

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon

Civil Action No. 2012-CP-32-00541  
Appellate Case No.: 2012-212587

David Randolph Whitt.....Appellant,

v.

Clonta M. Fox.....Respondent.

RECORD ON APPEAL

RECEIVED

JAN 10 2013

SC Court of Appeals

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Richard L. Whitt  
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STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT FOR THE  
ELEVENTH JUDICIAL CIRCUIT

FILED

Civil Action No.: 2012-CP-32-\_\_\_\_\_

David Randolph Whitt,

2012 FEB -6 1:20

Plaintiff  
BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

v.

COMPLAINT

Clonta M. Fox,

Defendant.

2012CP3200541

COPY

Now Comes the Plaintiff David Randolph Whitt, (hereinafter as, "Mr. Whitt"),  
complaining of the Defendant, Clonta M. Fox, (hereinafter as, "Fox", or "Defendant Fox").

**PARTIES AND JURISDICTION**

1. Plaintiff Mr. Whitt is a citizen and resident of Lexington County, South Carolina.
2. Upon information and belief, Defendant Fox is a citizen and resident of Lexington County, South Carolina.
3. The matters complained about in these pleadings took place in Lexington County, South Carolina.
4. Therefore, venue and jurisdiction are proper in the Lexington County Court of Common Pleas, for the Eleventh Judicial Circuit.

**COURSE AND PATTERN OF DEALINGS**

5. Paragraphs one through four above, are re-alleged, as if set forth verbatim.
6. Defendant Fox on or about July 4, 2010, complained to Plaintiff Mr. Whitt about Plaintiff Mr. Whitt discharging fireworks from Plaintiff Mr. Whitt's front yard. Defendant Fox, using profanity and threats of arrest by the Lexington County Sheriff's Department, confronted Plaintiff Mr. Whitt and his guests. Defendant Fox was not born and raised in South Carolina and upon information and belief, Defendant Fox mistakenly quoted the Law of his home State, Ohio, where almost all fireworks are illegal. Defendant Fox then contacted the Lexington County Sheriff's Department and attempted to have Plaintiff Mr. Whitt and his guests arrested. Deputies from the Lexington County Sheriff's Department informed Defendant Fox that it is legal to discharge fireworks in South Carolina, and Plaintiff Mr. Whitt was discharging the fireworks, in a legal manner.

7. Defendant Mr. Fox, in an attempt to impose a ban on fireworks in Defendant Fox's neighborhood, and upon information and belief, Defendant Fox researched South Carolina Law and discovered code Section 23-35-175, S.C. Code Ann. (1976, as amended). That code Section prohibits fireworks from being discharged from, in or into, those premises designated as a Firework Prohibited Zone (hereinafter as, "FP Zone"). The institution of an FP Zone does not affect nearby residents' rights to discharge fireworks in South Carolina, unless the discharge of those fireworks is in violation of the Statute cited hereinabove. The FP Zone also does not apply when fireworks are accidentally or otherwise, discharged into a FP Zone, because the Statute requires that a violation must be "knowing" and "intentional".

8. Deputy Bryant from the Lexington County Sheriff's Department in a conversation with Plaintiff Mr. Whitt, relayed that Defendant Fox had admitted that Plaintiff Mr. Whitt was not intentionally shooting fireworks at his residence, and acknowledged the FP Zone did not prevent Mr. Whitt from shooting fireworks on his own property.

9. Defendant Fox then waited <sup>1</sup>one year from his earlier attempt in July, 2010, to improperly stop his neighbors from discharging fireworks, until July 4, 2011. Several witnesses have testified in a legal proceeding described hereinbelow, that Defendant Fox informed them, in the time frame before July 4, 211, that Defendant Fox had established the FP Zone, and Defendant Fox improperly argued that the establishment of the FP Zone, meant no one living around him could discharge fireworks in his neighborhood even though the discharging of fireworks in Defendant Fox's neighborhood is perfectly legal.

10. When Plaintiff Mr. Whitt next discharged fireworks from his front yard, on July 4, 2011<sup>2</sup>, in the same manner as he had done on July 4, 2010, Defendant Fox telephoned the Lexington County Sheriff's Department and demanded that they issue a citation to Plaintiff Mr. Whitt. The offense that Defendant Fox caused Plaintiff Mr. Whitt to be charged with, is an arrestable offense. Plaintiff Whitt was not arrested, but Plaintiff Mr. Whitt, was given a citation for violation of Section 23-35-175, S.C. Code Ann. (1976, as amended).

---

<sup>1</sup> Plaintiff Mr. Whitt was out of town on New Year 's Day, 2011, therefore there was no discharge of fireworks on that occasion. However, other neighbors did discharge fireworks on that occasion, without Defendant Fox contacting the Lexington County Sheriff's Department.

<sup>2</sup> Two other neighbors in the immediate vicinity of Defendant Fox's residents, were discharging fireworks similar to the ones discharged by Plaintiff Mr. Whitt, as were other nearby residents. However, the only criminal complaint lodged by Defendant Fox was against Plaintiff, Mr. Whitt.

