THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No. 2010-CP-10-5532
Tracking Number 2012-211963

William C. Mitchell,

Appellant,

v.

James T. Helwig,

Respondent.

FINAL BRIEF OF RESPONDENT

Andrew E. Haselden
James P. Sullivan
Howser, Newman & Besley, LLC
215 East Bay Street, Suite 303
Charleston, South Carolina 29401
843.216.6940
Attorneys for Respondent

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STATEMENT OF THE CASE

Appellant filed suit against Respondent Helwig on July 9, 2010, asserting five separate causes of action against Respondent Helwig: civil conspiracy; tortious interference with a contract; intentional interference with business expectancy; malicious prosecution; and abuse of process. (Compl. ¶¶ 48–54; R. pp. 44–46). According to Appellant's own allegations, all of the claims are based on actions taken by Respondent Helwig in 2001, actions Appellant admits full awareness of in his own allegations. (*See id.*)

On August 5, 2010, Respondent Helwig filed a Motion to Dismiss with the court. On April 8, 2011, Judge Jefferson filed an Order dismissing all causes of action asserted in Appellant's Complaint, except for the malicious prosecution and abuse of process claims.

Respondent Helwig then filed a Motion for Summary Judgment with the court on June 23, 2011. On December 12, 2011, the Master-in-Equity heard arguments on Respondent Helwig's Motion for Summary Judgment. On January 6, 2012, the Order Granting Respondent Helwig's Motion for Summary, dismissing the remaining causes of action asserted in Appellant's Complaint, was filed with the Clerk of Court. Subsequently, on January 18, 2012, Appellant filed a Motion for Reconsideration pursuant to Rule 59(e). The Motion was denied on April 23, 2012.

Appellant served Respondent with the Notice of Appeal on May 10, 2012, and filed the Notice of Appeal on May 14, 2012.

STATEMENT OF THE FACTS

In April 2001, Respondent James T. Helwig, contacted Appellant about constructing a dock at a property located at 3088 Pignatelli Crescent, Mount Pleasant, South Carolina, property Respondent Helwig had recently purchased. (Compl. ¶ 4; R. pp. 33–34). On April 23, 2001, Respondent Helwig signed a contract agreeing to pay $40,500.00 to Appellant for construction of the dock. (*Id.* ¶ 5; R. p. 34). Along with the signed contract, Respondent Helwig sent a check to Appellant for $13,500.00 as a deposit. (*Id.*)

Sometime after forming the contract, Appellant had material delivered to Respondent Helwig's property in Mount Pleasant. (*Id.* ¶ 11; R. pp. 35–36). Respondent Helwig subsequently sent another check to Appellant in the amount of $13,500.00. (*Id.* ¶ 12; R. p. 36). However, Appellant never actually began construction of the dock. (Mitchell Dep. 142:11–12, June 29, 2011; R. p., lines 11–12; *see also* Thomas Dep. 26:12–24, Nov. 23, 2011; R. p. 414, lines 12–24). Finally, on August 6, 2001, Respondent Helwig provided Appellant with a letter terminating his agreement with Appellant and demanding a return of the $27,000.00 in payment. (Compl. ¶¶ 26, 28, 30; R. pp. 39–40). Subsequently, Respondent Helwig was informed by the South Carolina Contractors' Licensing Board that Appellant was not licensed at the time Appellant entered into the contract to build a dock for Respondent Helwig. (Helwig Dep. 28:21–29:1, May 31, 2011; R. p. 419, line 21–p. 420, line1). Furthermore, the Licensing Board informed Respondent Helwig that Appellant did not become licensed until June 6, 2001; however, Appellant was only licensed to build a dock with a maximum value of $30,000.00. (*Id.*) When Appellant refused to refund Respondent Helwig the $27,000.00 paid to him, Respondent Helwig decided to seek legal counsel. (*Id.* 7:12–18, 85:19–86:4;

R. p. 417, lines 12–18, p. 423, lines 19–4). On the recommendation of legal counsel, Respondent Helwig decided to report the incident to the Mount Pleasant Police Department. (*Id.* 8:15–12:22; R. p. 417, line 25–p. 418, line 22).

After the Mount Pleasant Police Department and the Charleston County Solicitor's Office performed an investigation, the Solicitor's Office determined probable cause existed for arresting Appellant on a charge of Obtaining Money by False Pretenses. (Knisley Dep. 22:3–17, July 28, 2011; R. p. 426, lines 3–17). Appellant was arrested on December 12, 2001. (Compl. ¶ 40, 51; R. p. 42). A Grand Jury then returned a true bill indictment for Obtaining Signature or Property Under False Pretenses. (Indictment, 2002-GS-10-0590, Feb. 5, 2002; R. p. 180). Additionally, Appellant was later indicted for Breach of Trust. (Indictment, Feb. 13, 2006; R. p. 186). A trial date was set for November 18, 2004. (*See id.*) However, Appellant failed to appear and a bench warrant was issued by the court on December 7, 2004. (Helwig Dep. 67:23–68:20; R. p. 421, lines 23–20). The Solicitor's Office informed Respondent Helwig that the trial was tentatively scheduled for November or December 2006. (*See id.*) Respondent Helwig could not be available for a tentatively scheduled trial on those dates and based on his unavailability for trial, the Solicitor's Office decided to dispose of the charges by *nolle prosequi* on December 21, 2006, a disposition that was filed with the Charleston County Clerk of Court on the same day. (*Id.*; Indictment/Warrant Status Change Form, Dec. 21, 2006; R. p. 184).

