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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Court of Common Pleas

Carmen Tevis Mullen
Circuit Court Judge

Appellate Case No. 2016-001113

Trial Court Case No. 2014-CP-07-02670
Opinion No. 5622

RECEIVED

FEB 14 2019

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, and HILTON C. SMITH
JR., INC. OF SOUTH CAROLINA
Defendants,

Of which HILTON C. SMITH, JR., COOSAW INVESTMENTS,
LLC, and HILTON C. SMITH, JR., INC. OF SOUTH
CAROLINA are
Respondents.

PETITION FOR REHEARING

PLEASE TAKE NOTICE that the Appellants herein, pursuant to Rule 220,
SCACR, petition the Court for the rehearing of certain matters in the Opinion of the
Court filed on January 30, 2019 (herein "the Decision"), upon the grounds that the Court
either overlooked or misapprehended them:

1. The Statement of the Facts in the Appellants' Brief (herein "the Statement") was
uncontested, but the Court deviated therefrom in making certain findings, including the
following:

Coosaw filed a motion for reconsideration of the master's decision, which the master denied, stating "I find the harm to River City in granting [Coosaw's] motion to reconsider outweighs the benefit to [Coosaw] if the [notice of] Lis Pendens remains in place. Decision at 2.

As is made clear in the Statement, the master had been asked to decide two different motions in his Order dated April 6, 2011. The first of these was the motion to reconsider his order dated February 15, 2011, in which he ordered the Lis Pendens to be struck. The other was a motion filed by the Appellants to strike an assessment lien placed on the property by the Respondents (after the hearing on the propriety of the Lis Pendens, but before the Order striking it had been filed), and, in his analysis of the two pending motions, the master may have conflated the two. See Appellants' Brief at 10-13.

However, at page 2 of his Order dated April 6, 2011, the master explicitly stated:

Upon consideration of the pleadings in this matter, the arguments of counsel, the law and the facts presented to me by counsel, I find and conclude that Somerset's motion to Reconsider [the striking of the Lis Pendens] 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. Record at 71.

The Appellants' argument to the Court was that the decision to deny the motion to reconsider the striking of the Lis Pendens was clear and unequivocal, and that the "balancing of the equities analysis" that followed was applicable only to the motion to strike the assessment lien. The master decided to leave that lien in place, thereby denying the motion to strike it, but he fashioned an equitable remedy to allow for the escrow of money if and when Lot 16 was sold.

By omitting any mention of the motion to strike the assessment lien, the Court clearly has overlooked a material (and admitted) fact central to the Appellants' argument. That argument was that the master's statement in his order dated April 6,

2011, that “I find that the balancing of the equities is appropriate” applied only to his resolution of the assessment lien question.

2. Furthermore, the Appellants argued that, if, due to the conflation of the two issues, the master’s order was ambiguous, the Appellants were entitled to prevail on the motion for summary judgment at issue in this case. See Appellants’ Brief at 18 and 39.

Again, by omitting any mention of the second motion to strike the assessment lien, as well as the remedy that the master arguably fashioned in lieu of striking the lien, the Court appears to have resolved any ambiguity in the Order dated April 6, 2011, without ever acknowledging that one even existed.

3. Finally, another assumption underlying the court’s decision was that Somerset “ultimately withdrew the appeal after River City’s sale of Lot 16 rendered the issue moot.” Decision at 3. That statement is simply wholly inaccurate and wholly at odds with the facts before the court. Because the master had “balanced the equities” and fashioned an equitable remedy, instead of simply striking the assessment lien, though the lien could be removed, the question remained about what would become of the \$33,345.00 that the master had decided must be escrowed. See, e.g. Record at 84-86.

The money remains escrowed to this day, despite the fact that Somerset does not have a cause of action pleaded in this case that would entitle it to recover any of the escrowed money. Record at 35-41.

4 To put a fine point on matters, had the facts described in paragraphs 1, 2 and 3 been clearly understood by the Court, it would have been equally clear that the Appellants were entitled to prevail, at least at the summary judgment stage, because of ambiguity in the master’s order. It would have also been clear that, because the Court

concedes that this case presents a novel question of law, some discovery would have aided in its resolution because the facts misapprehended would have become self-evident in discovery. Appellants' Brief at 41.

5. Indeed, had the case been allowed to unfold further, because Somerset had no pleading of record allowing it to recover the escrowed money (Record at 35-41), the Appellants would have been entitled to summary judgment on Somerset's underlying cause of action, which, after all, remained one **only** for injunctive relief. This, in turn, would have obviated the need for the court to decide whether an unlawful Lis Pendens was actionable under the theory of malicious prosecution in the absence of a favorable termination of the underlying action. If the cause of action based on the defective Lis Pendens was "premature," as the Court appears to hold, the resolution of the issue without any opportunity to develop the record to the extent necessary for the parties (and the Court) to comprehend these questions clearly was even more premature.