Plaintiff Mr. Whitt notes that Deputy Sprinkle of the Lexington County Sheriff's Department, the charging officer did not observe or claimed to have observed any fireworks violation by Plaintiff Mr. Whitt, nor did Deputy Sprinkle interview Plaintiff Mr. Whitt prior to issuing the written complaint. Apparently, Deputy Sprinkle relied solely on the representations of Defendant Fox, in that no neighbors or nearby residents were interviewed by Deputy Sprinkle except, Sylvia Smith whose testimony is discussed hereinbelow, and Sylvia Smith is also listed as a co-conspirator herein.

11. Defendant Fox and a resident of Defendant Fox's neighborhood, Sylvia Smith, met together and conspired together against Plaintiff Mr. Whitt, in a concerted effort to falsely claim that Plaintiff Mr. Whitt intentionally discharged fireworks towards Defendant Fox's house in an attempt to stop the neighborhood residents to be able to discharge fireworks, although the discharge of fireworks is legal. Later, there was sworn witness testimony<sup>3</sup> by an unbiased witness, in the proceeding described hereinbelow, that Sylvia Smith stated that she knew Plaintiff Mr. Whitt did not intentionally discharge fireworks in the direction of Defendant Fox's house. Despite that fact, Sylvia Smith appeared in Court in a proceeding described hereinafter, and testified falsely that Plaintiff Mr. Whitt intentionally discharged fireworks in the direction of Defendant Fox's house, as a result of her conspiracy of Defendant Fox, which conspiracy was against the economic interests of Plaintiff Mr. Whitt.

12. Although Deputy Sprinkle of the Lexington County Sheriff's Department was amenable to dismissing the criminal charge against Plaintiff Mr. Whitt, Defendant Fox insisted that the complaint should not be dropped, unless Plaintiff Mr. Whitt made an agreement with Defendant Fox prohibiting his future discharge of fireworks, which is evidence of Defendant Mr. Fox's ulterior purpose in this matter.

13. Plaintiff Mr. Whitt pled not guilty and demanded a Jury Trial, which Jury Trial was held on January 31, 2012. On that date, Plaintiff Mr. Whitt was found **not guilty** by a Jury.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT FOX**

(Abuse of Process)

14. Paragraphs one through eleven above, are re-alleged, as if set forth verbatim.

---

<sup>3</sup>Ms. Smith's omission described herein was also over heard by Plaintiff Mr. Whitt and another neighbor of Plaintiff Mr. Whitt.

15. As is described herein, Defendant Fox abused the judicial process and attempted to use it to accomplish an end other than that which it was designed to accomplish.

16. Defendant Fox abused process, with an ulterior purpose designed to stop his neighbors from discharging fireworks, although the discharging of fireworks is legal in Lexington County, by falsely claiming that Plaintiff Mr. Whitt knowingly and intentionally discharged fireworks into a FP Zone.

17. Defendant Fox, in instituting a criminal complaint against Plaintiff Mr. Whitt, which complaint was for an arrestable offense, thereby committing a wilful act in the use of the process, not proper in the regular conduct of the proceedings. Defendant Fox's actions were aimed at the illegitimate objective of forcing his neighborhood to cease the legal discharge of fireworks, an act not legitimate in the use of the process. After the process was issued, Defendant Fox insisted on the continuation of the criminal charge against Plaintiff Mr. Whitt.

18. Defendant Fox had an improper purpose and attempted to use coercion to obtain the cessation of fireworks in Defendant Fox's neighborhood, and attempted to use legal process as a threat or "club" to obtain his motive. Defendant Fox attempted to use the institution and maintenance of criminal proceedings against Plaintiff Mr. Whitt, as a form of extortion to cause Plaintiff Mr. Whitt, to cease the legal discharge of fireworks in the neighborhood.

19. As a result of Defendant Fox's actions described hereinabove, Plaintiff Mr. Whitt suffered damages connected with the expenses of his legal defense of the unwarranted proceeding and consequential damages including loss of earnings, totaling \$50,000.00.

**FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT FOX**  
(Malicious Prosecution)

20. Paragraphs one through seventeen above, are re-alleged, as if set forth verbatim.

21. Defendant Fox's institution and continuation of original judicial proceedings, a criminal complaint for an arrestable offense, captioned as, "The State of South Carolina, vs. David Randolph Whitt", Citation Number, "53977FI", redrafted as a courtesy summons on January 31, 2012, ( hereinafter as, "State vs. Whitt"), was unlawful.

22. State vs. Whitt, was opened upon the Complaint of Defendant Fox, and at the instance of the Defendant Fox.

23. State vs. Whitt, was concluded in Plaintiff Mr. Whitt's favor, by a not guilty verdict by a Jury on, January 31, 2012.

24. Defendant Fox exhibited malice in the institution of State vs. Whitt, in that Defendant Fox acted with intentional acts set forth herein, without just cause or excuse. Defendant Fox's actual conduct was malicious and egregious, by way of his false claims against Plaintiff Mr. Whitt.

25. Defendant Fox's lack of probable cause to institute State vs. Whitt, acted in bad faith and pursued, without a lawful basis, a criminal complaint against Plaintiff Mr. Whitt, and there is only one reasonable conclusion and inference to be drawn from the facts set forth hereinabove, namely that no probable cause existed to believe that Plaintiff Mr. Whitt was guilty of a crime and that there is an absence of reasonable cause to believe that Plaintiff Mr. Whitt was guilty of a crime.