Appellant filed suit against Respondent Helwig on July 9, 2010, asserting five separate causes of action against Respondent Helwig: civil conspiracy; tortious interference with a contract; intentional interference with business expectancy; malicious

prosecution; and abuse of process. (Compl. ¶¶ 48–54; R. pp. 44–48). According to Appellant's own allegations, all of the claims are based on actions taken by Respondent Helwig in 2001, actions Appellant admits full awareness of in his own allegations. (*See id.*)

On August 5, 2010, Respondent Helwig filed a Motion to Dismiss with the Court. After reviewing memoranda filed by all parties and after hearing oral arguments, Judge Jefferson filed an Order on April 8, 2010, dismissing all causes of action asserted by Appellant's Complaint, except for the malicious prosecution and abuse of process claims. (*See* Order, Apr. 8, 2010; R. pp. 6–16). In the Order, the court specifically "found that . . . conversion to summary judgment [was] not warranted." (*Id.* at 4 n.1; R. p. 9). Further, the Court found that "discovery ha[d] not been completed and converting the Motion to one for summary judgment would be premature." (*Id.*) Discussing the statute of limitations governing Appellant's malicious prosecution and abuse of process claims, the Court concluded "the allegations of the complaint give rise to competing inferences on a question of material fact therefore making dismissal of the case under Rule 12(b)(6) inappropriate. (*Id.* at 8; R. p. 13).

Clarifying its ruling, the Court stated the following:

> However, the [Respondent]'s Motion to Dismiss is made pursuant to Rule 12(b)(6), SCRCP. In ruling on a motion to dismiss, the trial court must determine "whether the complaint, viewed in the light most favorable to [Appellant], states any valid claim for relief." *Brazell*, 376 S.C. at 87, 655 S.E.2d at 738. Accordingly, "if facts alleged and inferences reasonably deducible therefrom entitle [Appellant] to relief under any theory," a South Carolina court must refuse to grant a motion to dismiss. *Id.* Moreover, "where the allegations of the complaint give rise to competing inferences on a question of material fact, dismissal of the case under Rule 12(b)(6) is not appropriate."
> . . . .

> [T]he Court finds there is an inference raised by the pleadings as to when [Appellant] received notice that his charges were dismissed. Accordingly, a dismissal pursuant to Rule 12(b)(6), SCRCP, as to the causes of action for malicious prosecution and abuse of process is not appropriate.

(*Id.* at 9–10; R. p. 14–15).

After engaging in discovery, Respondent filed a Motion for Summary Judgment on June 23, 2011. After reviewing memoranda filed by both parties and hearing oral arguments, on January 6, 2012, the Master-in-Equity issued an Order granting Respondent Helwig's Motion for Summary Judgment, dismissing the malicious prosecution and abuse of process claims asserted in Appellant's Complaint based on the time-barred filing of the causes of action. (*See* Order, Jan. 6, 2012; R. pp. 18–28).

In its Order, the Court issued the following ruling:

> [T]his Court finds [Appellant] knew or by the exercise of reasonable diligence should have known the alleged favorable termination occurred, at the latest, on December 27, 2006, and as of that date, a claim for malicious prosecution might exist against Respondent Helwig. According to South Carolina Code of Laws Section 15-3-530(5), [Appellant] had until December 27, 2009, to file a malicious prosecution claim against [Respondent] Helwig.
>
> . . . .
>
> [Appellant] failed to file the Complaint until July 9, 2010. This Court finds that while examining the record in a light most favorable to the nonmoving party, no question of fact exists as to [Appellant]'s failure to file the malicious prosecution claim against Respondent Helwig within the applicable statute of limitations.

(*Id.* at 8; R. p. 25).

The Court further determined, "[t]he allegations of the Complaint and Appellant's deposition testimony confirm Appellant knew or should have known he might have a claim for abuse of process, at the latest, by December 12, 2001." (*Id.* at 9; R. p. 26). However, "[Appellant] failed to file the Complaint until July 9, 2010." (*Id.* at 11; R. p. 28). Ultimately, the Court determined the following:

> [N]o question of fact exists as to [Appellant]'s failure to file the abuse of process claim against Respondent Helwig within the applicable statute of limitations. This Court finds Appellant filed the abuse of process claim well beyond three years after [Appellant] knew or by the exercise of reasonable diligence, should have known he had a potential claim.

(*Id.*)

For the above reasons, the Court granted Respondent's Motion for Summary Judgment and dismissed the remaining allegations of Appellant's Complaint. (*Id.*)

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Accordingly, a grant of summary judgment should be affirmed where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c).

ARGUMENT

I. BECAUSE SOUTH CAROLINA TRIAL COURTS APPLY A DIFFERENT STANDARD OF REVIEW FOR SUMMARY JUDGMENT MOTIONS THAN RULE 12(B)(6) MOTIONS TO DISMISS, THE MASTER-IN-EQUITY PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WHEN THE CIRCUIT COURT PREVIOUSLY PARTIALLY DENIED RESPONDENT'S MOTION TO DISMISS UNDER RULE 12(B)(6).

