized by the homeowners' association and staffed by Smith and other employees of and from his for-profit enterprises. In addition, Smith

demanded that River City pay fees which the entities that he owned and/or controlled did not pay, and he threatened to impose fines and penalties in the event of non-compliance with the ARC approval process or the violation its design standards.

[Complaint dated September 20, 2011]. (R. pp. 24-27). That led the River City Interests to conclude that Mr. Smith was committed to a course of anti-competitive conduct in an effort to frustrate River City's ability to build on lots owned by them and by others in the community. [*Id.*].

Therefore, River City Developers, LLC, filed an action on September 20, 2011, in the Court of Common Pleas for Beaufort County, South Carolina, in which it named as Defendants Hilton C. Smith, Jr., individually and as the managing member and/or agent of and for the developer of the subdivision, Coosaw Investments, LLC, as well as of and for both of the homeowners' associations, that is, the original one for Coosaw River Estates and its successor, Somerset Point at Lady's Island Homeowners Association, Inc. (R. pp. 022-028). River City's action was assigned Case No. 2011-CP-07-03945, and, in that action, the Plaintiff sought to recover damages from Smith and Coosaw Investments, LLC, under theories of breach of fiduciary duty and unfair trade practices. It also sought damages from the homeowners associations for the same causes of action, as well as for breach of the covenants. [*Id.*]. (R. p. 022-028)

One week later, on September 27, 2011, Somerset Point at Lady's Island Homeowners Association, Inc. (herein sometimes denominated "The Association"), filed its own suit in the same court. [Complaint dated September 26, 2011]. (R. pp. 005-007). That suit was assigned Case No. 2011-CP-07-04028. The Association sought only injunctive relief against River City and its managing member, Benjamin Gecy, namely, a

restraining order followed by an injunction to stop River City from working in Somerset Point, ostensibly based upon Appellants' alleged failure "to comply with requirements of the ARC [design] standards." [*Id.* ¶ 9]. (R. p. 006).

To implement its plan to stop work on River City's house at Lot 16, China Back (herein Lot 16), the Association, by a motion (R. p. 008) and supporting affidavit from Mr. Smith [Affidavit dated September 21, 2011] (R. p. 009), sought an *ex parte* restraining order [Motion dated September 26, 2011], and, when Judge Marvin H. Dukes, III (herein "the Master in Equity," "the Master" or "Judge Dukes"), declined to grant that relief, a rule to show cause requiring River City to appear in court two days later--on September 29, 2011--to explain why the construction of its house should not be enjoined. [Rule to Show Cause dated September 27, 2011]. (R. p. 011).

It is interesting to note that, although the Association later argued that its action was based on a violation of the covenants, no *lis pendens* was filed in the action at the outset. Instead, the plaintiff tried to stop construction by relying directly on injunctive relief, which, of course, is a special, ancillary or extraordinary proceeding in and of itself.

Indeed, the Association recognized that its action was in the nature of a special proceeding, because, among other things, it filed a Certificate of Exemption in which counsel certified that the claim was exempt from ADR "under . . . Rule 1(a)(3)(A) as this is a special proceeding seeking injunctive relief." [Certificate of Exemption dated September 26, 2011]. (R. p. 003).

Upon learning of the hearing scheduled before the Master on September 29, 2011, at which the Association proposed to restrain River City's construction on Lot 16,

counsel for River City filed a motion to continue the hearing based upon the counsel's need to attend to other preexisting commitments, as well as upon the primacy of River City's case, in which virtually the same issues were involved. [Motion dated September 28, 2011]. (R. p. 014). The Association then filed a Return to that Motion. (R. p. 017).

The hearing on the restraining order was continued, and the Association agreed to plead over as a Defendant in River City's case. Therefore, Case No. 2011-CP-07-04028 was ultimately dismissed on November 14, 2011. [Voluntary Dismissal dated November 14, 2011]. (R. p. 018). The parties continued the litigation in River City's case alone, that is, in Case No. 2011-CP-07-03945.

It is submitted that, in the course of the status conferences leading up to that outcome, the Association deduced that its quest for injunctive relief was unlikely to succeed (a) because the Association had an adequate remedy at law, and (b) because the constraints of Rule 65(e), SCRCP, prohibited the granting of a restraining order "to suspend the general and ordinary business" of River City, and made it difficult, if not impossible, to obtain a temporary injunction, especially in view the potential cost of the bond that is ordinarily required. Rule 65(c), SCRCP.

When the Association pleaded over, on October 24, 2011, by way of its counterclaim and cross-claim, which it expressly denominated a "REQUEST FOR TEMPORARY INJUNCTION" (R. p. 039), the Association continued to make only an apparent effort to obtain injunctive relief, that is, to restrain and/or to enjoin River City from building its house on Lot 16, which was a patent attempt to restrain and/or enjoin a going business. [Answer and Counterclaim dated October 24, 2011]. (R. p. 041).

.However, the Association made absolutely no effort to schedule a hearing to obtain that relief.

The reason was simple: The Association had recorded a *lis pendens* against Lot 16 at the same time that it had filed its Answer, Counterclaim and Cross-Claim. [Notice of Pendency of Action dated October 24, 2011, Case No. 2011-LP-07-02129]. (R. p. 033-034). As a bonus, the *lis pendens* had been recorded before the construction mortgage at the Register of Deeds' Office, which caused the lender to refuse to fund further construction on Lot 16.

In short, the Association had used one ancillary, special proceeding, namely, the filing of the *lis pendens*, to implement the objective of its initial ancillary, special proceeding, which was its action to obtain injunctive relief to stop construction.

This was atypical beyond a doubt, especially since the underlying action for an injunction was not, in any manner, an action "affecting the title to real property," as is required by S.C. Code Ann. §§ 15-11-10 *et seq.*

Even more unusual was the language utilized in the Association's *lis pendens* itself. A *lis pendens* must, of course, contain a description of the object of the action. *Id.* § 15-11-10. The actual object, in this case, was to enjoin the construction by River City of its house at Lot 16 unless and until it paid fees, fines and penalties that the Association claimed were due. (R. p. 041). In other words, the object had nothing to do at all with the title to real property. The Association was proceeding against the persons constituting the River City Interests, not against any real property owned by them.

Yet the *lis pendens* recited that the underlying action "was for the purpose of removing clouds upon the title of the Plaintiff above named in the property herein

described and to forever bar all claims, rights, titles, interests or liens of the Defendants above named in or to the property hereinafter described." [Notice of Pendency of Action, at 1 (emphasis added)]. (R. p. 034).

Please recall that River City Developers, LLC, is the Plaintiff in Case No. 2011-CP-07-03945. The Association, Coosaw Investments, LLC, and Smith are the Defendants. The conflation of the parties—especially in conjunction with the misstatement of the objective of the action—was, at best, an error and, at worst, a strong indication that the Association purposefully sought to encumber River City's property, on the pretext of quieting the title, for the duration of the litigation.

Therefore, River City moved to strike the *lis pendens*. [Motion dated January 4, 2012]. (R. p. 042-045). After a contested hearing, the Master in Equity held:

I find and conclude that the Counterclaim and Crossclaim do not seek to "affect" the title to the subject real property in this litigation. Accordingly, the the Lis Pendens is not authorized by S.C. Code Ann. §15-11-10 (2011) and must be removed. [Order dated February 15, 2012, at 3]. (R. p. 051).