26. As a result of Defendant Fox's actions described hereinabove, Plaintiff Mr. Whitt suffered damages connected with the expenses of his legal defense, of the unwarranted proceeding and consequential damages, including loss of earnings, totaling \$50,000.00.

**FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT FOX**

(Civil Conspiracy)

25. Paragraphs one through twenty-four are re-alleged, as if set forth verbatim herein.

26. Defendant Fox and Defendant Fox's neighbor Sylvia Smith conspired together, against the economic interests of Plaintiff Mr. Whitt. In furtherance of that conspiracy Defendant Fox and Sylvia Smith gave sworn testimony in Court, on January 31, 2012, while knowing the same to be false.

27. The facts set forth hereinabove, show a concert of action in the commission of unlawful acts, from which it may be inferred that the acts were in the furtherance of the common design of the conspirators.

28. Defendant Fox's actions described in detail hereinabove, were wilful, and Plaintiff Mr. Whitt is entitled to recover punitive damages in the amount of \$50,000.00.

29. Plaintiff Mr. Whitt, has special damages of damage to his professional reputation by Defendant Fox's filing of a criminal complaint and loss of business income and costs connected with the expenses of his legal defense, and consequential damages totaling \$50,000.00.

30. Plaintiff Mr. Whitt's damages are, in total, \$100,000.00.

**PRAYER FOR DAMAGES**

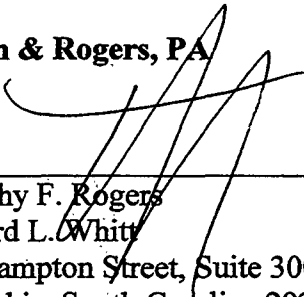
**WHEREFORE**, Plaintiff Mr. Whitt is entitled to actual, consequential and punitive damages and a Judgment as follows:

**FOR A FIRST CAUSE OF ACTION** against Defendant Fox, Plaintiff Mr. Whitt is entitled to recover damages of \$50,000.00.

**FOR A SECOND CAUSE OF ACTION** against Defendant Fox, Plaintiff Mr. Whitt is entitled to recover damages of \$50,000.00.

**FOR A THIRD CAUSE OF ACTION** against Defendant Fox, Plaintiff Mr. Whitt is entitled to recover damages of \$100,000.00.

**Austin & Rogers, PA**

  
\_\_\_\_\_  
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**Attorneys for Plaintiff**

February 6, 2012  
Columbia, South Carolina

BETH A. CARRIG  
CLERK OF COURT  
LEXINGTON SC

2012 FEB -6 1:20

FILED

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

IN THE CIRCUIT COURT FOR THE  
ELEVENTH JUDICIAL CIRCUIT

David Randolph Whitt,

2012 MAR -6 P 3: 24

Civil Action No.: 2012-CP-32-00541

Plaintiff,  
BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

NOTICE OF MOTION

AND

MOTION TO ATTACH PROPERTY

(Expedited Hearing Requested)

v.

Clonta M. Fox,

Defendant.

TO: JAMES R. SNELL, JR., ESQUIRE, ATTORNEY FOR THE DEFENDANT:

**INTRODUCTION**

This action began with Plaintiff David Randolph Whitt, (hereinafter as, "Mr. Whitt"), filing a Complaint alleging Abuse of Process, Malicious Prosecution and Civil Conspiracy. Plaintiff Mr. Whitt's claimed damages are substantial and upon information and belief, Defendant Clonta M. Fox, (hereinafter as, "Fox") is in the process of disposing of property of substantial value, which would impair Fox's ability to respond to Plaintiff Mr. Whitt's Complaint.

**NOTICE OF MOTION**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Mr. Whitt will move before the Presiding Judge of the Eleventh Judicial Circuit, Lexington Judicial Center, Lexington, South Carolina, within ten (10) days of the date of this Notice, or as soon thereafter as counsel may be heard, for an Expedited Hearing and an Order pursuant to § 15-19-10, *et seq.* In support of this Motion, the Plaintiff Mr. Whitt would respectfully show unto the Court as follows:

**MOTION TO ATTACH PROPERTY**

(§ 15-19-10, *et seq.*)

1. Plaintiff Mr. Whitt alleges damages against Defendant Fox of at least \$100,000.00.
2. Upon information and belief, Defendant Fox, has assigned, disposed of or secreted or is about to assign, dispose of or secrete property with intent to defraud his creditor, Plaintiff Mr. Whitt.

3. Specifically:

- Upon information and belief, Defendant Fox moved to South Carolina from the State of Ohio; and
- Defendant Fox, after the date the Complaint in this matter was filed against him, placed a "For Sale" sign in front of his residence on \*\*\* Blossom View Court, West Columbia, Lexington County, South Carolina, 29170; and
- Defendant Fox, has listed his residence for sale with a realty company, M & R Realty, Inc.; and
- A "rental, moving truck" was observed parked on the premises of Defendant Fox's residence, over night from Friday, March 2, 2012, until Saturday, March 3, 2012.

4. A Bond of \$250.00 should be required in this matter.

5. Although the debt, described hereinabove, is not yet liquidated and due, Plaintiff Mr. Whitt, upon information and belief, reasonably believes that Defendant Fox, has assigned, disposed of, or secreted or is about to assign, dispose of, or secrete property with intent to defraud his creditor, Plaintiff Mr. Whitt, and this Court should issue its Warrant of Attachment as if such debt was now due and payable.