According to South Carolina law, "[u]nder Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action." *Brazell v. Windsor*, 376 S.C. 83, 87, 655 S.E.2d 736, 737 (2007). Furthermore, "[t]he decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint." *Id.* at 87, 655 S.E.2d at 737–38. In ruling on a motion to dismiss, the trial court must determine "whether the complaint, viewed in the light most favorable to [Appellant], states any valid claim for relief." *Id.* at 87, 655 S.E.2d at 738. Accordingly, "if facts alleged and inferences reasonably deducible therefrom entitle [Appellant] to relief under any theory," a South Carolina court must refuse to grant a motion to dismiss. *Id.*

According to Rule 56 of the South Carolina Rules of Civil Procedure, "[t]he judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). According to South Carolina caselaw, "[t]he purpose of summary judgment is to expedite disposition of cases which

do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

As explained by the South Carolina Supreme Court, "[i]n determining whether any triable issues of fact exist, the [trial] court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). If a court finds that the "evidence supports but one reasonable inference . . . , the question becomes a matter of law for the court." *Clyburn v. Sumter County Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 888 (1994). It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. *Durkin v. Hansen,* 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993).

A. Master-In-Equity Properly Granted Respondent Summary Judgment on Appellant's Malicious Prosecution Claim After the Circuit Court Partially Denied Appellant's Motion to Dismiss.

South Carolina courts require a plaintiff to prove the following elements when asserting a malicious prosecution claim:

> (1) institution or continuation of original judicial proceedings, either civil or criminal;
> (2) by, or at the instance of, the defendants;
> (3) termination of such proceedings in plaintiff's favor;
> (4) malice in instituting the proceedings;
> (5) lack of probable cause; and
> (6) resulting injury or damage.

Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986).

While not addressed directly by a South Carolina appellate court, ostensibly, the statute of limitations begins to run on a malicious prosecution claim when the complained of proceeding terminates in a plaintiff's favor. *See Brooks v. City of Winston-Salem,* 85

F.3d 178, 183 (4th Cir. 1996) (claim for malicious prosecution does "not accrue until a favorable termination is obtained").

According to South Carolina law, filings with a clerk of court, particularly in cases where Appellant is a party, constitute constructive notice. *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997) (holding the statute of limitations began to run, at the latest, when the bond documents were publicly filed with the clerk of court, at which time, The plaintiff residents had constructive notice). In similar cases involving matters of public record, South Carolina courts have evinced a willingness to find constructive notice for purposes of barring claims under an applicable statute of limitations. *Fuller-Ahrens Partnership v. South Carolina Dept. of Highways and Public Transp.*, 311 S.C. 177, 181–82, 427 S.E.2d 920, 922–23 (1993). As discussed in the *Fuller-Ahrens* decision, constructive notice is an integral part of our judicial system.

Although not binding in South Carolina, a Texas state court issued an instructive opinion regarding the issue of constructive notice in a malicious prosecution case. In *Lang v. City of Nacogdoches*, 942 S.W.2d 752 (Tex. Ct. App. 1997), at the behest of the defendant, the plaintiff was arrested on February 4, 1990, for criminal trespass. 942 S.W.2d at 756. However, the charges were subsequently dropped on May 21, 1990. *Id.* Although the plaintiff had retained a criminal attorney and maintained frequent contact with his legal representation, the plaintiff failed to discover the criminal charges had been dropped until December 5, 1991. *Id.* After discovering the charges had been dropped, the plaintiff filed a complaint on February 3, 1992, against the defendant, alleging a claim for malicious prosecution. *Id.* Respondent filed a motion for summary judgment, arguing that the applicable one year statute of limitations barred the plaintiff's malicious prosecution

claim. *Id.* at 756–57.

After stating the general rule that the applicable statute of limitations begins to run when the alleged malicious prosecution terminates in The plaintiff's favor, the *Lang* court addressed the plaintiff's argument that under the "discovery rule," the limitations period began on December 5, 1991, when the plaintiff's attorney informed him the criminal case had been dismissed. *Id.* at 758. Specifically, the plaintiff argued that he "exercised reasonable diligence to discover the status of the charges by repeatedly checking with [his] attorney and that [he] believed the charges were still pending during that time." *Id.*

Unconvinced by the argument, the *Lang* court found that "matters disclosed in public records filed in the county courthouse are not such circumstances where it is difficult for the injured party to learn of the [alleged injury]." *Id.* In general, the *Lang* court found that "a person is charged with constructive notice of the actual knowledge that could have been acquired by examining public records." *Id.* The *Lang* court further "concluded that interested parties are charged with constructive notice of the contents of documents recorded in the public records of the county." *Id.* Because the existence of and date of the dismissal were undisputed, the *Lang* court ruled that the plaintiff's malicious prosecution was barred by the applicable statute of limitations. *Id.*

After reviewing the above case law, the Master-in-Equity found that "South Carolina courts apply the constructive notice doctrine in cases where the subject notice is filed with the Clerk of Court and thus publicly available to all interested parties." (Order at 7, Jan. 6, 2012; R. p. 24). Moreover, the Master-in-Equity found persuasive the *Lang* decision and adopted its reasoning. (*Id.*)

In the instant case, neither party disputes that notice of the dismissal of the underlying criminal actions filed against Appellant were filed with the Clerk of Court on December 27, 2006. (*Id.* at 8. R. p. 25). Respondent maintains the filing of the dismissals in the public records, as a matter of law, placed Appellant on notice as of December 27, 2006. (*Id.*) For this reason, the Master-in-Equity ruled as a matter of law that the malicious prosecution cause of action asserted by the Complaint was time-barred pursuant to South Carolina Code of Laws Section 15-3-530. (*Id.*)