The Master thereupon directed that the *lis pendens* shall be "stricken and removed, and shall henceforth be of no further force or effect." [*Id.*]. (R. p. 051)

There the issue should have ended but for the fact that the Association moved to reconsider the Order striking the *lis pendens*, to all intent and purposes, from the court record, for the first time, attempting to justify its filing of the *lis pendens* as an aid to the enforcement of a covenant and relying on *dicta* from a slander of title case to support that misguided position. [Motion to Reconsider dated February 17, 2012]. (R. p. 054).

In addition, after the Master's decision to strike the *lis pendens* had been announced, but five days before the order was actually entered, the Association had

secretly recorded at the Register of Deeds' Office, on February 10, 2012, a putative Certificate of Lien that appeared to be an assessment lien [First Certificate of Lien] (R. p. 057), but, in actuality, was an attempt by the Association to collect the fees, fines and penalties allegedly unpaid by River City according to the Affidavit by Hilton C. Smith, III. [Smith Affidavit dated March 2, 2012]. (R. p. 059). The amounts allegedly due, again according to Mr. Smith's affidavit, were for "authorized fines," ostensibly resulting from violations of ARC Standards (which had never been recorded, but only "delivered" to River City by hand or via email), as well as for supposedly "unpaid assessments," though none was, in fact, unpaid, and for "costs and attorney's fees." [*Id.*] (R. p. 059).

Upon learning of the so called Certificate of Lien, the Plaintiff, River City Developers, LLC, moved to strike or cancel the certificate as well. [Motion to Strike Certificate of Lien dated February 17, 2012]. (R. p. 060-064).

Because the fees, fines and penalties allegedly due all had their origin, if any, in design standards for the Architectural Review Committee (herein "the ARC"), which clearly had never been recorded, the Association's argument that it was enforcing one or more covenants was attenuated at best.

But argue it did, nevertheless, and strenuously. In response to River City's Motion to Strike the Certificate of Lien recorded on February 10, 2012, which was filed on February 17, 2012, the Association filed a Return dated March 5, 2012 (R. p. 064), in which the Association, attempting to remake history, set up a full blown defense of its conduct, contending that it's *lis pendens* beforehand, and now its certificate of lien, was each lawful because each had been issued in support of an action to enforce a covenant which, in turn, authorized the Association to record an equitable lien. (R. p.

064-067). The so-called certificate of lien had not been filed until *after* the argument of motion to strike the *lis pendens*, as well as *after* the Master's announcement of his decision to grant the motion. The Return was filed and served immediately before the argument of all of the pending motions, which did not occur until March 5, 2012.

The Master in Equity reached a decision and directed that an order be prepared. Debate then ensued about the content of the order, and argument continued.

The Association ultimately made a motion to amend its Answer, Counterclaim and Cross-Claim on March 30, 2012 [Motion to Amend dated March 30, 2012], presumably in an effort to bring its pleading more closely into line with the argument that was then being advanced (e.g., that the Association was entitled by the covenants to file a lien). At that juncture, despite the surreptitious filing of the putative assessment lien, the Association still had no plea except one for injunctive relief. (R. p. 035-041). No record exists that the motion was ever heard. And no order was entered authorizing an amendment.

A status conference was finally held to resolve all outstanding matters. The Plaintiff's lawyer ultimately prepared an order, to which the Association's attorney requested changes, which led to the Master adopting a synthesized order.

However, in that order, which is dated April 6, 2012 (R. p. 070-074), the Master unequivocally denied the Association's Motion to Reconsider the Order dated February 15, 2012, concluding, without further adornment, "Somerset's Motion to Reconsider my Order striking the Lis Pendens is denied." [Order dated April 6, 2012, at 4.] (R. p. 073).

The Master also denied the Plaintiffs' motion to strike the certificate of lien. [*Id.*].

The Master then fashioned an equitable remedy, in essence deciding, by “balancing the equities,” that the escrow of a certain amount of money from a potential sale would be a sufficient basis on which to order the certificate of lien to be released and satisfied. *Id.* at 4-5. (R. p. 073-074)

No affidavit of service is on file indicating when the Order dated April 6, 2012 was served. However, the Association’s lawyer had participated in preparing the order, so she had to receive notice of it sometime between April 6, the date of its entry, and April 27, 2012, because, on the latter date, the Association filed its next motion. This new motion was *not* one for reconsideration of the Order dated April 6, 2012.

Instead, the Association filed a motion seeking a rule to show cause against the Plaintiffs to enforce their compliance with the Order dated April 6, 2012, by contempt, if necessary. [Motion for Rule to Show Cause and to Stay Appeal dated April 27, 2012]. (R. p. 078-079). The motion also requested a stay from the Master of the time within which to appeal in the following language:

Somerset must act to protect its interests by filing its Notice of Appeal for the denial of its Motion to Reconsider entered . . . by the Court on April 6, 2012.

Further argument to be presented ore-tenus.

.....

Somerset further respectfully requests that this Court enter an order staying the time for Somerset to file its Notice of Appeal until such time as this Motion is ruled upon. [Id. at Page 2 (emphasis added)]. (R. p. 079).

Manifestly, the Master did not have the authority to grant a stay or an extension of the time to appeal, which is jurisdictional. Therefore, the time to appeal from the Master’s Order dated April 6, 2012, that, *inter alia*, denied of the Association’s motion to

reconsider the Order dated February 15, 2012, which, in turn, had unconditionally removed the *lis pendens*, expired at some point between May 6 and May 27, 2012.

No further argument ensued, and, finally, the Master-in-Equity entered a form order which denied the request for a rule to show cause, but required the Plaintiff to provide certain information within seven days. The Master also denied the remarkable motion for a stay of the time within which to file an appeal. That order was filed on May 31, 2012. [Order dated May 17, 2012]. (R. p. 080).

On or about June 28, 2012, the Association filed a Notice of Appeal purporting to appeal from "the May 31, 2012, Order of the Honorable Marvin H. Dukes, III, including all orders underlying the said Order." [Notice of Appeal dated June 28, 2011]. (R. p. 087). In submissions to the Court by the Moving Defendants in the new action, all three orders appeared to be attached to the notice, namely, that dated February 15, 2012, that dated April 6, 2012, and that dated May 31, 2012, which created the inaccurate impression that all three orders had been properly appealed.

However, as has been discussed, commencing at page 13 above, the appeal from the Order dated February 15, 2012, as well as from the Order dated April 6, 2012, in which the Association's motion to reconsider the previous order had been denied, was already time-barred and was therefore never lawfully undertaken.

That argument did not have to be made on appeal because, after requesting a stay [Motion for Stay dated May 31, 2013] (R. p. 088), and having it denied [Order denying Stay dated July 3, 2013] (R. p. 091), the Association moved without opposition to withdraw the appeal [Motion dated August 5, 2013] (R. p. 093), after which the Court of Appeals dismissed the appeal. [Order dated August 12, 2013] (R. p. 098). The

remittitur was dated August 29, 2013, and was received by the Clerk of Court for Beaufort County on the following day. [Remittitur dated August 29, 2013]. (R. p. 100).

