THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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

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

v.

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

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

RETURN TO PETITION FOR REHEARING OF RESPONDENTS HILTON C. SMITH, JR., COOSAW INVESTMENTS, LLC, AND HILTON C. SMITH, JR., INC. OF SOUTH CAROLINA

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Respondents Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina (collectively, Coosaw) submit this return to the Petition for Rehearing dated February 14, 2019 filed by Appellants Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC (collectively, River City) pursuant to South Carolina Appellate Court Rules 221 and 240. For the following reasons and those set forth in these Coosaw's Final Brief, the Appellants' Petition for Rehearing should be denied.

STANDARD FOR PETITION FOR REHEARING

Rule 220(c) of the South Carolina Appellate Court Rules provides that the "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Rule 221 of the South Carolina Appellate Court Rules provides that a petition "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Retirement Center, 349 S.C. 531, 564 S.E.2d 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court for a second time." Id. (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)).

ARGUMENT

The petition for rehearing does not identify any issue that this Court overlooked or misapprehended. Rather, this Court properly determined that River City failed to establish the third element required to bring a claim for malicious prosecution—favorable termination of

proceedings. Therefore, this Court properly concluded that the circuit court did not err in granting partial summary judgment on River City's cause of action for malicious prosecution.

A. The Court Did Not Overlook Or Misapprehend Appellants' Argument Regarding The Master's Balancing Of The Equities

River City argues that this Court overlooked or misapprehended River City's argument 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." Pet. For Rehearing at 2. A review of Judge Dukes' order dated April 6, 2012 denying both the Somerset HOA's motion to reconsider Judge Dukes' prior order striking the *lis pendens* and River City's motion to strike the assessment lien demonstrates that this is manifestly incorrect. See R. at 72-73. In the order, Judge Dukes specifically clarified his reasoning in striking the *lis pendens*, stating the following:

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

R. at 72-73. For purposes of the petition before this Court, the opinion recognizes that the language referenced in the order further explained Judge Dukes' reasoning for striking the *lis pendens* and denying the HOA's motion to reconsider. This Court's opinion states that "Coosaw filed a motion seeking reconsideration of the master's decision, which the master denied, stating, 'I find that 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.'" Gecy v. Somerset Point

at Lady's Island Homeowners Ass'n, Inc., Op. No. 2016-1113 (S.C. Ct. App. Jan. 30, 2019), at 3 (emphasis added). "The master further explained, 'I find that balancing the equities in this case is appropriate.'" Id. (emphasis added). The language in the order specifically states on its face that Judge Dukes is addressing the *lis pendens* and not River City's motion to strike the assessment lien that was the subject of the same order. See R. at 73. In the Facts/Procedural History section of the opinion, this Court correctly notes that this section of Judge Dukes' order pertains to the order denying the HOA's motion to reconsider the prior order striking the *lis pendens* and not River City's motion to strike the assessment lien. See Gecy, Op. No. 2016-1113, at 3 (stating that Coosaw filed a motion to reconsider "which the master denied, stating . . .") (emphasis added). In other words, this Court did not misapprehend or overlook the fact that Judge Dukes' order means what it says—that that potential harm to River City of keeping the *lis pendens* in place outweighed the benefit to the HOA, a balancing of the equities was appropriate, and the HOA's motion to reconsider the prior order granting River City's motion to strike the *lis pendens* was denied. See R. at 73.

Further, the suggestion that "[t]he Statement of the Facts in Appellants' Brief was uncontested, but the Court deviated therefrom in making certain findings" is simply erroneous. See Pet. For Rehearing at 1; Rule 208(b)(2), SCACR.[1] Coosaw provided its own statement of the case, see Respondents' Final Brief at 1-4, which states "[i]n the order, Judge Dukes also clarified his reasoning in striking the *lis pendens*, stating the following:

[1] Rule 208(b)(2) states as to a respondent's brief requirements that "a statement of the issues, of the case, or of the standard of review need not be made unless the respondent is dissatisfied with the statement of the issues, of the case, or of the standard of review by appellant. If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case. If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case." Rule 208(b)(2), SCACR.

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

Id. at 3 (citing R. at 72-73) (emphasis added). As set forth above, this Court likewise recognized that this section of the order means what it says and applies to the motion to reconsider the order striking the *lis pendens*. River City argues that "[b]y 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." Pet. For Rehearing at 2. "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." Id. There is no admitted material fact associated with River City's argument that the language in the order pertains to River City's motion to strike the assessment lien rather than the HOA's motion to reconsider the order striking the *lis pendens*. The order states that it applies to the motion to reconsider the order striking the *lis pendens* as set forth in Coosaw's statement of the case. See Respondents' Final Brief at 3. This Court did not need to address Judge Dukes' order with respect to the denial of River City's motion to strike the assessment lien because (1) the language in the order clearly applies to the HOA's motion to reconsider the order striking the *lis pendens* and (2) the order denying River City's motion to strike the assessment lien is not the subject of River City's appeal. There are no omissions to the contrary as incorrectly argued by River City nor anything this Court overlooked or misapprehended. Therefore, the petition should be denied.