As discussed above, Judge Jefferson reviewed Respondent's Rule 12(b)(6) Motion to Dismiss under the applicable standard of review before denying Respondent's motion as to Appellant's malicious prosecution cause of action. (Order at 9–10, Apr. 8, 2010; R. pp. 14–15). Importantly, because Judge Jefferson's review was limited to the allegations of Appellant's Complaint, Judge Jefferson declined to review and rule upon the issue of constructive notice. (*See id.*) Judge Scarborough, during the December 12, 2011 hearing, carefully explained that his decision was governed by a different standard of review than Judge Jefferson's review of Respondent's Motion to Dismiss under Rule 12(b)(6). (Hr'g Tr. 3–5, Dec. 12, 2011; R. pp. 82–84). Governed by a different standard of review, Judge Scarborough engaged in a thorough review of the issue of constructive notice and applied his analysis to the fully developed record before the Court. (Order at 6–8, Jan. 6, 2012; R. pp. 23–25). During the April 23, 2012 hearing on Appellant's Rule 59(e) Motion for Reconsideration, Judge Scarborough again carefully explained the different standards applied by courts, different standards that allow a court to issue an order granting a party summary judgment although a court had previously denied the

same party's Rule 12(b)(6) motion to dismiss. (Hr'g Tr. 8–12, 16, Apr. 23, 2012; R. pp. 156–60, 164).

In essence, Judge Scarborough reviewed the issue of constructive notice unconstrained by Judge Jefferson's rulings on an undeveloped record. When viewing a fully developed record and all reasonable inferences that could be drawn from such evidence in the light most favorable to Appellant, Judge Scarborough correctly determined Appellant had failed to raise a question of fact regarding the untimely filing of the Complaint's malicious prosecution cause of action. Therefore, this Court should affirm Judge Scarborough's Order, granting Respondent's motion for summary judgment as to Appellant's malicious prosecution cause of action.

B. Master-In-Equity Properly Granted Respondent Summary Judgment on Appellant's Abuse of Process Claim After the Circuit Court Partially Denied Appellant's Motion to Dismiss.

Under South Carolina law, "[t]o successfully maintain an abuse of process claim, the plaintiff must show an ulterior purpose and a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Swicegood v. Lott*, 379 S.C. 346, 351–52, 665 S.E.2d 211, 213 (Ct. App. 2008). As opposed to malicious prosecution, the right to bring an abuse of process claim accrues when process is first used for an improper purpose, rather than when the proceedings terminate in favor of the plaintiff. *See Yoost v. Zalcberg*, 925 N.E.2d 763, 771 (2010).

According to South Carolina law, "[t]he abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food Commercial Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). Furthermore, "[a]n ulterior purpose

exists if the process is used to gain an objective not legitimate in the use of the process." *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). Finally, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

The allegations of the Complaint and Appellant's deposition testimony confirm Appellant knew or should have known he might have a claim for abuse of process, at the latest, by December 12, 2001. In the Complaint, Appellant alleges that Respondent Helwig "used the criminal justice process and held [Appellant] hostage to the system to force [Appellant] to refund payments made on contracts with the Defendant[s], as a mean[s] of extortion." (Compl. ¶ 54; R. p. 48). On December 12, 2001, "[Appellant] knew, because [Appellant] had not given in to the threats, intimidations and complied with the demands of the Defendant's to refund the Defendants the payments which the Defendants had made on the contracts with [Appellant,] [t]he [Appellant] was arrested on a warrant for Breach of Trust and Obtaining Money Under False Pretenses." (*Id.* ¶ 40; R. p. 42). According to the Appellant's own allegations, Appellant at the time of his arrest in December 2001 believed Respondent Helwig pursued the criminal action against him for the alleged improper purpose of extorting money from Appellant.

In his deposition testimony, Appellant confirmed he believed at the time of his arrest that Respondent Helwig was pursuing charges against Appellant to gain an objective not legitimate in the use of the process:

> Q Okay. When you were arrested and you -- when were you arrested on the charges?
> A 2001, I believe it was.
> Q Late 2001, I believe. Correct?

A It seemed like it was in December. I'm not sure.
Q All right. When you were arrested, why did you think Mr. Helwig had pressed charges against you?
A Because he was pissed off I wouldn't give him his money back that I didn't owe and he wanted to prosecute me.
Q Okay. And you knew that as of -- at the time you were being arrested?
A That was my opinion, yes, sir.
Q Okay. I have your -- here it is. I'm looking at your Complaint, paragraph 54. All right. It's the abuse of process allegation, and in it -- and I'll just read it for you, and you can check if you want to: The . . . defendants negligently, willfully, with callous and reckless indifference used the criminal justice process and held [Appellant] hostage to the system to force [Appellant] to refund payments made on contracts with the defendants as a means of extortion. Okay?
A That's what I just said.
Q And that was your belief at the time that you were arrested?
A I don't know, that's what it states when this was filed.
Q Okay. Well, it's your allegation.
A There could have been ten beliefs at that time in 2001. You're asking me what this legal document states, that's what it states, yes, sir, as of the date that it's dated.
Q Okay. It's your allegation -- I think it's fair for me to assume that this is an opinion you had at the time you were being arrested.
A It could have been an opinion I had in 2001, I'm not sure.
Q Okay. You did just say that at the time you were arrested you believed that Mr. Helwig was pissed off and that you owed him money and that's why he had you arrested.
A And because I wouldn't refund it, he wanted to use the criminal process as a collection agency.
Q In 2001.
A Yes, sir.