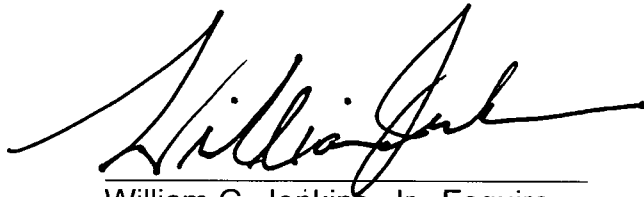
6. By labeling the cause of action based upon the unlawful Lis Pendens "premature" the Court leaves open the question of whether another cause of action for malicious prosecution could be filed if and when the Appellants were to prevail on Somerset's purported underlying cause of action, that is, its claim for injunctive relief.

7. The Court's reliance upon the *Pond Place Partners* case is misplaced. As was demonstrated in the Appellants' Brief, except for the express authorization for parties aggrieved by unlawful filings of a Lis Pendens to find redress in the law of malicious prosecution and abuse of process, that decision should be limited to slander of title causes of action in which privilege is a viable defense. See Appellants' Brief at 25-26 and 35 (Note 2).

8. The limitation described in paragraph 7 is especially desirable in view of the dubious and procrustean measures required to reach the result in *Pond Place Partners*. Despite expressions in that case, and now in this one, that a Lis Pendens is a “pleading,” Rule 7(a), SCRCP, expressly defines what are (and are not) pleadings, and a Lis Pendens is, therefore, clearly and necessarily excluded from that term.

9. By relying on the vagaries of describing a Lis Pendens as “a form of pleading” and a document that simply “gives notice” of a pending law suit to would be purchasers, the Court has sought to place a veil of normalcy over what is an abusive and potentially devastating mechanism that, in the absence of a pre-existing encumbrance, such as a mortgage or a mechanic’s lien, allows extortion by litigation to take place. As Judge Ernest Kinard was known to say, appellate courts are “policy courts,” meaning that they, not trial courts, are intended to decide matters of public policy. Because an unlawful Lis Pendens can cause extensive harm even if the filer’s underlying cause of action ultimately proves to be successful, the Court ought to evaluate fully whether its lawfulness should have any connection at all to the merits of the cause of action supposedly underlying it. In this case, it manifestly did not.

ACCORDINGLY, the Appellants request that the Court take these matters under consideration, rehear the issues as it may deem appropriate, and then enter a decision modified in accordance with the matters presented herein.



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February 14, 2019

Hilton Head Island, South Carolina.

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Carmen Tevis Mullen
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Of which HILTON C. SMITH, JR., COOSAW INVESTMENTS,
LLC, and HILTON C. SMITH, JR., INC. OF SOUTH
CAROLINA are Respondents.

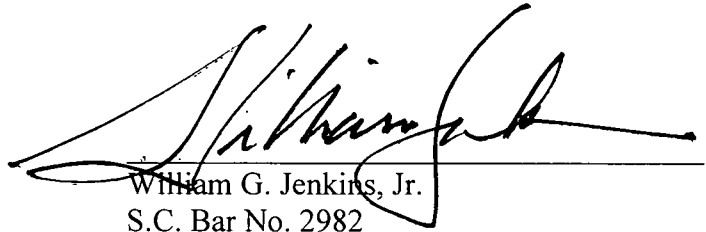
PROOF OF SERVICE

I, William G. Jenkins, Jr., hereby certify that on February 14, 2019, I served by
mail a copy of the Petition For Rehearing, by depositing same, with sufficient first class postage
prepaid, at the United States Post Office at Hilton Head Island, South Carolina, addressed as
follows:

Morgan S. Templeton, Esquire
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A handwritten signature in black ink, appearing to read "W. Jenkins, Jr.", is written over a horizontal line. The signature is fluid and cursive.

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February 14, 2019

Hilton Head Island, South Carolina.

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February 14, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
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Columbia, South Carolina 29211

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Re: Benjamin C. Gecy, et al. v. Somerset Point at Lady's Island Homeowners'
Association, Inc., et al.
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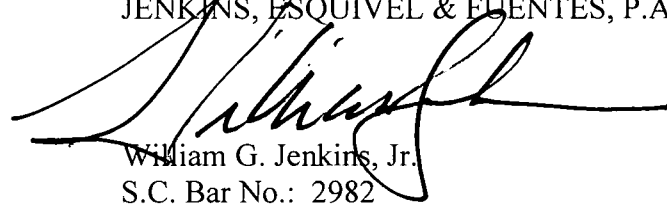
Dear Ms. Kitchings:

Please find enclosed an original and six (6) copies of a Petition for Rehearing, which I am filing on behalf of the Appellants, as well as the Proof of Service, relative to the above matter. I am additionally enclosing \$50.00 for the cost of filing the Petition.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Thanking you in advance and with best wishes, I remain

Sincerely,
JENKINS, ESQUIVEL & FUENTES, P.A.



William G. Jenkins, Jr.
S.C. Bar No.: 2982

WGJr/km
Enclosure

cc: Morgan S. Templeton, Esquire
John Joseph Dodds, IV, Esquire
William Wharton Watkins, Jr., Esquire
Jeffrey J. Wiseman, Esquire
E. Mitchell Griffith, Esquire
Robert V. Mathison, Jr., Esquire
Mr. Benjamin C. Gecy