As a consequence of the dismissal of the appeal by the Association, the striking of the *lis pendens* became final under “the law of the case” doctrine, if not otherwise.

Finally, at the behest of River City [Motion to Construe Order dated July 1, 2013] (R. p. 082), the Master entered an Order (R. p. 084-087), in which he stated:

The motion brought by River City asks me to construe certain language in my Order in this case dated April 6, 2012. In that order I fashioned an equitable remedy, substituting funds to be held in escrow from a closing of River City's property for an assessment lien so that the assessment lien could be released and discharged from the property. My purpose was to facilitate a sale, which appeared to be not only equitable but in the best interest of all parties. [Order dated July 2, 2013.] (R. p. 085).

The Order dated November 10, 2015, by the trial judge in the instant case (R. p. 225), which granted summary judgment to the Moving Defendants, was based upon the foregoing facts that were extracted primarily from court records in the underlying case. The Moving Defendants presented a digest of the court records to the trial judge in their motion for partial summary judgment filed on March 30, 2015. [Motion for Partial Summary Judgment dated March 24, 2015.] (R. p. 189).

The Plaintiffs and Appellants handed up to the trial Judge at the hearing on August 4, 2015, their own memorandum documenting the procedural background of the underlying case. [Plaintiffs' Memorandum (Procedural Background in the Underlying Case) dated August 3, 2015.] (R. p. 200-207).

ARGUMENT

A. STANDARD OF REVIEW.

It is submitted that this appeal raises at least two questions of law, namely, (1) whether the favorable termination of a Notice of Pendency of Action (herein "*lis pendens*") will support the bringing of an action for malicious prosecution, and (2) whether the party who obtains the favorable termination of the *lis pendens* also must obtain the favorable termination of the underlying action in which the *lis pendens* was issued before bringing (and in order to bring) an action for malicious prosecution. Although conflicting authority exists in other states, the writer can locate no decision in South Carolina that directly addresses either of these issues, and, thus each is a question of first impression in South Carolina.

A third question is whether the decision by Judge Dukes to strike the *lis pendens* amounted to a final decision on the merits and favorable to the Appellants. The trial judge ruled that Judge Dukes ruling was "not a final determination under the general rule requiring the ruling must be on substantive grounds." [Order dated November 10, 2015 at 6-7.]

The trial judge, it is believed, resolved all of these issues as questions of law after reviewing court orders, pleadings and motions in the underlying case, as well as after having heard and read the arguments of counsel.

In deciding such questions, the Court of Appeals reviews questions of law *de novo*. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); citing *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)[herein after referred to as "*Catawba*"]. In other words, the Court of Appeals

is “free to decide a question of law with no particular deference to the circuit court.”

Catawba, supra, 372 S.C. at 524, 642 S.E.2d at 753.

That standard applies with particular force to novel questions of law:

[Because] [t]his case raises a novel question of law, the [Court of Appeals is] free to decide a question of law with no particular deference to the lower court. See S.C. Const. art. 5 §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and 330 (1976 and Supp. 1999); S.C. Code Ann. § 14-8-200 (Supp. 1999)(granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); see also *l'ON, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)(same standard of review where “the essential facts are largely undisputed”).

With respect to the interpretation of documents:

It is a question of law for the court whether the language . . . is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)(citations omitted). On the other hand, the construction of a clear and unambiguous [document] is a question of law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987). *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299 (2001) [herein after referred to as “SCDNR”].

Although the Moving Defendants supported their motion for summary judgment with no affidavit, and no deposition or other sworn testimony was taken, as noted above, the trial judge based her decision upon court records from the underlying case, as well as upon the argument of counsel as to the interpretation and import of the those documents. Thus, one or more mixed questions of law and fact may exist. The standard of review on appeal from a summary judgment is as follows:

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show that there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Turner*

v. *McMillan*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); Rule 56(c), SCRPC. To determine whether triable issues of fact exist, ***the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party.*** *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008) (emphasis added). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013) (emphasis added).

The Plaintiff must carry the burden of proof with respect to an action for malicious prosecution. Restatement (Second) of Torts §§ 674, *Comment e*, and 681A (American Law Institute 1977)[herein after referred to as “the **Restatement of Torts**” or “the **Resatatement**”]. However, that burden is not enhanced and amounts only to a preponderance of the evidence with respect to each element. *Pallares v. Seinar*, 407 S.C. 359, 366, 756 S.E.2d 128, 131 (2014)

Although the Plaintiff bears the burden of proof with respect to the elements of malicious prosecution cause of action:

“Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. 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 merely rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2004)(emphasis added)(internal citations omitted)[herein after referred to as “Schmidt”].

Moreover, when deciding a motion for summary judgment, “all ambiguities,” such as those described at page 17 above, as well as all “conclusions and inferences arising

from the evidence *must be construed most strongly against the moving party.*" *Schmidt, supra*, 357 S.C. at 317, 592 S.E.2d at 330 (emphasis added). Indeed, "On appeal, from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Schmidt, supra*, 357 S.C. at 17, 592 S.E.2d at 331 (internal citations omitted); *quoting Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Schmidt, supra*, 357 S.C. at 319, 592 S.E.2d at ___ (collecting cases).

In the *Schmidt* case, the Court of Appeals "found it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to *Schmidt and the novel issue involved in [the] case.*" *Schmidt, supra*, 357 S.C. at 318, 592 S.E.2d at 330 (emphasis added). In short, novel questions are not typically decided on motions for summary judgment, and the rule has been expressed in many forms: Thus, "[a]lthough all issues of novel impression do not require a trial, *summary judgment is inappropriate where further inquiry into the facts is desirable to clarify application of the law.* *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct. App. 1995)(emphasis added); *cited in Shadwell v. Craigie*, 361 S.C. 492, 501-02, 605 S.E.2d 567, 572 (2004).

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had 'a full and fair opportunity to complete discovery.'" *Schmidt, supra*, 357 S.C. at 319, 593 S.E.2d at 330 (collecting cases). In addition:

“Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law.” *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences that should be drawn from them, summary judgment should be denied. *Schmidt, supra*, 357 S.C. at 319, 592 S.E.2d at 331, *citing Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003) (additional citations omitted).

In a recent statement of the standard of review for a summary judgment, which is clearly applicable to the decision in this case, the Supreme Court stated:

Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law or when there is a dispute as to the conclusions and inferences to be drawn from the facts. *Pallares v. Seinar*, 407 S.C. 359, 373-74, 756 S.E.2d 128, 135 (2014); *citing Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)(further discovery required).

B. Prologue.

The order under appeal states that the Defendants' motion for summary judgment should be granted "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 the Plaintiffs." Order dated November 10, 2015, at 1 [herein after "the Appealed Order"]. (R. p. 225). Essentially, the trial judge decided that, unless and until the cause of action in the underlying case had been terminated in favor of the Appellants, they were not entitled to bring a malicious prosecution action—even though the Plaintiffs' malicious prosecution action was, in fact, actually predicated upon an unlawful *lis pendens* that had been canceled by a final court order.