6. Based on the foregoing, this Court should cause the Warrant of Attachment to be directed to any Sheriff or Constable of Lexington County, South Carolina to attach and safely keep all the property of Defendant Fox within Lexington County, South Carolina, or so much thereof as may be sufficient to satisfy Plaintiff Mr. Whitt's demand of at least \$100,000.00.

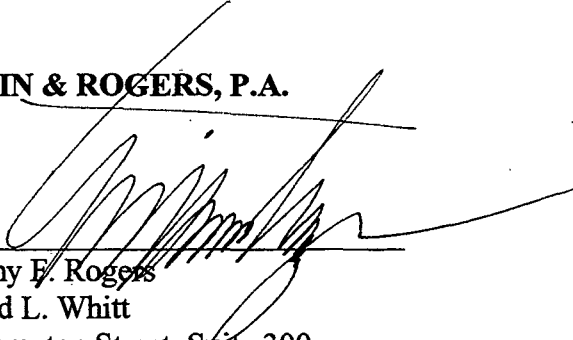
**PROPERTY FOR ATTACHMENT**

7. Upon information and belief, Defendant Fox possesses and/or is the owner of record of real property and vehicles and furnishings and equipment and bank accounts and cash equivalents and other property unknown to Plaintiff Mr. Whitt, at this writing.

**REQUEST FOR EXPEDITED HEARING**

8. Based on the exigent circumstances set forth hereinabove, Plaintiff Mr. Whitt seeks an expedited Hearing before this Court, to preserve the *status quo ante* between the parties.

**AUSTIN & ROGERS, P.A.**



\_\_\_\_\_  
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(803) 252-3679 facsimile  
**Attorneys for the Plaintiff**

Columbia, South Carolina  
March 12, 2012

COPY

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN THE CIRCUIT COURT FOR THE )  
ELEVENTH JUDICIAL CIRCUIT )

Civil Action No.: 2012-CP-32-00541

David Randolph Whitt,

Plaintiff, )

v. )

Clonta M. Fox,

Defendant. )

**AFFIDAVIT  
OF  
DAVID RANDOLPH WHITT**

FILED  
2012 APR 23 P 12:15  
PPB  
BETH H. CARPLOG  
CLERK OF COURT  
LEXINGTON, SC

Personally appeared before me David Randolph Whitt, the Plaintiff herein, who on oath says, deposes and says that he is over the age of twenty-one (21) years and makes this Affidavit based on his personal knowledge, Affiant is competent to testify as to the matters stated herein, and he hereby declares under the penalties of perjury, and states as follows:

1. My name is David Randolph Whitt and I am the Plaintiff in this matter.
2. I have reviewed both the Complaint and Motion to Attach Property prepared herein, on my behalf and I attest to the accuracy of the allegations of the same.
3. Defendant, Clonta M. Fox, (hereinafter as, "Fox"), has assigned, disposed of, or secreted or is about to assign, dispose of, or secrete property with intent to defraud me, as his creditor.
4. Specifically, and upon information and belief, (i) Defendant Fox moved to South Carolina from the State of Ohio (ii) Defendant Fox, after the date the Complaint in this matter was filed against him, placed his current residence on \*\*\* Blossom View Court, West Columbia, Lexington County, South Carolina, 29170 for sale<sup>1</sup>, **(Defendant admitted that this allegation was true in his "Answers to Plaintiff's First Request for Admissions", dated March 15, 2012)**, (iii) Defendant Fox, has listed his residence for sale with a realty company, M & R Realty, Inc., **(Defendant admitted that this allegation was true in his "Answers to Plaintiff's First Request for Admissions", dated March 15, 2012)**, (iv) Defendant Fox, or someone acting on Defendant Fox's behalf, placed a "For Sale" sign at his current residence on \*\*\* Blossom View Court, West Columbia, Lexington County, South Carolina, 29170, **(Defendant admitted that this allegation was true in his "Answers to Plaintiff's First Request for Admissions", dated March 15, 2012)**, and (v) A "rental, moving truck" was observed parked on the premises of Defendant Fox's residence, over night from Friday, March 2, 2012, until Saturday, March 3, 2012, **(Defendant admitted that this allegation was true in his "Answers to Plaintiff's First Request for Admissions", dated March 15, 2012)**.

<sup>1</sup> See "Sales Flyer", attached hereto, as Exhibit "A".

5. That Defendant Fox is justly and truly indebted to me for the sum of, at least, One Hundred Fifty Thousand, (\$150,000.00), which amount is inchoate at this writing, and that I am entitled to an attachment against Defendant Fox, upon the grounds of, *inter alia*, the Abuse of Process, Malicious Prosecution and Civil Conspiracy described in the Complaint between these parties.
6. A Bond of \$250.00 should be required in this matter.
7. Although the debt, described hereinabove, is not yet liquidated and due, I, upon information and belief, reasonably believe that Defendant Fox, has assigned, disposed of, or secreted or is about to assign, dispose of, or secrete property with intent to defraud me, as his creditor, and this Court should issue its Warrant of Attachment as if such debt was now due and payable.
8. Based on the foregoing, this Court should cause the Warrant of Attachment to be directed to any Sheriff or Constable of Lexington County, South Carolina to attach and safely keep all the property of Defendant Fox within Lexington County, South Carolina, or so much thereof as may be sufficient to satisfy my demand of at least \$150,000.00.
9. If testifying before the Court, I would so testify as above and my statements are true and correct.
10. Further deponent saith not.

