

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2013-CP-40-1469  
Appellate Case No: 2014-000058

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Hugh Allen Hoover.....Appellant,

v.

L.A. Blue and Kem Dempsey.....Respondents.

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**FINAL BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of Facts.....1

Statement of the Case.....2

Arguments

I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT’S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?.....3

II. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER DIMISSING THE APPELLANT’S COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS?.....8

Conclusion..... 10

**TABLE OF AUTHORITIES**

Cases

*Stiles v. Onoranto*, 318 S.C.297, 300, 457 S.E.2601,602 (1995).....4,8

*Toussaint v. Ham* 292 S.C.415,416, 357 S.E.2d 8,9 (1987).....4

*Plyler vs. Burns*, 647 S.E.2d, 188, 373 S.C.637(S.C. App. 2007).....4

*McBride v. School Dist of Greenville County*, 698 S.E 2d 845, 389 S.C 546 (S.C. App. 2010).....5

*Eaves v. Broad River Elec.Coop., Inc.*, 277 S.C.475, 479,289 S.E.2d.414,416 (1982).....5

*Jordan v.. Deeese*, 317 S.C.260, 261-62, 452 S.E.2d 838,839,citing 52 Am Jur 2d Malicious Prosecution Section 28 (2000).....5

*Food Lion, Inc v. United Food & Commercial Workers Intern. Union*, 567 S.E. 2d 251, 351 S.C. 65(S.C. App. 2002).....6,8

*Loadholdt v. Cribb*, 2004 UP-238.....6

*Hainer v. Am.Med Int'l*, 328 S.C. 128,136,492 S.E.2d 103,107 (1997).....7

*LaMotte v. Punch Line of Columbia, Inc*, 296 S.C.66, 370 S.E.2d 711 (1988)..... 7

*First Union Mortgage Corp. v. Thomas*, 317 S.C.63,74,451 S.E. 2d 907, 914 (Ct. App. 1994)..7

*New York Times Co., v. Connor*, 291 F.2d. 492,495 (5<sup>th</sup> Cir. 1961).....9

*Heinrich ex rel.Heinrich v. Sweet*, 118 F. Supp. 2d 73,78 (D. Mass. 2000).....9

*Randy's Sanitation, Inc. v. Wright County, Minn.*, 65 F. Supp. 2d 1017, 1022 (D. Minn. 1999).....9

*Murphy v. Owens-Corning Fiberglas Corp.*, 550 S.E 2d 589, 346 S.C. 37 (S.C. 2001).....9

Other Legal Authorities

Black's Law Dictionary 21 (7<sup>th</sup> Ed. 1999).....9

## STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT BASED UPON APPELLANT'S FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?**
  
- II. **DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS?**

## STATEMENT OF FACTS

This case is presented on appeal based upon procedural issues only. The relevant facts are that Respondents in October 2006 brought an action initially seeking declaratory and injunctive relief against the Appellant in connection with Appellant's plans to develop his lakefront property that was located adjacent to the properties of Respondents. (R. pp.67-86). That litigation was subsequently dismissed in favor of Appellant in March 2009 on a Motion for Summary Judgment against Respondents, whereupon Respondents appealed the Court's order to the South Carolina Court of Appeals. The Court of Appeals, affirmed the decision of the Circuit Court in March 2011.(R. pp. 19-29). Thereafter, in March 2013, Appellant filed a Summons of Complaint against the Respondents, alleging malicious prosecution, abuse of process and outrage in connection with the above prior action instituted by Respondents against Appellant (R. pp. 58-66). Respondents subsequently filed a Motion to Dismiss Plaintiff's Complaint based upon allegations of failure to state a claim upon which relief can be granted along with allegations of the claim being barred by the applicable statute of limitations. (R. pp. 38-39). The

Respondents' Motion was granted; Appellant's Motion to reconsider was thereafter denied, and Appellant appeals the dismissal of his action.