B. The Court Did Not Overlook Or Misapprehend Appellants' Ambiguity Argument

River City argues that this Court overlooked or misapprehended River City's argument that "the Appellants were entitled to prevail on the motion for summary judgment at issue in this case." Pet. For Rehearing at 3.[2] As set forth above, Judge Dukes' order is clear and there is neither "conflation" of issues nor any ambiguity. As it pertains to the petition before the Court, again the opinion recognizes that the language in the order pertains to the denial of the motion to reconsider the order striking the *lis pendens* and Judge Dukes' "balancing of the equities" reasoning associated with the denial. See Gecy, Op. No. 2016-1113, at 3. This Court might also take note of the distinct contrast between the Appellants' first argument—that the Court clearly overlooked the fact that Judge Dukes' balancing of the equities pertained to River City's motion to strike the assessment lien rather than the HOA's motion to reconsider the order striking the *lis pendens*—and the second argument couched in the alternative that "if, due to the conflation of the two issues, the master's order was ambiguous, that the Appellants were entitled to prevail on the motion for summary judgment at issue in this case." See Pet. For Rehearing at 3. Further, under Rule 220(c), this Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Judge Mullen granted partial summary judgment to Coosaw because "the underlying action that gives rise to the claim for malicious prosecution is still pending, and because there was no termination of the *lis pendens* in favor of Plaintiffs." R. at 225. This Court affirmed likewise finding that River City failed to establish the third element required to bring a claim for malicious prosecution—favorable termination of proceedings. See

[2] The Petition for Rehearing references pages 18 and 39 of the Appellants' Brief in relation to the ambiguity argument. However, neither the Petition for Rehearing nor Appellants' Brief include any citation to the record on appeal where River City ever raised this argument below. River City does not specifically argue that Judge Dukes' order was, in fact, ambiguous nor does River City indicate anywhere that this argument was raised below.

Gecy, Op. No. 2016-1113, at 5-12. River City argues that "[a]gain, 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." See Pet. For Rehearing at 3. This Court was neither required to acknowledge nor resolve any ambiguity in order to affirm the trial court's order granting partial summary judgment. As set forth above, this Court was not required to address Judge Dukes' order with respect to the denial of River City's motion to strike the assessment lien because (1) the language in the order clearly applies to the HOA's motion to reconsider the order striking the *lis pendens* and (2) the order denying River City's motion to strike the assessment lien is not the subject of River City's appeal. Even if River City could show that the ambiguity argument was raised below, the argument is couched in the alternative as applicable only in the event Judge Dukes' order is found ambiguous. See Pet. For Rehearing at 3. This Court did not overlook or misapprehend River City's ambiguity argument by affirming Judge Mullen's order granting partial summary judgment based on the absence of any favorable termination of the proceedings and the plain language of Judge Dukes' order.

C. The Court Did Not Overlook Or Misapprehend The Underlying Facts With Respect To The Escrow

Although not entirely clear, River City appears to argue that this Court overlooked or misapprehended that Judge Dukes should have stricken the assessment lien and the HOA does not have any cause of action pleaded in this case that would entitle the HOA to recover the escrowed amount. River City states that "[b]ecause the master has '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 deed had decided must be escrowed." See Pet. For Rehearing at 3. This section of the petition for rehearing

(Item Number 3) bears no relation to this Court's opinion or reasoning nor any issue raised in this appeal.

D. The Court Did Not Overlook Or Misapprehend Appellants' Argument Regarding A Novel Issue Of Law

River City argues that this Court overlooked or misapprehended River City's argument that "had the facts described in paragraphs 1, 2 and 3 [of the petition] 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." See Pet. For Rehearing at 3. For the reasons set forth above, there is no ambiguity in the order even if River City properly raises the issue on appeal. River City further argues that this Court overlooked or misapprehended River City's argument that "[i]t 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." Id. at 4. In Section II of the opinion labeled "Novel Questions of Law," this Court addressed River City's arguments and disagreed. See Gecy, Op. No. 2016-1113, at 12 ("River City contends summary judgment was inappropriate because this case presents novel questions of law and the circuit court should have afforded the parties the opportunity to fully develop the facts. We disagree."). This Court noted that the "circuit court considered each party's arguments, memoranda, and exhibits on all of the elements of River City's cause of action for malicious prosecution" in granting partial summary judgment. Id. This Court also noted that "[t]he circuit court also reviewed the master's order removing the notice of lis pendens to determine the exact reasons for the master's decision." Id. As such, this Court found "the parties could not have developed any additional facts on the issue of favorable termination of proceedings." Id. Further, the opinion adds that "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." Id. (citing

Houck v. State Farm Fire & Cas. Ins., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005)). As such, River City's argument that this Court overlooked or misapprehended River City's novel issue of law argument is wholly without merit and the petition should be denied.