  
David Randolph Whitt

SWORN to and subscribed  
before me this 4<sup>th</sup> day of

April, 2012

  
Notary Public for South Carolina

My Commission Expires: 5-21-2012

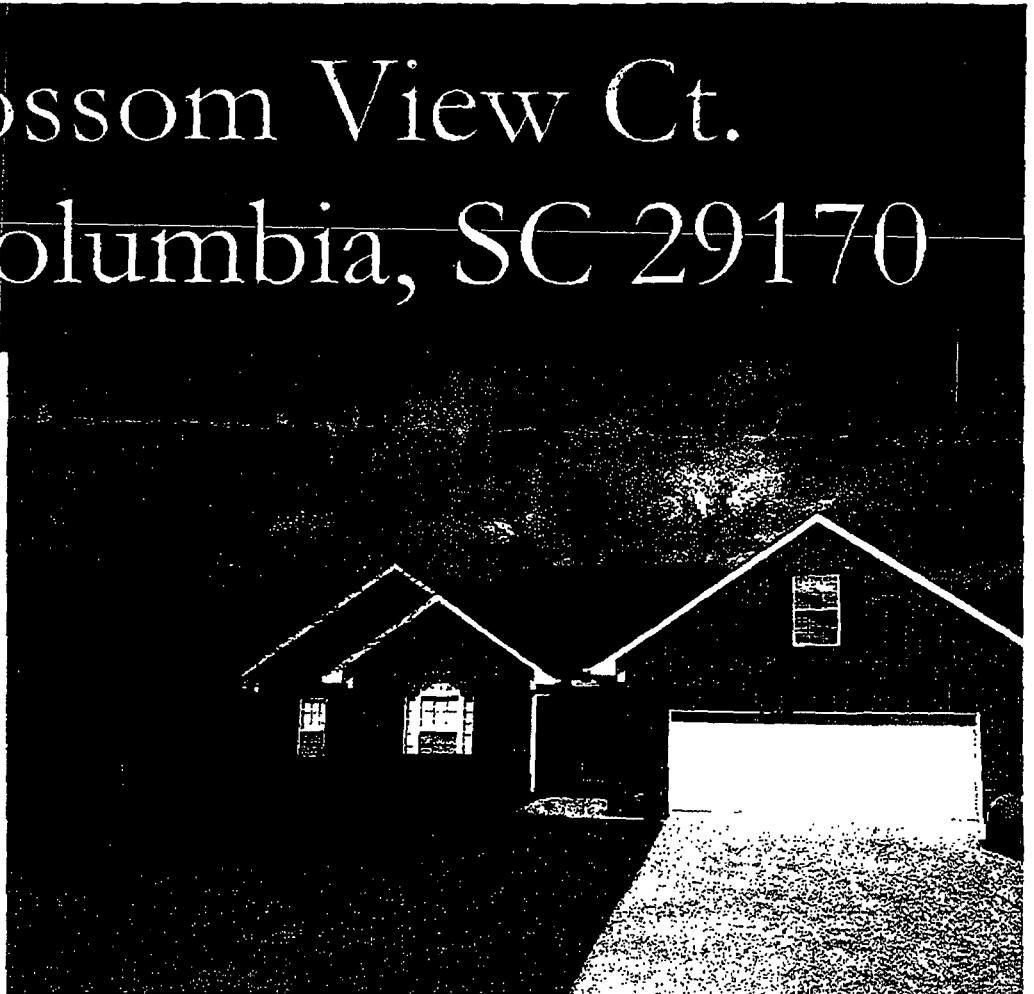
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LEXINGTON, SC

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2012 APR 23 P 12:17

**M&R REALTY, INC.**

# 347 Blossom View Ct. West Columbia, SC 29170

*Serving the Midlands for over  
30 years.*



## **Magnolia Ridge!**

- Brick Home, Double Garage on Cul de Sac
- 3 Bedrooms with 2 Baths
- Beautiful Hardwood Floors
- Eat in Kitchen with Granite Countertops Lots of Space and Appliances
- Dining Room with Hardwoods & Tray Ceiling
- Family Room with Fireplace & Tray Ceiling
- Large Master Bed. w/sitting area, cathedral ceilings, walk-in closet, private bath, separate tub and shower.
- Enclosed Sitting Porch
- FROG with lots of storage
- 30 x 24 Workshop with Power
- 4 Zone Sprinkler System
- \$199,500.00
- M&R Realty, Inc. 803-791-1100

**M&R REALTY, INC.**

M&R Realty, Inc.

640 Sunset Blvd.

West Columbia, SC 29169

Gene Brazzell

Cell Phone: 803-206-4816

Phone: 803-791-1100

Fax: 803-791-4971

E-mail: [nebrazzell@aol.com](mailto:nebrazzell@aol.com)

**EXHIBIT**

**A**

Record p. 12

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
 )  
David Randolph Whitt, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Clonta M. Fox, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No.: 2012-CP-32-00541

**DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO MOTION  
TO ATTACH PROPERTY**

**Procedural History**

This action was filed by the Plaintiff, David Randolph Whitt on February 6, 2012. The Plaintiff's complaint arises out of the issuance of a Magistrate Court citation issued by the Lexington County Sheriff's Department. Plaintiff is seeking \$200,000 in liquidated damages for three causes of action: Abuse of Process, Malicious Prosecution and Civil Conspiracy. Damages appear to relate to payment of attorney's fees and lost profits to his law practice. Defendant is a seventy (70) year old neighbor of the Plaintiff. On February 27, 2012, Defendant, Clonta M. Fox, filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC. On March 6, 2012, Plaintiff filed a Motion to Attach Property.