### **STATEMENT OF THE CASE**

On October 5, 2006 Respondents filed a Summons and Complaint against the Appellant, Hugh Allen Hoover and Richland County, seeking declaratory and injunctive relief with regard to Hoover's plan for development and construction upon his lakefront property located at 2204 Johnson Marina Road in Richland County. (R. pp. 67-86). Appellant's property is adjacent to the properties of Respondents. Procedurally, on October 30, 2008, the Circuit Court heard the arguments of Appellant and Defendant Richland County on Richland County's motion for Summary Judgment, and on April 1, 2009, the Honorable Casey L. Manning granted Summary Judgment in favor of then Defendants Richland County and Appellant, finding that Respondent's declaratory judgment actions were moot due to the County's subsequent grant of a certificate of occupancy to Appellant which rendered their issues non-justiciable, as the County was the proper regulatory authority in this matter, not the Circuit Court, and further finding that Kem Dempsey and L.A. Blue had failed to demonstrate that they would suffer any irreparable harm without injunctive relief. (R. pp. 10-18).

Respondent's appealed this decision of the Circuit Court to the South Carolina Court of Appeals. Arguments were heard on December 8, 2010, and on March 22, 2011, the South Carolina Appellate Court affirmed the Circuit Court's opinion, holding that Respondents lacked standing to seek declaratory judgment against

Appellant and Richland County, concluding that the claims for declaratory judgment were indeed non-justiciable, and also concluding that Respondents failed to present even a scintilla of evidence demonstrating irreparable harm. (R. pp. 19-29).

Thereafter Appellant filed a Summons and Complaint on March 11, 2013 against Respondents alleging the causes of action for malicious prosecution, abuse of process and outrage. (R. pp. 58-66). Respondents timely answered and subsequently filed a Motion to Dismiss, alleging that Appellant's pleadings failed to state a claim upon which relief can be granted along with alleging that Plaintiff's causes of action are barred by the statute of limitations. (R. pp. 38-39). Arguments were heard by Circuit Judge, Honorable G. Thomas Cooper, Jr. on October 8, 2013, (R. pp. 87-104), and on November 12, 2013, Judge Cooper's Order of November 8, 2013 granting Respondents' Motion to Dismiss Appellant's Complaint was filed with the Richland County Clerk of Court's Office. (R. pp. 31-35).

On, November 27, 2013 Appellant filed a Motion to Reconsider with the Honorable G. Thomas Cooper, Jr., pursuant to Rule 59 (e), SCRPC. (R. pp. 46-51). Thereafter, on December 27, 2013, the Honorable G. Thomas Cooper, Jr. denied Appellant's Motion for Reconsideration and entered an Order Denying the Motion for Reconsideration, filed with the Richland County Clerk of Court's Office on December 30, 2013.(R. pp. 36-37). Thereafter, on January 9, 2014, Appellant filed his Notice of Appeal with the South Carolina Court of Appeals.

### **ARGUMENT**

I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

In deciding a motion to dismiss pursuant to Rule 12(b) (6), SCRPC, failure to state a claim upon which relief can be granted, the Court should consider only the allegations set forth on the face of the plaintiff's complaint, *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12 (b) (6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* (emphasis added). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief, *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E. 2<sup>nd</sup> 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*, *Plyler v. Burns*, 647 S.E. 2d, 188, 373 S.C. 637 (S.C. 2007). (R. pp. 47-48).

Appellant's complaint alleged three causes of action: malicious prosecution, abuse of process and outrage. (R. pp. 58-66). If the Court finds from looking at the allegations as set forth in the complaint and in the light most favorable to the Appellant with every doubt resolved in the Appellant's favor that any single one or more of these above causes of action state any claim upon which relief could be granted at trial then the Court should not under those circumstances grant the Motion to Dismiss for failure to state a claim upon which relief can be granted.

The elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of

such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *McBride v. School Dist. of Greenville County*, 698 S.E.2d 845, 389 S.C. 546 (S.C.App. 2010). Malice has been defined by our courts as "the deliberate intentional doing of a wrongful act without just cause or excuse." *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982). It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. *McBride v. School Dist. of Greenville County*, 698 S.E.2d 845, 389 S.C. 546 (S.C.App. 2010). Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution. *McBride v. School Dist. of Greenville County*, 698 S.E.2d 845, 389 S.C. 546 (S.C.App. 2010)

In the instant case, the Defendants/Respondents did institute a judicial proceeding against the Appellant which was terminated in the Appellant's favor, one element necessary to maintain an action for malicious prosecution, *Jordan vs. Deese*, 317 S.C. 260,261-62, 452 S.E.2d, 838, 839 (1995); 52 Am Jur. 2d Malicious Prosecution Section 28 (2000). Further, the fact that the Respondents' case against Appellant was dismissed on a motion for Summary Judgment motion could create the inference of want of probable cause on the part of Respondents to bring said actions against the Appellant. In

addition, as the Circuit Court concedes, Appellant did allege in his Complaint that Respondents had an ulterior motive or improper purpose or malice in pursuing this action, namely Respondents wanted to force Appellant to develop his land in a manner consistent with the homes and properties owned by the Respondents or force him to sell the property and move off the property and out of the neighborhood as Appellant could only afford to build a modest home and therefore did not meet the "personal" home building standards of the Respondents which favored larger, more extravagant homes on their adjacent lakefront properties.(R. p. 48). Therefore, contrary to the Circuit Court's stated opinion in this matter, Appellant asserted and one could conclude that "read in a light most favorable to the Appellant, and with every doubt resolved in his favor or behalf", a jury or fact-finder could conclude that based upon the alleged ulterior motive or improper purpose that the Respondents did indeed act with malice towards the Appellant and without any probable cause in pursuing their action against Appellant, causing Appellant damages and harm in defending himself against their actions against him. Accordingly, Respondents' motion to dismiss plaintiff's cause of action for malicious prosecution should have been denied, *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 567 S.E.2d 251, 351 S.C.65 (S.C. App. 2002). (R. pp. 48-49).

Secondly, to sustain a claim for abuse of process, the judicial process must in some manner be involved. Our Appellate Court has defined "process" to "embrace the full range of activities and procedures attendant to litigation". The word process as used in the tort of abuse of process has been interpreted broadly and encompasses the entire range of procedures incident to the litigation process. For purposes of the tort, the word

“process” may encompass a range of court procedures incident to the litigation. See *Loadholdt v. Cribb*, 2004-UP-238. A plaintiff alleging abuse of process in South Carolina must assert two essential elements: (1) an “ulterior purpose”, and (2) a “willful act in the use of process not proper in the conduct of the proceedings”, *Hainer v. Am. Med Int’l*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C.66, 370 S.E.2d 711 (1988). “An 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). (R. p. 49).

In this instant case, Appellant has alleged that the legal action brought and maintained against him was done so for an improper purpose. To that end, and given the definition of “abuse of process” as adopted by our appellate courts it would be improper to dismiss, at this stage, Appellant’s cause of action. Therefore, contrary to the Circuit Court’s decision to grant Respondents’ motion to dismiss for failure to state a cause of action upon which relief can be granted, “read in a light most favorable to Appellant and with all doubts resolved in his favor”, one would have to conclude that Appellant had indeed alleged that the Respondents had an ulterior motive or improper purpose in pursuing this action, namely that ulterior purpose being to force Appellant to either develop his land in a manner more consistent with their larger and more extravagant homes and properties or to sell his property and move from the neighborhood. (R. pp. 49-50)

Thirdly, Appellant has in his pleadings properly alleged a claim for “Outrage”. Although, this cause of action has clearly become suspect by our trial and appellate

courts, at this juncture, the Court may only look at the allegations contained in the pleadings. Therefore, insofar as the Appellant's allegations set forth a proper claim, the court should not dismiss the claim at this point. (R. p. 50).

In conclusion, a 12(b) (c), SCRCR, motion should not be granted if "fact alleged and inferences reasonably deducible therefrom would entitle the Appellant to any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E. 2d, 601, 602 (1995) (emphasis added). Here in this instant case, the lower court erred in dismissing Appellant's case. Therefore, Appellant is entitled to have his case restored to the active docket and to have his case tried on its merits before a jury or fact-finder.

II, DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER DISMISSING THE APPELLANT'S COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS?

Turning back to the Appellant's claim of malicious prosecution, this cause of action does not accrue and therefore the statute of limitations does not begin to run, until the proceedings are terminated in the Plaintiff/Appellant's favor. In this instant case, Appellant did not prevail until the opinion of the Court of Appeals was issued on March 22, 2011, affirming the lower court's order granting Summary Judgment to Appellant and Richland County. Thereafter, Appellant filed this current action against the Respondents on March 11, 2013, which is well within the three (3) year statute of limitations of when his action would have accrued. (R. p. 48). Accordingly, Respondents' motion to dismiss Appellant's claim as being barred by the statute of limitations should have been denied. *Food Lion, Inc. vs. United Food & Commercial Workers Intern. Union*, 567 S.E.2d 251, 351 S.C. 65 (S.C. App. 2002). Likewise, the actions for abuse of process and outrage

would also not have fully accrued until the Respondents' prior proceedings against the Appellants were terminated in the Appellant's favor.

As to the issue of when an action accrues our courts have held:

**...South Carolina courts use the verbs 'arise' and 'accrue' interchangeably while determining when a cause of action comes into existence... Thus a cause of action arises, accrues, and springs into action only when all of the elements exist and one has a right to seek relief (Emphasis in original)**  
**A cause of action "accrues" when it becomes so that the aggrieved party can begin and prosecute such action"**  
*New York Times Co., v. Connor*, 291 F.2d 492, 495 (5<sup>th</sup> Cir. 1961);  
see also *Heinrich ex rel. Henrich v. Sweet*, 118 F. Supp. 2d 73, 78 (D. Mass. 2000) (According to Black's Law Dictionary...  
there is a subtle, yet important, difference between the two words. 'Accrue' means (t)o come into existence as an enforceable claim or right.' Black's Law Dictionary 21 (7<sup>th</sup> ed. 1999), in contrast, 'arise' means (t)o originate' as in a federal claim arising under the U.S. Constitution.' " (citation omitted) *Randy's Sanitation, Inc. v. Wright County, Minn.*, 65 F Supp. 2d 1017, 1022 (D. Minn. 1999) (As a general rule, a claim does not accrue until the plaintiff has 'a complete and present cause of action.'" (citations omitted).

*Murphy v. Owens-Corning Fiberglas Corp.*, 550 S.E.2d 589, 346 S.C. 37 (S.C. 2001)

Clearly Appellant's cause of action for malicious prosecution did not accrue until he had prevailed in the prior case. This did not occur until the South Carolina Court of Appeals issued its ruling.

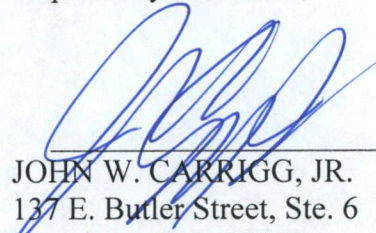
Therefore, as none of these above causes of action had fully accrued until such time as the Respondents' prior proceedings against the Appellant had been completely terminated in the Appellant's favor on March 22, 2011, the lower court erred in how it applied the applicable statute of limitations to bar all of Appellant's causes of action against Respondents.

CONCLUSION

Accordingly for the reasons stated above the ruling of the lower court should be reversed and this matter should be remanded to the lower court for trial to allow Appellant to try this case on its merits at trial before a jury or fact-finder.

Respectfully submitted,

November 17, 2014



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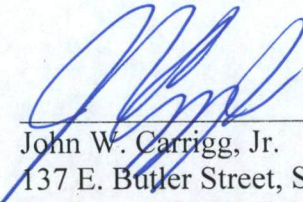
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that Appellant's Final Brief complies with Rule 211 (b), SCACR.



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Hugh Allen Hoover..... Appellant  
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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellant, hereby certify that copies of the Final Brief of Appellant and Certificate of Counsel were served on all parties, by mailing in the United States mail, postage prepaid, a copy therefore, to attorney for all parties, this 21 day of November 2014, addressed as follows:

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