(Mitchell Dep. 165:24–168:1; R. p. 165). Therefore, as alleged on the face of the Complaint and as admitted during his deposition, Appellant believed as of December 12, 2001, that Respondent Helwig had instituted process against him for an improper purpose. As noted above, Appellant failed to file the Complaint until July 9, 2010.

Based on the above, Judge Scarborough found that when viewing the record in a light most favorable to Appellant, no question of fact exists as to Appellant's failure to file the abuse of process claim against Respondent Helwig within the time period set

forth in South Carolina Code of Laws Section 15-3-530. (Order at 11, Jan. 6, 2012; R. p. 28).

As discussed at length above, Judge Scarborough reviewed Respondent's Motion for Summary Judgment unconstrained by Judge Jefferson's findings on an undeveloped record. When viewing a fully developed record and all reasonable inferences that could be drawn from such evidence in the light most favorable to Appellant, Judge Scarborough correctly determined Appellant had failed to raise a question of fact regarding the untimely filing of the Complaint's abuse of process cause of action. Therefore, this Court should affirm Judge Scarborough's Order, granting Respondent's motion for summary judgment as to Appellant's abuse of process cause of action.

II. BECAUSE THE ORDER GRANTING RESPONDENT'S SUMMARY JUDGMENT WAS FILED ON JANUARY 6, 2012, THE MASTER-IN-EQUITY PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHEN APPELLANT SUBMITTED A PROPOSED ORDER DENYING RESPONDENT'S SUMMARY JUDGMENT ON DECEMBER 30, 2011.

According to South Carolina law, "[a]n abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). Additionally, South Carolina courts have determined that "to warrant reversal[,] a party must demonstrate the alleged procedural failure caused him prejudice." *See Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E.2d 826, 831 (Ct. App. 2009).

On December 12, 2011, the Master-in-Equity heard arguments on Respondent Helwig's Motion for Summary Judgment. On January 6, 2012, the Order Granting Respondent Helwig's Motion for Summary was filed with the Clerk of Court, dismissing

the remaining causes of action asserted in Appellant's Complaint. (Order, Jan. 6, 2012; R. pp. 18–29). The Order is dated December 29, 2011. (*Id.*)

Appellant alleges he submitted a proposed order denying Respondent's Motion for Summary Judgment on December 30, 2011. (Appellant's Initial Br. at 13–14.) Appellant states the Master-in-Equity instructed both parties to submit proposed orders before December 31, 2011. (*Id.* at 13.) Therefore, Appellant argues, by signing the Order prior to receiving Appellant's proposed order, the Master-in-Equity "clearly abused his discretion." (*Id.* at 14.)

Assuming arguendo that Appellant submitted a proposed order on December 30, 2011, no South Carolina reported decisions indicate a court abuses its discretion by simply signing an order prior to the receipt of proposed orders from all parties. South Carolina law clearly states that an abuse of discretion review deals solely errors of law or unfounded factual conclusions. The arguments offered by Appellant deal with neither. Furthermore, to the extent Appellant's contentions involve an alleged procedural error on behalf of the Master-in-Equity, any such error would be harmless given the record before this Court clearly supports affirming summary judgment in favor of Respondent.

III. BECAUSE THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO JUDICIAL DECISIONS BASED ON DIFFERENT STANDARDS OF REVIEW FOR MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT, THE MASTER-IN-EQUITY PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

Under the law of the case doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

The record before this Court does not involve the relitigation of unappealed matters. The central argument raised by Appellant involves his contention that the Master-in-Equity committed reversible error by granting summary judgment to Respondent, finding the Appellant's malicious prosecution and abuse of process claims were barred by the applicable statute limitation, given the denial of Respondent's Rule 12(b)(6) Motion to Dismiss. (*See* Appellant's Initial Br. at 10–13, 14–17.) Such a contention fails to fall within the law of the case doctrine because the issue is the exact issue presently being appealed. Raising an issue during two different stages of pre-trial dispositive motions is not a situation encompassed by the law of the case doctrine. Therefore, Appellant's reliance on the doctrine is misplaced.

IV. BECAUSE ADDITIONAL GROUNDS APPEAR IN THE RECORD WARRANTING SUMMARY JUDGMENT ON THE MERITS, THE COURT OF APPEALS SHOULD AFFIRM THE GRANTING OF SUMMARY JUDGMENT TO THE RESPONDENT.

According to South Carolina law, a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Further, "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723. According to South Carolina's appellate rules, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

A. Because Appellant Has Failed to Raise a Jury Question Regarding Lack of Probable Cause, the Master-In-Equity's Summary Judgment in Favor of Respondent Helwig as to the Malicious Prosecution Claim

Should be Affirmed.

According to South Carolina statutory law,

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

S.C. Code Ann. § 40-11-30.

Additionally, South Carolina statutory law provides the following:

> A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:
> (1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is ten thousand dollars or more;

S.C. Ann. § 16-13-240.