**Attachment is Not a Proper Remedy**

Under the circumstances presented in this matter, attachment is not a proper remedy. There is no need to take the extraordinary measure of granting an attachment to protect the claimed interests of the Plaintiff. Initially, there is no prima facie showing by the Plaintiff of loss. In his complaint, the Plaintiff makes no specified claim of damages, and only claims

unliquidated economic damages. There is nothing to show that absent an attachment, the Plaintiff, if successful, would be unable to collect on a judgment.

Additionally, there is no reason to believe that the Defendant intends dispose of property with the intent to defraud any current or potential creditor. Defendant has listed his residence for sale at the listing price of \$199,500.00, which is above the price the home was purchased for in 2005. Defendant intends to sell his property in good faith and for valuable consideration.

Furthermore, an attachment would place an unreasonable hardship upon the Defendant. Defendant currently resides at the house on 347 Blossom View Court West Columbia, Lexington County, South Carolina 29170. Since the date of the Complaint in this matter, Defendant's wife accepted a job as the Registrar at the University of South Carolina Upstate in Spartanburg, South Carolina. Defendant has listed his residence for sale with the intent of relocating to be with his wife there. The Defendant will not be relocating out of state as the Plaintiff insinuates in his motion for attachment. Defendant has no fraudulent intent in listing his residence for sale and has no intent of defrauding any existing or potential creditor by his actions.

#### **Homestead Exemption**

§15-41-30 S.C. Code Ann. provides a listing of property that is exempt from attachment, levy and sale. In §15-41-30(A)(1) provides that there is an exemption in a debtor's interest in the amount of \$50,000, in real property he uses as a residence.

Defendant purchased a residence located on 347 Blossom View Court, West Columbia, Lexington County, South Carolina 29170 in 2005 for \$185,000.00 with his wife. This property is currently encumbered by two mortgages. The first is a home mortgage to Wells Fargo Bank. As of January 2, 2012, the unpaid principal balance upon this mortgage was \$129,251.64. In

addition to this mortgage, a second mortgage exists on the property to Carolina Collegiate Federal Credit Union with an estimated payoff amount of \$41,440.85 as of March 11, 2012.

Furthermore, as previously stated, the listing price set by Defendant of his home is \$199,500.00. From the amounts listed above, the value of indebtedness on the property is around \$170,695.49. If the property were sold for the listing price, there would be a remainder of only \$28,804.51. Out of this remainder amount comes the commission to the real estate agent and closing costs associated with the sale. After these costs, the remaining amount of interest from the sale of Defendant's property would be protected under the Homestead Exemption.

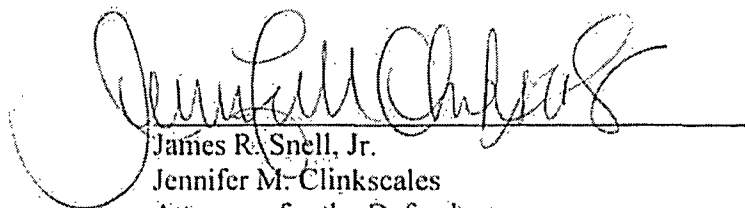
#### Bond Amount

In the event that the Court grants the attachment, the bond of \$250.00 proposed by the Plaintiff is grossly insufficient to cover the amount of costs that may be awarded to the Defendant, much less all damages he will sustain by reason of the attachment as required by §15-19-80 S.C. Code Ann. In this action, the court should require the Plaintiff to post a bond of no less than \$200,000.00 with the Court.

#### Conclusion

For the foregoing reasons, the Defendant, Clonta M. Fox, respectfully requests that Plaintiff's motion to attach property be DENIED.

April 17, 2012  
Lexington, South Carolina



James R. Snell, Jr.  
Jennifer M. Clinkscales  
Attorneys for the Defendant  
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Lexington, South Carolina 29072  
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(803) 359-7691 (facsimile)

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

VERIFICATION

I, Clonta M. Fox, hereby acknowledge that I have reviewed this document along with the attached memorandum in Opposition to Attachment. The information provided herein is truthful and accurate to the best of my knowledge. If additional information becomes available or known to me I will update this document.

Clonta M. Fox  
Clonta M. Fox

SWORN TO AND SUBSCRIBED BEFORE  
ME THIS 1 DAY OF April, 2012

Jennifer Adams  
Notary Public for South Carolina  
My Commission Expires 2/28/2012

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon

Civil Action No. 2012-CP-32-00541

COPY

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JUL 25 2012

SC Court of Appeals

David Randolph Whitt.....Appellant,

v.

Clonta M. Fox.....Respondent.