The Appellant never argued in the case below that the Moving Defendants' cause of action had been decided, favorably or otherwise. Instead, the Appellant pleaded and argued that the unlawful *lis pendens*, once it was ordered to be removed by the Master in Equity on February 15, 2012 (in what the Appellant contends is a final order), provided a separate and independent basis for bringing a malicious prosecution action, irrespective of whether the Moving Defendants cause of action in the underlying case had been decided or not. August 4, 2015 Hearing Tr. at 10; (R. p. 112, line 19-p. 118, Line 10). Plaintiffs' Memorandum dated August 31, 2015 [herein after "Plaintiffs' Memo"].

Nevertheless, the trial court's order ignores the Appellants' two principal arguments that were made during and after the initial hearing on August 4, 2015 [*Id.*], namely, that the Appellants' approach in this case is substantiated by the explicit endorsement of Section 674 of the **Restatement (Second) of Torts**, as well as by the

literal invitation of the Court of Appeals in *Pond Place Partners v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002)(herein after referred to as "*Pond Place*"). (R. p. 114, line 13-p. 117, line 15).

Thus, as noted at page 2 above, the Appellants expressly pleaded, in paragraph 20 of their Complaint:

Pursuant to the Order of . . . [Judge] Dukes dated . . . February 15, 2012, the Lis Pendens was determined to be unlawful, and it was ordered to be canceled and released of record because no cause of action in the [Defendant's] Counterclaim and Cross-claim "affect[ed] the title to real property," as is required by S.C. Code Ann. § 15-11-10. (R. p. 174-75).

In addition, the Plaintiffs pleaded that the invalidation of the *lis pendens* was upheld when the motion to reconsider the Order dated February 15, 2012, was denied, and that, if any effective appeal from that order was taken, that appeal was dismissed by the Court of Appeals. Complaint ¶¶ 21 and 22 at 5. (R. p. 175). Finally, the Plaintiffs also alleged, "With respect to the unlawful Lis Pendens . . . , the proceedings have been terminated in the Plaintiffs' favor." *Id.* ¶ 30 at 7. (R. p. 177).

Accordingly, from the very outset of the instant case, the Appellants never contended that they had prevailed on the Moving Defendants' cause of action in the underlying case. The order under appeal simply sets up that requirement as a strawman by insisting:

Plaintiffs are unable to prove the element of termination of such proceeding in Plaintiffs' favor. All of the causes of action [*sic*] in the Underlying Action are still pending. So there cannot have been any termination of any of the causes of action asserted in the Underlying Action in anyone's favor. Appealed Order at 5. (R. p. 229).

That argument avoids the real question which is whether a cause of action for malicious

prosecution can be based on a favorable, final decision to strike a *lis pendens*. And no direct authority exists in South Carolina on that question, which makes it a novel issue in this state, and also makes it an issue not typically subject to disposition on a summary judgment motion. Please review the discussion of the *Schmidt* case at pages 18-20 above. *Schmidt, supra*, 357 S.C. 310, 592 S.E.2d 326.

C. The Restatement (Second) of Torts Is the Best Authority which Authorizes the Bringing of a Malicious Prosecution Action.

However, there is no paucity of authority in the learned treatises and in other states on this question. And the Appellants strenuously argued that to the trial judge, repeatedly, though it would be difficult to ascertain that from the Appealed Order.

And the persuasive authorities overwhelmingly support the Appellants' position. The **Restatement** § 674, for example, states that the favorable termination of an ancillary proceeding, such as the striking of a *lis pendens*, would support an action for malicious prosecution:

f. Ancillary proceedings. A particular civil proceeding may be ancillary to other proceedings. Thus an attachment may be issued to secure the payment of a possible future judgment. If the principal proceedings were improperly brought under the rule stated in this section, compensation for the harm done by the ancillary proceedings is recoverable as part of the damages for the improper initiation of the principal proceedings. ***Even though the principal proceedings are properly brought, the ancillary proceeding may be wrongfully initiated. In this case the wrongful procurement and execution of the ancillary process subjects the persons procuring it to liability under the rule stated in this Section.*** *Id.* § 674, Comment *f*, at 455 (emphasis added).

The Section to which reference is made in the foregoing quotation is Section 674. That section is entitled "Wrongful Use of Civil Proceedings," and it is the analogue to the tort of malicious prosecution in a civil proceeding in South Carolina. Copies of the pertinent provisions of the **Restatement** were handed up to the trial judge at the hearing on

August 4, 2015. [August 4, 2015 Hearing Tr. at 18; (R. p. 120, lines 5-16) Plaintiffs' Memorandum dated August 31, 2015]. Section 674 provides that a person initiating, continuing or procuring civil proceedings against another is liable if he acts without probable cause and "(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought." *Id.* § 674(b) at 452.

With no South Carolina case in point, it is submitted that the **Restatement** is the most persuasive authority available.¹ In fact, when the South Carolina Supreme Court extended the tort of malicious prosecution from criminal prosecutions to an "ordinary civil action," the court did so by expressly relying on the very same § 674 of the **Restatement** which the Appellants urged the trial judge (and now this court) to apply. *Cisson v. Pickens Sav. & Loan*, 258 S.C. 37, 42-43, 186 S.E.2d 822, 825 (1972)[herein after referred to as *Cisson*].

Indeed, one of the most cited decisions in this jurisdiction, which is another malicious prosecution case, was decided by the Court of Appeals' reliance, in part, on **Restatement** § 674, *Comment d*, at 453. *Gaar v. North Myrtle Beach Realty Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986)(attorney not subject to action for malicious prosecution as a consequence of litigation brought solely for and on the behalf of client). That comment is one paragraph (and two pages) removed from § 674, *Comment f*, which is the precise authority quoted with respect to ancillary proceedings

¹ The appellate courts of this state, on important issues of tort law, have long supplemented the case law with relevant provisions from the **Restatement**, which is a synthesis of rules drawn from prior decisions. For example, after a number of negligent misrepresentation cases had been decided by the Court of Appeals by looking to the **Restatement** for guidance, the Supreme Court adopted **Restatement** § 552 verbatim in its entirety as the law of South Carolina with respect to negligent misrepresentation. *ML-Lee Acquisition v. DeLoitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997)(footnote Nos. 3 and 4).

at page 23 above. In short, it is certainly reasonable for the Appellants to request that pertinent principles from the **Restatement** be applied to the facts of this case.

It is also worth noting that the earliest example of malicious prosecution being available in South Carolina to redress a grievance growing out of a civil proceeding arose not in "an ordinary civil action," but, instead, in an extraordinary and ancillary one, that is, an attachment. Thus, the court in *Cisson* stated:

We have recognized that an action will lie for the malicious prosecution of "either civil or criminal proceedings." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 143 S.E.2d 607; *Hyde v. Southern Grocery Stores, Inc.*, 197 S.C. 263, 15 S.E.2d 353. In *Parrott* the action was on a criminal prosecution and, in *Hyde*, upon an attachment of property. *Cisson, supra*, 258 S.C. at 42, 186 S.E.2d at 824 (1972)(emphasis added).

And the question answered in *Cisson* was, "Whether or not the action for malicious prosecution covers an ordinary civil action, where *there was no arrest or interference with property rights*," as would be the case with an ancillary proceeding, such as an attachment, or the filing of a *lis pendens*. *Id.* (emphasis added).