According to South Carolina common law, in bringing a malicious prosecution claim, "[t]he burden is on the plaintiff to show that the prosecuting person or entity lacked probable cause to pursue a criminal or civil action against him." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). According to appellate decisions, probable cause means

> the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered.

Id. Therefore, in determining the existence of probable cause, a court must examine the facts "from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." *Eaves v. Broad River Elec. Co-op.,*

Inc., 277 S.C. 475, 478, 289 S.E.2d 414, 415–16 (1982).

According to South Carolina law,

> [i]n order to return a "true bill" of indictment, twelve or more state grand jurors must find that probable cause exists for the indictment and vote in favor of it. Upon indictment by a state grand jury, the indictment must be returned to the presiding judge. If the presiding judge considers the indictment to be within the authority of the state grand jury and otherwise in accordance with the provisions of this article, he shall return the indictment by order to the county where venue is appropriate under South Carolina law for prosecution by the Attorney General or his designee.

S.C. Code Ann. § 14-7-1750.

Importantly, South Carolina courts have long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution. *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 182, 262 S.E.2d 727, 728 (1980). Finally, South Carolina courts have ruled that although the question of whether probable cause exists is typically a jury question, the issue may be decided as a matter of law when the evidence leads only to one conclusion. *Parrott*, 246 S.C. at 323, 143 S.E.2d at 609; *see also Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006). In *Kinton*, the grand jury returned a true bill of indictment against the plaintiff on a breach of trust charge. *Kinton*, 274 S.C. at 182, 262 S.E.2d at 728. Because the plaintiff was unable to overcome the presumption of probable cause, the *Kinton* court ruled that the lower court had committed reversible error by not granting the defendant judgment as a matter of law on the malicious prosecution cause.

Detective Hoose from the Mount Pleasant Police Department initiated an independent investigation, an investigation that eventually led him to send information about the case to the Charleston County Solicitor's Office. (Incident Report at 4, Case No. 01-009441; R. p. 441). Detective Hoose sent the file to the Solicitor's Office on or

about October 23, 2001. (*Id.*; Knisley Dep. 9:21–10:17; R. p. 424). During his deposition, Mr. Edward L. Knisley, Jr., provided detailed testimony about the subject criminal charges brought against Appellant, testimony based on knowledge he gained while he worked as an Assistant Solicitor for the Charleston County Solicitor's Office. (Knisley Dep.; R. pp. 424–28).

Contained within the file sent to the Solicitor's Office were several items, including an August 28, 2001 letter and a September 10, 2001 letter from Stan Bowen, an investigator for the South Carolina Contractors' Licensing Board to Respondent Helwig. (Knisley Dep. 16:6–18:24; R. p. 425, lines 6–24). The August 28, 2001 letter indicated that although Appellant was licensed as a marine contractor, his license limited him to construction of docks with a value of $30,000.00 or less. (*Id.*) The September 10, 2011 letter indicated Appellant was not licensed until June 6, 2001. (*Id.*) As discussed above, and as evidenced by the documents provided to the Solicitor's Office, the contract for the construction of a dock worth $40,500.00 was entered into on April 23, 2001, and Respondent Helwig had paid two-thirds of the contract price without any substantial work being performed. Mr. Knisley testified that the Solicitor's Office considered the Licensing Board a reasonably reliable source for facts produced during an investigation. (*Id.* 18:25–19:3; R. p. 425, lines 25–3). In addition to reviewing the letters, the Solicitor's Office spoke directly with the Licensing Board to confirm the facts presented in the letters to Respondent Helwig. (*Id.* 20:21–21:6; R. p. 425, line 21–p. 426, line 6).

During its investigation, the Solicitor's Office also endeavored to review Appellant's criminal background. (*Id.* 19:16–20:20; R. p. 425, lines 16–20). The Solicitor's Office discovered that Appellant "was a career criminal and con artist" who

"had a very lengthy history of property convictions," including "a litany of criminal felony charges that were brought in Beaufort County after some multiyear period in the '90's." (*Id.*) According to the Solicitor Office's review, the charges involved

> the exact type of scheme, where [Appellant] would enter into an agreement to build a dock for someone, he would take cash payment for the work, and either not complete the work or just run off with the money, and it appeared to be that this was his MO for some substantial period of time in Beaufort County, and that he had moved on to Charleston County.

(*Id.*) Mr. Knisley further testified that the Solicitor's Office routinely reviews an accused individual's background, "particularly in a case like [Appellant's case], where one of the elements of the offense is fraudulent intent, seeing that same pattern of conduct in the past is certainly relevant to the element of fraudulent intent, as opposed to a mistake or something of that nature." (*Id.*)

On October 25, 2001, after reviewing the file, the Solicitor's Office contacted Detective Hoose and informed him that probable cause existed to charge Appellant with Obtaining Money by False Pretenses. (Knisley Dep. 21:23–23:20; R. p. 426, lines 23–20). According to Mr. Knisley's testimony, the Solicitor's Office determined probable cause existed to charge Appellant with Obtaining Money by False Pretenses only after the Solicitor's Office had reviewed the file provided by the Mount Pleasant Police Department. (*Id.*) Mr. Knisley also testified the Solicitor's Office made such determination before having any direct contact with Respondent Helwig. (*Id.*)