**NOTICE OF APPEAL**

David Randolph Whitt, hereby appeals the Order of the Honorable R. Knox McMahon, which hearing was held on May 17, 2012. Counsel for both Appellant and Respondent were present for the hearing and received oral notice of the Court's denial of Plaintiff's Motion to Attach Property, on May 17, 2012. The Court requested a proposed Order from Defendant's counsel on that date, and a proposed Order was submitted to the Court on June 19, 2012, but no written Order has been forthcoming from the Court. Pursuant to Rule 205, SCACR, the lower Court retains jurisdiction over all other matters in this action, except the issue of the denial of the Motion to Attach Property.

**[Signature Page Follows]**

**Other Counsel of Record:**

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**AUSTIN & ROGERS, P.A.**

By:



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**Attorneys for Appellant**

July 25, 2012

State of South Carolina )  
County of Lexington )

In the Court of Common Pleas  
Eleventh Judicial Circuit  
2012-CP-32-00541

David Randolph Whitt, )  
Plaintiff )

vs. )

Clonta M. Fox, )  
Defendant. )

Transcript of Record

September 20, 2012  
York, South Carolina

B E F O R E:

The Honorable Knox McMahon, Judge

A P P E A R A N C E S:

Richard L. Whitt, Esq.  
Attorney for the Plaintiff

James R. Snell, Jr., Esq.  
Attorney for the Defendant

Bonnie H. Kelly  
Circuit Court Reporter

I N D E X

	<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
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1 MR. WHITT: No, Your Honor. I think the other motion  
2 is plaintiff's.

3 THE COURT: All right. Then what is that motion?

4 MR. WHITT: Your Honor, that's a motion to attach.  
5 May I approach and hand you a reference guide?

6 THE COURT: Yes, sir.

7 (Mr. Whitt hands a document to the Court.)

8 THE COURT: Thank you.

9 MR. WHITT: Thank you.

10 (Brief pause as the Court reviews the document.)

11 MR. WHITT: Your Honor, in the reference guide, for  
12 your convenience, I have put in the -- our motion, the  
13 affidavit of plaintiff, the exhibit or -- our argument. I  
14 put in the beginning of the attachment Statute 15-9-10. I  
15 -- I made a reference to admissions by defendant, and also  
16 our complaint and some case law.

17 But Your Honor, I'd like to refer you to behind Tab 4  
18 once again, which is our argument on the attachment. And  
19 based on the response that we received from counsel on our  
20 motion for attachment, Your Honor, I'd like to state that -  
21 - as Your Honor knows, an attachment statute is not a  
22 seizure action. When the motion to attach is granted, all  
23 it does is preserve assets for the plaintiff if he prevail  
24 -- he or she prevails later. It doesn't seize any assets  
25 and it doesn't change anybody's ownership rights.

1           And you know, we've had these attachments granted  
2 around the state based simply on an affidavit. And what  
3 the statute contemplates, as Your Honor knows, is that it  
4 says under 15-9-10 that you can have an attachment motion  
5 right after you file the summons and complaint,  
6 immediately. So a lot of times we'll file the summons and  
7 complaint, and then 1 minute later, file the motion for  
8 attachment.

9           And what the -- the attachment statute tells us, Your  
10 Honor -- and let's see, that's at -- behind Tab 5 is the  
11 beginning of the attachment statute, Your Honor.

12           And the fact that we can file for attachment  
13 immediately after the summons and complaint is filed kind  
14 of countermands the -- counsel's arguments about it.

15           He says we failed to make a prima facie showing, but  
16 it's clear that if I can file for attachment immediately  
17 after the summons and complaint, just to -- just to make  
18 sure those assets are there at the end, there's been no  
19 discovery, there hasn't even been an answer filed. The  
20 attachment statute doesn't contemplate responsive pleadings  
21 or -- or affidavits coming back. It's simply that if  
22 there's an affidavit by a plaintiff that sets forth the  
23 appropriate facts, which are that the assets of the  
24 defendant are in danger of being lost so that they can't be  
25 there to respond to the litigation, then you can get an

1 attachment.

2 So it's immediately after. So no prima facie showing  
3 required, none of this going beyond anything. It's simply  
4 can you make an affidavit that is sworn, under penalties of  
5 perjury, that these things occurred.

6 But Your Honor, behind my Tab 4, we have something  
7 that we don't normally have in an attachment case. In this  
8 case, we filed a summons and complaint and the defendant  
9 put his house up for sale. Now, I don't know that we've  
10 ever had that before. We normally just have an affidavit  
11 that we're concerned that these things are going to happen.

12 But Your Honor, we sent request to admit to counsel,  
13 and behind our Tab 4 we have four admissions that -- that  
14 say that this attachment motion should be granted.

15 Number 1 is what I just alluded to, Your Honor. After  
16 we filed the summons and complaint, he placed his current  
17 residence here in Lexington County for sale.

18 Number 2 is that it's not a for sale by owner. He  
19 actually went down to a realty company and signed a  
20 contract to sell his house.

21 Number 3 is there's a for sale sign in front of his  
22 house.

23 Number 4, there's been a rental truck parked at his  
24 house, and he has admitted that these things are all true.

25 So Your Honor, these are not things just being alleged

1 in our affidavit in support of attachment -- which they  
2 have four admissions which make it very clear that the  
3 defendant is trying to sell what is presumably his greatest  
4 asset.

5 And in his response, counsel says -- goes through a  
6 computation where he says, "Well, what we sell the house  
7 for, what we owe for the house, there's no equity there."