E. . The Court Did Not Overlook Or Misapprehend Any Issue Regarding River City's Failure To Meet The "Favorable Termination Of Proceedings" Element Of A Claim For Malicious Prosecution

River City's petition states that "[b]y 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." See Pet. For Rehearing at 4. First, the Court's opinion does not "label" River City's malicious prosecution action "premature"—the opinion affirms the trial court's order granting Coosaw summary judgment on this cause of action. Second, the opinion does not indicate any issue left open nor does the opinion state or even imply that River City could ever file yet another action for malicious prosecution. Third, even if the HOA did not prevail on its cause of action for injunctive relief, that would not mean that River City obtained a favorable resolution of the proceedings as to the order striking the *lis pendens*. River City can never obtain a favorable termination of the proceedings based on the order striking the *lis pendens* because Judge Dukes' order striking the *lis pendens* does so on equitable grounds. As stated in this Court's opinion: "[o]ur finding is that a maliciously filed notice of lis pendens can act as the primary basis for a malicious prosecution claim, provided the party bringing the claim can establish *a favorable termination reflective of the merits of the underlying action associated with the filing of the notice of lis pendens.*" See Gecy, Op. No. 2016-1113, at 10-11 (emphasis original). Finally, River City does not set forth in the petition anything that this Court overlooked or misapprehended with respect to the erroneous view that this Court

labeled River City's argument premature and left open the open the question of whether River City could later file another cause of action for malicious prosecution which this Court clearly did not do.

F. The Court Did Not Overlook Or Misapprehend Appellants' Argument Regarding *Pond Place*

River City argues that "[t]he Court's reliance upon the *Pond Place Partners* is misplaced . . . that decision should be limited to slander of title causes of action in which privilege is a viable defense." See Pet. For Rehearing at 4. However, this Court did not overlook or misapprehend any argument with respect to the Pond Place opinion. The opinion cites Pond Place for, among other things, the proposition that "[t]he notice of lis pendens does not dispossess anyone of property; it is merely another form of pleading that does not provide any substantive right." See Gecy, Op. No. 2016-1113, at 6. This Court's reference to Pond Place pertains to the nature of a *lis pendens* that does not depend upon nor bear any relation to the fact that Pond Place was a slander of title case. As such, this Court did not overlook or misapprehend any argument that Pond Place should be limited to slander of title causes of action in which privilege is a viable defense.

G. The Court Did Not Overlook Or Misapprehend Appellants' Argument That A *Lis Pendens* Is A Pleading

Although not entirely clear, River City appears to argue that this Court misapprehended or overlooked an argument that a *lis* pendens is a "pleading" under Rule 7(a) of the South Carolina Rules of Civil Procedure because a *lis pendens* is not specifically excluded from Rule 7. River City states that "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." See Pet. For Rehearing at 5. First, River City does not state that this argument was raised nor refer to its brief or the record in this regard. Second, this Court's opinion addresses the nature of a *lis pendens* in detail. See,

e.g., Gecy, Op. No. 2016-1113, at 6 ("The notice of lis pendens does not dispossess anyone of property; it is merely another form of pleading that does not provide any substantive right."). Third, the "inclusion by absence of exclusion" argument is illogical and inconsistent with prior South Carolina appellate opinions and opinions from other jurisdictions regarding the nature of a *lis pendens* referenced by this Court. Finally, River City does not set forth in the petition anything that this Court overlooked or misapprehended with respect to this argument even if raised.

H. The Court Did Not Overlook Or Misapprehend Any "Public Policy" Issues

River City argues that "[b]y 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." See Pet. For Rehearing at 5. River City further lectures this Court that it "ought to evaluate fully whether its lawfulness should have any connection at all to the merits of the cause of action supposedly underlying it." Id. River City does not specifically state any public policy argument that the Court supposedly overlooked or misapprehended. With due deference to description of our appellate courts as "policy courts" attributed by the Appellants to Judge Kinard, this Court knows its role and understands the impact of its opinions when it issues them. For purposes of the petition before this Court, there are no public policy arguments raised that were overlooked or overlooked or misapprehended and the petition should be denied.

CONCLUSION

Accordingly, for the foregoing reasons, Respondents Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina respectfully request this Court deny Appellants' Petition for Rehearing.

Dated this 28th day of February, 2019.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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Carmen T. Mullen, Circuit Court Judge

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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, Graham P. Powell, of Wall Templeton & Haldrup, do hereby certify that I have served the Return to Petition for Rehearing of Respondents Hilton C. Smith, Jr., Coosaw Investments, LLC and Hilton C. Smith, Jr., Inc. of South Carolina on all counsel of record by depositing the same in the United States Mail, properly posted on February 28, 2019 addressed as follows to counsel of record:

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Respectfully submitted,

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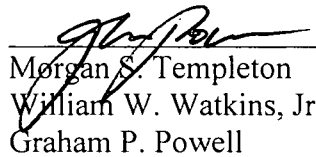

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February 28, 2019

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

Re: *Benjamin Gecy, Rover City Developers, LLC and River City Real Estate vs. Somerset Point at Lady's Island HOA, et al*
Appellate Case No. 2016-001113

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Respondents' Return to Petition for Rehearing in the above referenced matter. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

By copy of this letter to all counsel, I am serving them with the enclosed Return to Petition for Rehearing.

Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Graham P. Powell

GPP/sds
Enclosures
cc: *Via U.S. Mail:*
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