After reviewing the facts gathered during its initial investigation, the Solicitor's Office reached the reasonable conclusion that Appellant was guilty of obtaining money by false pretenses. (*Id.* 27:12–21; R. p. 427, lines 12–21). Based on the recommendation of the Solicitor's Office, Mount Pleasant Municipal Judge Mel Coleman issued a warrant

for Appellant's arrest, an arrest that was made on December 12, 2001. (*Id.* 27:22–28:8; R. p. 427, lines 22–8). Shortly after his arrest, Appellant was indicted by a Charleston County Grand Jury for committing the crime of Obtaining Money by False Pretenses. (*Id.* 29:16–30:14; R. p. 428, lines 16–14; Indictment, 2002-GS-10-0590, Feb. 5, 2002; R. p. 180). For its own part, the Mount Pleasant Police Department continued its own investigation, an investigation that confirmed on January 7, 2002, that the Licensing Board required Appellant to be properly licensed on April 18, 2001, when he offered to build a dock for Respondent Helwig. (Mount Pleasant Police Dep't Incident Report at 6–7, Case No. 01-009441; R. p. 443–44).

During his deposition, Appellant admitted the following: Appellant was not licensed as a marine contractor at the time he entered into the contract with Respondent Helwig; Respondent Helwig paid and Appellant accepted $27,000.00, or two-thirds of the overall value of the contract, in payment for the construction of the dock; Appellant has not refunded any portion of the $27,000.00 paid to him; Appellant has never possessed any license to construct a dock valued at $30,000.00 or more; and although the contract was signed on April 23, 2001, by August 6, 2001, Appellant had failed to actually begin construction of the dock. (Mitchell Dep. 144:17–22, 216:14–218:9; R. p. 385, lines 17–22). Furthermore, Appellant could produce no evidence that at the time the contract was signed, he informed Respondent Helwig that he was not a licensed contractor. (*Id.* 215:15–217:14; R. p. 388, lines 15–25).

For his part, Respondent Helwig testifies he never learned from Appellant about his lack of contractor's license and that he entered into the contract based on his belief that Appellant was properly licensed to build a dock worth $40,500.00. (Helwig Am. Aff.

¶¶ 3–4; Not included in Record on Appeal). Furthermore, Respondent Helwig admits he received a $2,269.00 credit from Dock Doc's, Inc., the properly licensed dock company that constructed a dock at his Pignatelli residence, a credit granted on the only usable portions of material previously delivered by Appellant; however, beyond that credit, Respondent Helwig has received no refund from Appellant or any other source for the $27,000.00 paid on the fraudulently induced contract. (*Id.* ¶ 5–7; Not included in Record on Appeal). Regarding the criminal charges brought against Appellant, Respondent Helwig testifies he only agreed to allow his legal counsel to contact the Mount Pleasant Police Department after the following events: the Licensing Board informed him Appellant did not possess the required contractor's license to build the contracted for dock and Appellant refused to refund the $27,000.00 paid on the fraudulently induced contract. (*Id.* ¶ 8; Not included in Record on Appeal).

Based on the evidence discussed above, a reasonable juror could reach only one conclusion: the facts and circumstances within the knowledge of Respondent Helwig at the time he cooperated with the Mount Pleasant Police Department and the Charleston County Solicitor's Office would lead any reasonable person to believe Appellant was guilty of obtaining money by false pretenses. Therefore, as a matter of law, probable cause existed at the time of Appellant's arrest, a determination, incidentally, corroborated by the Solicitor's Office. Finally, pursuant to South Carolina law, the issuance of a true bill of indictment by a grand jury against Appellant is prima facie evidence of probable cause and Appellant has failed to present even a mere scintilla of evidence to overcome this presumption.

All of the above issues were briefed by Respondent Helwig prior to the December

12, 2011 hearing in front of Judge Scarborough. (Mem. of Law in Supp. of Respondent's Mot. for Summ. J. at 14–20; Not included in Record on Appeal). Furthermore, the above issues were argued on behalf of Respondent Helwig at the December 12, 2011 hearing and Appellant was given an opportunity to respond. (Hr'g Tran. at 12–18, 34–49, 59–60, Dec. 12, 2011; R. pp. 92–98, 114–29, 139–40). Therefore, the Court of Appeals has the authority to affirm the Master-in-Equity's Order granting summary judgment to Respondent based on the merits of Appellant's malicious prosecution against Respondent Helwig.

B. Because Appellant Has Failed to Raise a Jury Question Regarding an Ulterior Purpose, the Master-In-Equity's Summary Judgment in Favor of Respondent Helwig as to the Abuse of Process Claim Should be Affirmed.

In *Guider v. Churpeyes, Inc.*, the South Carolina Supreme Court dealt with a case involving a restaurant employee who failed to properly deposit restaurant proceeds into the restaurant's bank account. 370 S.C. 424, at 427–29, 635 S.E.2d 562, at 564–65 (2006). Because she believed the restaurant owed her for recent paycheck deductions, the employee kept the proceeds. *Id.* However, a short time after her actions, the employee contacted the restaurant manager, confessed her wrongdoing, and expressed the intention to return the money. *Id.* Nevertheless, the restaurant manager contacted the police and signed an accompanying affidavit for a warrant issued for the employee's arrest. *Id.* The employee was later arrested although she had recently deposited the proceeds in the restaurant's bank account. *Id.* The charges were later dropped when the restaurant failed to appear at her hearing. *Id.* The employee subsequently filed suit against the restaurant, asserting *inter alia* a claim for abuse of process. *Id.* at 429, 635 S.E.2d at 565.