8 But that's not -- that's not the way attachment works.  
9 If we come in and have an affidavit saying that we're --  
10 that we're afraid that he's about to dispose of assets,  
11 then we're entitled to an attachment. And if there's  
12 anything to attach is a question for later on.

13 And counsel lists some other concerns, but as Your  
14 Honor knows from an attachment proceeding, you don't get a  
15 cookie-cutter order out of an attachment. We're here today  
16 seeking attachment. If attachment is granted, I would then  
17 provide a warrant for attachment that would have  
18 particulars on it for counsel to comment on, and for Your  
19 Honor to review and comment on and change as you saw fit.

20 So today is just the initial step: Can we take  
21 advantage of the attachment statute, which is available in  
22 any action that's filed in circuit court, available  
23 immediately after and upon the filing of an affidavit.

24 And so I think the -- the attachment statute -- statute  
25 is misunderstood by defense counsel a lot, that it's

1 something that it's not. We're not taking anything from  
2 Mr. Fox as Your Honor knows. We simply are -- would have  
3 an order issued that said that when he sells his house --  
4 which could have, for all we know, occurred last week or  
5 could occur any day now -- that -- that Mr. Whitt's rights  
6 are protected in the proceeds of that sale and other assets  
7 he might have.

8 So based on that, Your Honor, I think we've met our  
9 burden under 15-9-10 with our affidavit, we've gone beyond  
10 the affidavit with four admissions that certainly make it  
11 clear that after the summons and complaint was filed --  
12 this is -- this is like anybody who gets sued, Your Honor,  
13 and then says, "Well, you know, I got to put -- I got to  
14 put my car in my uncle's name, because, you know, they  
15 might get it in this law suit."

16 So we filed the law suit, and then a for sale sign  
17 goes up.

18 So Your Honor, we would -- we had filed this several  
19 months ago. Like I said, I don't know the present state of  
20 the for sale -- of the sale of that residence, but we  
21 certainly think that time is -- is of the essence. We  
22 think we have exigent circumstances, and by way of the  
23 affidavit of plaintiff, we've established the basis for  
24 attachment.

25 Thank you, Your Honor.

1 THE COURT: Mr. Snell? Thank you, Mr. Whitt.

2 MR. SNELL: Thank you. Thank you so much, Your Honor.  
3 And Your Honor, with greatest respect to plaintiff's  
4 counsel, we have serious misgivings about the motion for  
5 attachment and that use in these proceedings.

6 We filed a responsive memorandum which has been  
7 verified by the defendant. You know, Your Honor, when  
8 somebody gets sued by their neighbor for calling the  
9 Sheriff's Department complaining about fireworks falling in  
10 your yard --

11 THE COURT: Let -- let -- let me stop you. I'm  
12 denying the motion for attachment.

13 MR. SNELL: Thank you, Your Honor.

14 THE COURT: It's just not clear to my satisfaction as  
15 a circuit court judge that the debtors departed the state  
16 with the intent to defraud his creditors or to avoid the  
17 service of a summons and complaint. He's been properly  
18 served, he has an attorney, he's answered the complaint. I  
19 -- I'm not attaching his property.

20 Seems like to me if there's neighbors arguing, the --  
21 the other neighbor would want him to move. But be that as  
22 it may, I'm denying that motion.

23 MR. WHITT: Thank you, Your Honor.

24 THE COURT: All right. Mr. Whitt, will you please do  
25 me a brief order on the 12(B)(6)?

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

David Randolph Whitt,

Plaintiff,

vs.

Clonta M. Fox,

Defendant.

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IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No.: 2012-CP-32-541

Defendant's Answers to Plaintiff's First  
Requests for Admission

The defendant, Clonta M. Fox, hereby Answers the Plaintiff's First Requests for Admission dated March 7, 2012, as follows:

1. Admit that, you placed your current residence on Blossom View Court for sale, after you were served with a Summons and Complaint on February 6, 2012.

Admitted

2. Admit that, you have your current residence on Blossom View Court for sale with M & R Realty, Inc.

Admitted

3. Admit that, you or someone acting on your behalf, has placed a "For Sale" sign at your current residence on Blossom View Court.

Admitted

4. Admit that, there was a "rental moving truck" parked at your current residence on Blossom View Court, on one occasion, in the time frame between March 1, through March 5, 2012.

Admitted

Law Office of James R. Snell, Jr., LLC



James R. Snell, Jr.  
Attorney for the Defendant  
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Lexington, South Carolina 29072  
(803) 359-3301  
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March 15<sup>th</sup>, 2012  
Lexington, South Carolina

EXHIBIT

tabbler

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon

Civil Action No. 2012-CP-32-00541  
Appellate Case No.: 2012-212587

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SC Court of Appeals

David Randolph Whitt.....Appellant,

v.

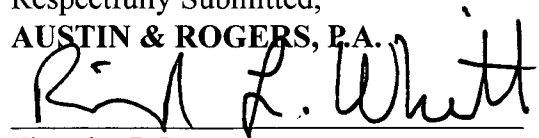
Clonta M. Fox.....Respondent.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the Parties and not any other material.

Respectfully Submitted,  
**AUSTIN & ROGERS, P.A.**

By:



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**Attorneys for Appellant**

January 10, 2013