Thus, in the instant case, when the trial court declined to discuss whether malicious prosecution was an appropriate tort with which to redress the wrongful filing of an ancillary proceeding, namely, a *lis pendens*, it turns out that, one of, if not the first, example in South Carolina of malicious prosecution being authorized for civil matters, was in the case of another ancillary proceeding, namely, the attachment in *Hyde*. *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 15 S.E.2d 353 (1941)[herein after "*Hyde*"].

D. The Court of Appeals Invited those Aggrieved by an Unlawful *Lis Pendens* to Pursue an Action for Malicious Prosecution.

Not only did the trial judge ignore the origin of malicious prosecution in civil case in South Carolina, but she also ignored the clear direction from the Court of Appeals in

Pond Place, a case in which the court held that the filing of a *lis pendens* was absolutely privileged and thus not subject to attack on a theory of slander of title. Concerned, lest the trial bar conclude that no cause of action could be brought to rectify a wrongful *lis pendens*, the Court of Appeals devoted an entire section of its opinion in *Pond Place* to the causes of action that it unequivocally stated would apply to an unlawfully filed *lis pendens*. Thus, the court concluded:

V. Alternative Relief

Lastly, we are not unmindful of the fact that our holding above may limit the prosecution of actions for slander of title in South Carolina. However, it does not extinguish every form of relief when a party files a *lis pendens* which is motivated by some malicious intent. The jurisdictions are in agreement that ***the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution***. See *Sanders v. Rollinson*, 33 S.C. Law (2 Strob.) 447 (1848)(stating an action for slander based on a defamatory affidavit was a non-suit; ***the proper attack was under malicious prosecution***). *Pond Place*, 351 S.C. 1, 31, 567 S.E.2d 881, 897 (emphasis added)(albeit, perhaps, *dicta* in that case).

The Court of Appeals then went on to cite as examples seven cases from other jurisdictions. Two authorized a recovery for an unlawful *lis pendens* under the theory of abuse of process. Five cases, however, concluded that the proper action to redress an unlawful *lis pendens* was malicious prosecution. *Id.*

In short, the Appellants, in pleading the instant case, have followed the express invitation of the Court of Appeals. The case before you comprises two causes of action: One is for abuse of process, which, so far, has avoided attack from the Respondents, and the other cause is for malicious prosecution, all as would appear to be expressly authorized by *Pond Place*, as well as by *Sanders v. Rollinson*. *Id.* Despite having called this invitation to the attention of the trial court, it was overlooked in the Appealed

Order. August 4, 2015 Hearing Tr. at 12; (R. p. 114, line 13-p. 115, line 21); Plaintiffs' Memo dated August 31, 2015.

Accordingly, it is highly plausible both to argue and to conclude that a wrongful *lis pendens* may be redressed with a cause of action for malicious prosecution, not the contrary, as is implied by the Appealed Order.

E. The Filing of a *Lis Pendens* is an Ancillary Proceeding.

Bearing the foregoing conclusion in mind, and returning to the **Restatement** formulation stating that ancillary proceedings are actionable, as discussed on page 23 above, the only question remaining to be answered is whether the filing of a *lis pendens* is an ancillary proceeding similar to an attachment. And, about that, there can be little doubt. Thus, in *Isobe v. Sakatani*, 127 Hawaii 368, 387, 279 P.3d 33, 52 (2012)[herein after referred to as "*Isobe*"], the Court of Appeals of Hawaii held:

We conclude that the filing of a *lis pendens* is an ancillary proceeding. If a *lis pendens* is terminated favorably for a party to the prior proceeding who was adversely affected by its filing, the *lis pendens* filing can serve as the basis for meeting the first element [favorable termination] of a subsequent malicious prosecution claim. *Id.*

The reasoning underpinning that conclusion is equally helpful to the analysis in the instant case. According to *Isobe*, "[A]n order expunging a *lis pendens* is an appealable collateral order 'affecting rights which are independent of, and separable from, the rights asserted in the main action,' [in part because it] 'does not address the merits of the underlying claim.'" *Id.* (internal citations omitted).

That is exactly the same status accorded to an order expunging a *lis pendens* under South Carolina law, which is to say independent of the main or underlying cause of action and separately appealable under S.C. Code Ann. §14-3-330 (1976). *Lebovitz*

v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986)[herein after "*Lebovitz*"]. Indeed, in deciding that the cancellation of a *lis pendens* is directly appealable, the South Carolina Supreme Court unequivocally equated the cancellation of a *lis pendens* to the dissolution of an attachment. *Lebovitz*, 289 S.C. at 479, 347 S.E.2d at 96.

In addition, in South Carolina, it is clear that the outcome of the ancillary proceeding and of the underlying action are entirely separate and distinct. The fact that a plaintiff has prevailed on the merits of the underlying cause of action, has no bearing at all on the question of whether an attachment was unlawful and should be dissolved. *Prince Manufacturing Inc. v Jus' Tennis, Inc.*, 287 S.C. 499, 500, 339 S.E.2d 871, 872 (1986)(attachment was properly dissolved, despite plaintiff prevailing on the underlying action, because plaintiff failed to show fraud by affidavit in the attachment proceeding)[herein after referred to as "*Prince*"].

The courts--both in Hawaii and in South Carolina—also recognize that a *lis pendens* constitutes an imposition on real property that is entirely separate from the actual causes of action in the underlying case. In the *Isobe* decision the *lis pendens* is referred to as an "encumbrance" and a "burden on the property tending to lessen the value or interfere with its free enjoyment, *separate and apart from the underlying claim.*" *Isobe, supra*, 127 Hawaii at 387, 29 P.3d at 52 (italics in the original). In South Carolina, the *lis pendens* has been described as "a cloud on [the] title which prevents the owner from freely disposing of the property" *Pond Place, supra*, 351 S.C. at 17, 567 S.E.2d at 889.

It is clear, therefore, that the filing of a *lis pendens* is every bit as much of an ancillary proceeding as is an attachment. It also should be clear that whether the filing

and subsequent judicial striking of a *lis pendens* amounts to actionable malicious prosecution has nothing to do with the success or failure of the main action in the underlying suit, (except that the failure of the main action, of course, will ordinarily, albeit ultimately, result in the termination of the *lis pendens*).

F. The Plaintiff Need Not Prevail in the Underlying Case in order to Attack The Validity of a *Lis Pendens*.

But could it be argued that, as conditions precedent to bringing the malicious prosecution action, a potential plaintiff would need to get both (a) a favorable and final determination both with respect to the invalidity of the *lis pendens* and (b) another one with respect to his opponent's claim in the underlying action?

Based on the reasoning in the *Prince* decision, *supra*, the answer should be a resounding "No." And, again, the most reputable authorities squarely align with the Appellants' position. Thus, on this subject, Professor Prosser has said:

Ordinarily, the plaintiff must prove the termination of the former proceeding in his favor. ***But there are necessary exceptions*** where, as in the case of putting a man under bond, to keep the peace, the proceeding is an *ex parte* one and relief is granted without the opportunity for the party against whom it is sought to be heard. ***This is true also as to proceedings ancillary to a civil suit, such as an attachment or arrest under civil process, as to which, if they are themselves unjustified, it is unnecessary to show a favorable termination 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.*** *Isobe, supra*, 127 Hawaii at 386-87, 279 P.3d at 51-52 (italics in the original); *quoting* Prosser and Keeton, Law of Torts §120 at 892 (5th Ed. 1984)(italics in the original with bold added)[herein after referred to as "Prosser"].