Although the lower court allowed the case to proceed to a jury verdict in favor of

the employee, the *Guider* court later reversed, finding that the lower court committed reversible error by denying the restaurant's motion for directed verdict on the abuse of process claim. *Id.* at 431–32, 635 S.E.2d at 566–67. After stating the elements required for an abuse of process claim, the *Guider* court noted "there is no liability when the process has been carried to its authorized conclusion, even though with bad intentions." *Id.* at 431, 635 S.E.2d at 566 (citations and internal quotation marks omitted). In reaching its ruling, the *Guider* court provided the following analysis:

> Viewing the facts in the light most favorable to Guider, we find the record devoid of evidence that Church's misused the legal process or operated with an illegitimate purpose. Instead, the evidence shows Church's used the legal process with the objective of seeking redress against a former employee who admittedly took and retained company funds. . . . This is clearly a legitimate use, not a perversion, of the legal process.

Id. at 432, 635 S.E.2d at 566–67.

During his deposition, Appellant acknowledged he believed Respondent Helwig pursued criminal charges against him because he wanted Appellant to "refund" the $27,000.00 paid to Appellant. (*See* Mitchell Dep. 167:18–24; Not included in Record on Appeal). When asked if he believed Respondent Helwig pursued legal action against him for any other reason, he testified he was "not aware of any." (*Id.* 172:21–174:15; R. p. 387, line 21–p. 388). Furthermore, when questioned by Appellant at his deposition, Respondent Helwig testified he pursued criminal action against Appellant because he wanted "justice to prevail" and "so this would not happen to any other person." (Helwig Dep. 71:4–11; R. p. 422, lines 4–11).

As discussed in the *Guider* case, if the facts viewed in a light most favorable to the nonmoving party provide evidence showing the use of legal process only to seek the return of money wrongfully obtained, then a plaintiff has failed to raise a question of fact

regarding an abuse of process claim. In the instant case, as discussed above, Appellant has admitted he was not licensed at the time of contract; he has admitted he has no evidence he informed Respondent Helwig about his lack of license; he has admitted he has not returned the $27,000.00 paid to him even though he failed to construct the dock; and he has admitted he believed Respondent Helwig used the legal process in order to effect a return of the $27,000.00. Stated differently, Appellant has admitted Respondent Helwig used the legal process only with the objective of seeking redress against Appellant who admittedly took and retained Respondent Helwig's money while working without a license and while not actually performing any construction on the dock. Therefore, Appellant has failed to raise a question of fact as to Respondent Helwig's alleged improper use of the legal process.

All of the above issues were briefed by Respondent Helwig prior to the December 12, 2011 hearing in front of Judge Scarborough. (Mem. of Law in Supp. of Respondent's Mot. for Summ. J. at 20–22; Not included in Record on Appeal). Furthermore, the above issues were argued on behalf of Respondent Helwig at the December 12, 2011 hearing and Appellant was given an opportunity to respond. (Hr'g Tran. at 18–21, 44–46, Dec. 12, 2011; R. pp. 98–101, 124–26). Therefore, the Court of Appeals has the authority to affirm the Master-in-Equity's Order granting summary judgment to Respondent based on the merits of Appellant's abuse of process claim against Respondent Helwig.

CONCLUSION

For the reasons discussed above, this Court should fully affirm the Master-in-Equity's granting of summary judgment in favor of James T. Helwig.

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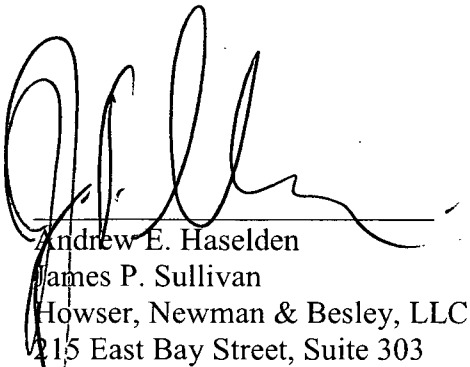
Respectfully submitted,



Andrew E. Haselden
James P. Sullivan
Howser, Newman & Besley, LLC
215 East Bay Street, Suite 303
Charleston, South Carolina 29401
843.216.6940
Attorneys for Respondent

April 19, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No. 2010-CP-10-5532
Tracking Number 2012-211963

William C. Mitchell,

Appellant,

v.

James T. Helwig,

Respondent.

PROOF OF SERVICE

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 211(a) and 262(b), *SCACR*, in this matter on Appellant William C. Mitchell, *Pro Se*, by depositing a copy of it in the United States Mail, postage prepaid, on April 19, 2013, addressed to his mailing address of record, William C. Mitchell, 9452 Koester Road, Ladson, SC 29456.

Andrew E. Haselden
James P. Sullivan
Howser, Newman & Besley, LLC
215 East Bay Street, Suite 303
Charleston, South Carolina 29401
843.216.6940
Attorneys for Respondent

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RULE 211(B), SCACR, CERTIFICATION

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

Andrew E. Haselden
James P. Sullivan
Howser, Newman & Besley, LLC
215 East Bay Street, Suite 303
Charleston, South Carolina 29401
843.216.6940
Attorneys for Respondent

April 19, 2012