One might look askance at these ancient authorities, except for the fact that they have been fully embraced and applied by the court of appeals in *Isobe* as recently as

2012. In the same foreclosure action in which a *lis pendens* (the first Notice of Pendency of Action (herein "NOPA")) had been filed and then expunged by court order, the defendants sought to set up a counterclaim for malicious prosecution based upon what they contended were (a) their opponent's flawed causes of action, which still remained pending, and (b) the *lis pendens* (the first NOPA), which had been expunged.

The court affirmed that portion of the dismissal of the counterclaim predicated upon the pending causes of action because there had been no favorable disposition of them. However, applying the same principles described above, including **Restatement** § 674, *Comment f*, as well as Prosser §120, the court allowed the malicious prosecution action to proceed to judgment on the merits with respect to the question of the *lis pendens* that had been expunged. *Isobe, supra*, 127 Hawaii at 387-88, 279 P.3d at 52-53.

In *Isobe*, the court of appeal endorsed a procedure whereby the first *lis pendens* was expunged as unlawful at the outset of litigation, and the defendants were allowed to set up a counterclaim based on the unlawful *lis pendens in the same foreclosure action in which the lis pendens had been expunged. Id.* The important consideration is not the quick turn-around from wrongful *lis pendens* to counterclaim, but the fact that the aggrieved parties were able to obtain rapid *pendente lite* relief from the oppression of the *lis pendens*. If the aggrieved parties had been required to wait for the favorable determination of their opponent's cause of action in the underlying case, the damage that might have been done as a consequence could well have been astronomical.

The Respondents' argument appears to be that a person harmed by a wrongful attachment or *lis pendens*, at a minimum, would have to win the underlying action, and then make an effort to establish lack of probable cause by his opponent in bringing the

underlying action, just to have a chance to institute a malicious prosecution action based solely upon the unlawful ancillary proceeding--no matter how egregious or harmful the initiation of the ancillary proceeding proved to be.

However, both the *Hyde* and *Prince* decisions, *supra*, strongly militate against that argument. No case or other authority has been cited to show The Respondents' argument to be the law of this state. And it is prohibitively unlikely ever to become the law because of the probability that gross injustice in the procurement of ancillary proceedings would go unpunished (unless the defendant in the underlying proceeding could get it dismissed, or otherwise adjudicated, in such a way as to establish that his oppressor lacked probable cause to sue him). As with cases before the adoption of exceptions to the mootness doctrine, even willful irregularities in the use of ancillary proceedings would be "capable of repetition but evading review" on appeal, if the law were as the Moving Defendants would have it. *Cf. Byrd v. Irmo High School*, 468 S.E.2d 861, 864 (1996).

Stated simply, one can have probable cause to institute a law suit, and yet not have probable cause to record a *lis pendens* in aid of that law suit. That most likely is what happened in this case. And the determination of probable cause as to the underlying cause of action has no bearing whatsoever on the determination of probable cause with respect to the ancillary proceeding.

In short, to paraphrase Prosser, "It is unnecessary to show a favorable termination of the main action," provided that the "ancillary proceeding" has already been found to be "unjustified." Prosser §120 at 892. That is precisely what was decided by Judge Dukes' Order dated February 15, 2012. Which leads to the penultimate question--whether

that order was final, "substantive" and/or "on the merits."

G. The Termination of the *Lis Pendens* in favor of the Appellants Was Final, Substantive and on the Merits.

The Respondents contended, and the trial judge accepted, that Judge Dukes' Order dated February 15, 2012, as well as his express denial of Somerset Point's motion to reconsider that order, "was not considered a final determination because Judge Dukes' ruling on striking the *lis pendens* is not based on substantive grounds." [Respondents' Motion for Summary Judgment at 5-6.] This murky line of reasoning was supported by absolutely no South Carolina authority whatsoever. And for good reason, because the Respondents conceded that "South Carolina courts have not addressed whether a finding on substantive grounds is necessary for a ruling to be considered a termination in favor of the plaintiff asserting malicious prosecution." [*Id.*] However, that same concession is notably absent from the order granting summary judgment by the trial judge, as she seemed undeterred by the paucity of authority [Order dated November 10, 2015 at 6 *et seq.*], and she also overlooked authority submitted by the Appellants to the effect that a decision on the merits was **not** required to support a cause of action for malicious prosecution. **Restatement** § 674, Comment *f*, at 455.

So what appears to be yet another novel question nevertheless was resolved, without any discovery, let alone affidavits, on a motion for summary judgment. The only legal basis for this conclusion was the citation to a case collector, 30 A.L.R.4th 572, for the nebulous proposition, based on old cases from California and other states, that the "termination of underlying civil proceedings, in order to constitute a favorable determination for the purposes of a malicious prosecution action, must be consistent

with a finding for the defendant on substantive grounds and must not ***be based solely upon technical or procedural considerations.*** [Order dated November 10, 2015, at 6.](emphasis added). (R. p. 231).

A review of these cases reveals, for example, that the California Court of Appeals, in 1963, regarded the dismissal of a cause of action in a prior probate proceeding, for lack of jurisdiction, as one “[implying] a termination not consistent with the plaintiff’s innocence.” *Ferraris v. Levy*, 223 Cal.App.2d 408, 411. Nevertheless, the court reversed the dismissal of the malicious prosecution action because the record did not reflect that lack of jurisdiction was the reason for the dismissal. *Id.*

In another of the cases collected in 30 A.L.R. 4th 572, a lawyer had sued his former client “on the common counts” for costs advanced in a prior lawsuit. *Lumpkin v. Friedman*, 131 Cal.App.3d 450, 452 (1982). However, when the case was called for trial, because neither party had filed a “Witness and Evidence Statement,” it was dismissed for lack of prosecution. The prevailing client, Lumpkin, then filed an action for malicious prosecution, and the issue on appeal was whether a dismissal for want of prosecution was sufficiently “on the merits” to constitute a termination of the prior action favorable to the plaintiff. *Id.* at 452-53. The court of appeals ruled that it was, which is the likely resolution of this question as well in South Carolina. See, e.g., *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989); Rule 41(b), SCRCP.

Cases in California also hold that, where the underlying cause of action has been dismissed because of a controlling affirmative defense, such as the statute of limitations, the standard required for a favorable determination has not been met. *Lochner v. LaCroix*, 25 Cal.3d 747 (1979). In addition,

Where the proceeding has been terminated ***without regard to its merits or propriety, by agreement or settlement of the parties*** or solely by the procurement by the accused of an act of favor or as the result of some act, trick or device preventing action or consideration by the court, there is no such termination as may be availed of for the purpose of a [malicious prosecution] action. *Levy's Store, Inc. v. Endicott-Johnson Corp.*, 272 N.Y. 155, 162 (1936).

The underlying distinction that leads to these different rules is apparent. In one case, the termination is of such character as establishes or fairly implies lack of a reasonable ground for the prosecution. In the other case, no such implication reasonably follows. *Id.* (emphasis added).

However, not a single one of the cases collected in 30 A.L.R. 4th 572 has any relevance to or bearing on the case at bar for two reasons: First, none of the cases cited by either the Respondents or by the trial judge in her Order dated November 10, 2015, makes ***any*** mention of the termination of an ancillary proceeding such as the *lis pendens* that was vacated by Judge Dukes in the underlying action. The only applicable authority for ancillary proceedings is found in the **Restatement § 674, Comment f**, as described at page 32 herein above, and that authority does not require a decision on the merits. And, second, and even more importantly, Judge Dukes' decision to strike the *lis pendens* was manifestly both substantive and on the Merits, and certainly not one ***"based solely upon technical or procedural considerations,"*** as the trial judge insisted. [Order dated November 10, 2015, at 6.] (R. p. 230).

Judge Dukes decisions were clear and based upon the applicable law as and when it was presented to him. Therefore, as was discussed at page 10 above, he wrote:

I find and conclude that the Counterclaim and Crossclaim do not seek to "affect" title to real property in this litigation. Accordingly, the Lis Pendens is not authorized by S.C. Code Ann. §15-11-10 (2011) and must be removed. [Order dated February 15, 2012, at 3.] (R. p. 051)

That decision, it is submitted, is wholly unambiguous and entirely substantive, which is to say, on the merits. Arguments to the contrary must be unavailing, especially in view of the posture of the case on the date of the argument of the motion to strike before the Master. [See pages 8-11 above.]

Subsequently, Somerset Point moved for reconsideration of the Order dated February 15, 2012. [See page 10 above.] Somerset Point had also by then recorded a Certificate of Lien, without having served it on the Appellants. [*Id.*] The lien, however, still reflected amounts due primarily for the alleged violation of the ARC design standards, which were clearly neither covenants nor otherwise recorded. [*Id.* at 10-11.]

Yet, in their motion for reconsideration, Somerset Point attempted to Re-characterize their counterclaim and cross-claim as one for a declaratory judgment to enforce a covenant. In that motion, it also asserted that the Master had "misinterpreted" the decision in *Pond Place Partners*.² (R. p. 054).

There is no evidence, however, that the *Pond Place* decision was even argued to Judge Dukes prior to the entry of his Order dated February 15, 2012. Abundant evidence exists, instead, that Somerset Point was making every effort after the hearing of the motion to strike the *lis pendens* to change the nature of its claim to one that arguably would support the issuance of a *lis pendens*. [See pages 10-12 above.]

By the time that Somerset Point's motion for reconsideration came to be heard, the Appellants had learned of the secretly filed lien and had moved to strike it as well.

² As is discussed at pages 25 and 26 above, *Pond Place Partners* was a slander of title action, in which absolute privilege was set up and sustained as a complete defense. The Appellants submit that the Respondents' attempt to rely on this case to cast doubt upon the Master's decisions is misplaced because no privilege exists as a defense to malicious prosecution. If such a defense were in existence, the Court of Appeals in *Pond Place Partners* wasted more than a page of its opinion in that case inviting plaintiffs aggrieved by a wrongful *lis pendens* to pursue, in lieu of slander of title claims, causes of action for malicious prosecution and abuse of process. [See the discussion at pages 25 and 26 above.]

Thus, the two motions were heard together on March 5, 2012, and the decisions on the two motions were announced in the same order dated April 6, 2012.

With respect to Somerset Point's motion for reconsideration, Judge Dukes ruled, "Somerset's Motion to Reconsider my Order striking the Lis Pendens is denied." [See Page 12 above.] The words "modify," "amend," "alter," "qualify," "change" or "clarify" do not appear in the Order of April 6, 2012, with respect to any statement in the Order dated February 15, 2012. In fact, in the body of his order, Judge Dukes makes perfectly clear what he was doing:

I find and conclude that Somerset's Motion for Reconsideration should be denied and that equitable relief should be provided to Somerset to secure its interests in this litigation, which is more fully set forth hereinafter. [Order dated April 6 at 2.] (R. p. 071).

Judge Dukes had been confronted with the evolving argument about the nature of Somerset Point's cause of action, namely, that it was then attempting to enforce a covenant which gave rise to an equitable lien. With that argument then on the table, Judge Dukes did what the law required: He "balanced the equities" to reach a fair resolution of the motion to strike the equitable lien. See, e.g., *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392-93, 680 S.E.2d 289, 291-92 (2009)[herein after referred to as "*Buffington*"]; *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987). In balancing the equities, the Master declined to strike the equitable lien. However, he fashioned a remedy whereby the lien would be released upon the payment into escrow of the sum of \$33,345.00. [Order dated April 6, 2012 at 6.] (R. p. 075).

Indeed, because Somerset Point refused to be bound by that order, we know

exactly what Judge Dukes intended because he subsequently was asked to construe the order, at which time he stated:

The motion brought by River City asks me to construe certain language in my Order in this case dated April 6, 2012. In that order I fashioned an equitable remedy, substituting funds to be held in escrow from a closing of River City's property for an assessment lien so that the assessment lien could be released and discharged from the property. My purpose was to facilitate a sale, which appeared to be not only equitable but in the best interest of all parties. Order dated July 3, 2013; (R. p. 085); see also Page 15 above.]

Accordingly, the Order dated April 6, 2012, did absolutely nothing to alter or qualify in a material way the striking of the *lis pendens* that had been ordered on February 15, 2012. While the Master may have explained his thought process, it is important to focus on what he did, instead of claiming to be confounded by what he may have said. The decision was clear and was clearly substantive, meaning, on the merits.

H. The decision, if Reached on Equitable Grounds, such as Balancing of the Equities, Was Substantive and on the Merits.

The Appellants do not concede that the Judge Dukes' decision to strike the *lis pendens* was influenced by his decision "to balance the equities" with respect to whether to dissolve the Certificate of Lien or to fashion a different remedy. Nevertheless, there is little doubt that he conflated the discussion that issue with the issue of the motion to reconsider the previous striking of the *lis pendens*. Specifically, he stated that, in his view, because of the circumstances then obtaining, "leaving the Lis Pendens in place benefits neither party." [Order dated April 6, 2012, at 2.]; (R. p. 071). The Judge's expression of that opinion, however, did not change the fact that Somerset Point (a) desired the *lis pendens* to remain in place, and (b)) Judge Dukes removed it anyway by flatly denying the Motion to Reconsider.

Nevertheless, assume that the Master denied the Motion to Reconsider by “balancing the equities.” The writer is aware of no precedent in South Carolina that makes a decision based on equitable considerations any less final or favorable to the prevailing party than one founded on a legal conclusion. And neither the Respondents, nor the trial judge, has cited any such authority on what they consider to be a controlling point, to wit, “In the order denying the motion to reconsider and the motion to strike the lien, Judge Dukes made it clear that his ruling to strike the *lis pendens* was based on balancing the equities, ***not on substantive grounds.***” [Appealed Order at 6 (emphasis added).]; (R. p. 230). That notion, in turn, provided the platform for the next conclusion by the trial judge, namely, that “the order on the issue of the *lis pendens* was not a final termination under the general rule that it must be on substantive grounds. [*Id.*]. (R. p. 230). In short, the trial judge appears to be insisting that equitable considerations are not substantive grounds, and that, accordingly, a decision based on them is neither on the merits nor final. Those notions, it is submitted, are just wrong.

Please recall that, only when Somerset Point began asserting that it was enforcing a covenant that entitled it to an equitable lien, which first occurred at the hearing on March 5, 2012, did the Master decide to balance the equities, ***as he was by law required.*** See *Buffington, supra*, and the discussion at page 36 above. In other words, Judge Dukes was required by precedent to do what the trial judge in her order has now dismissed as not being “substantive,” on the merits or final. However, the idea that even the maxims in equity are not substantive or not entitled to be treated with the same dignity as legal precepts is simply not sustainable under South Carolina law:

Maxims [in equity] are but attempted general statements of rules of law.

The judicial process is the continuous effort on the part of the courts to state accurately these general rules, with their proper limitations and exceptions. Even today it is not unusual to find judges citing and applying these ancient maxims. (much like modern courts use cases as precedents) in deciding whether or not to grant equitable relief. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011)(equitable lien case).

In short, equating a decision reached on equitable considerations, including a balancing of the equities, to a disposition lacking substance or finality is simply erroneous, especially when such a balancing test is required by precedent. See *Buffington, supra*.

I. If Ambiguity Exists in the Master's Orders, the Appellants Were and Are Entitled to Prevail.

Of course, if the Master's decision, as set forth in his Order dated April 6, 2012, was not clear because of the conflation of concepts pertaining to the balancing of the equities with respect to the disposition of the motion to reconsider and the motion to strike the Certificate of Lien, and, as a consequence, an ambiguity resulted, the Appellants were entitled to prevail on the Respondents' Motion for Summary Judgment under the well accepted principles discussed at pages 18-19 above. See, e.g., *Schmidt v. Courtney*, 357 S.C. 310, 317, 592 S.E.2d 326, 331 (Ct. App. 2004).

J. The Striking of the *Lis Pendens* Became Final when Appeal Was Not Timely Taken by the Respondents.

Once the parties received notice of the entry of the Order dated April 6, 2012, the time within which to appeal began to run. *Lebovitz*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986). As is discussed at pages 12 and 13 above, Somerset Point filed a motion on or about April 27, 2012, seeking, *inter alia*, "an order staying the time for Somerset to file its Notice of Appeal" [Motion dated April 27, 2012.] No such order was entered, and, indeed, the Master lacked the authority to dispense with a jurisdictional requirement. *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985).

Judge Dukes' decision to strike the *lis pendens*, therefore, became final once the time to appeal had expired, and well before the entry of the Order filed on May 31, 2012.

K. The Dismissal of the Appeal Made the Master's Decision to Strike the *Lis Pendens* Final and Incontrovertible for All Purposes.

An appeal, of course, was taken by Somerset Point with respect to the Master's Order filed on May 31, 2012, as well as "all orders underlying the Order of May 31, 2012." Irrespective of whether the appeal was timely filed, the striking of the *lis pendens* became final because Somerset Point elected not to pursue the appeal, all as appears more fully at page 14 above. After its motion for a stay of the appeal was denied, Somerset Point moved to dismiss the appeal as moot. Although the Appellants did not oppose the motion, they did not consent to it, and certainly did not agree to any settlement. The Court of appeals dismissed the appeal without specifying a reason.

Therefore, it is submitted that the striking of the *lis pendens* became unconditionally and absolutely final in the underlying case under the law of the case doctrine. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015).

L. The "Law of the Case" Doctrine Precludes the Re-Litigation of the Striking of the *Lis Pendens* in the Instant Case as Well.

An un-appealed decision of the trial court, right or wrong, is the law of the case. *In re Thames*, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001). The doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. *Bone v. U.S. Food Service*, 397 S.C. 566, 733 S.E.2d 200, *adhered to on rehearing* 404 S.C. 67, 744 S.E.2d 552 (2012); *ML-Lee Acquisition Fund, L.P. v. DeLoitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997)(un-appealed ruling is the law of the case).

Put simply, the law of the case doctrine prohibits issues that have been decided, or that could have been decided, in a prior appeal from being re-litigated in the trial court in the same case. *Ross v Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997). This doctrine, in turn, in the context of subsequent cases, such as the case at bar, implicates the doctrines of both *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). *South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 337, 737 S.E.2d 532 (Ct. App. 2012). The latter doctrine, of course, can and often does preclude the litigation of an issue raised in a prior case in a second case, even when some of the parties in the second case were not participants in, or related to a party in, the first case. *Id.* citing Restatement (Second) of Judgments § 27. Accordingly, the Respondents in this case are barred from re-litigating the import of Judge Dukes' orders striking the *lis pendens* by the doctrine of collateral estoppel.

M. The Novel Questions of Law In this Case Should Not Have Been Decided Without Full, Factual Development.

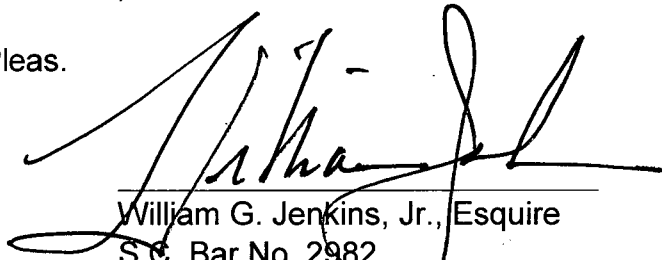
Last, but not least, the Appellants submit that this case presents novel questions of law that should not have been decided on a summary judgment motion without an opportunity by the parties to develop the facts fully, all as appears at pages 15 and 16 above. The circumstances are even more compelling in this case, in which another cause of action for abuse of process remains pending against all of the Defendants in the trial court, and at least one Defendant, Somerset Point, the loser of its motion for summary judgment on the malicious prosecution issues, is still defending that claim in the trial court.

Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law or when there is a dispute as to the conclusions and inferences to

be drawn from the facts. *Pallares v. Seinar*, 407 S.C. 359, 373-74, 756 S.E.2d 128, 135 (2014); citing *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 330 (Ct. App. 2003)(discovery required).

IV. CONCLUSION

For the foregoing reasons, the Appellants request that the Court of Appeals reverse the orders subject to this appeal, thereby reinstating the cause of action for malicious prosecution against the Respondents, and remand the case for further proceedings in the Court of Common Pleas.



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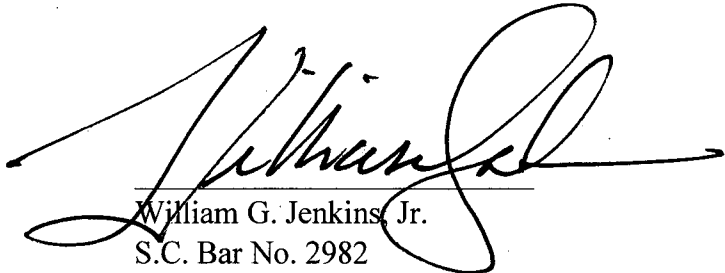
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CERTIFICATE OF COUNSEL
(Rule 211(b), SCACR)

I, the undersigned attorney for the Appellants, hereby certify that the Appellants' Final Brief complies with the requirements of Rule 211(b), SCACR.



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