THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Richland County Master In Equity
Joseph M. Strickland, Master in Equity

Civil Action No. 2018-001577

The Homestead Property Owners Association, Inc.....Respondents

v.

Wanda J. Miller and Orlando F. Miller.....Appellants

APPELLANTS' REPLY BRIEF

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I. Appellants were clearly relieved of default.

The Master-in-Equity clearly relieved Appellants of the entry of default when he allowed Appellants to file an Answer and assert Counterclaims. "An order should be construed within the context of the proceeding in which it is rendered." Acrey v. Acrey, 292 S.C. 387, 389, 356 S.E.2d 437, 438 (Ct.App.1987). A party in default cannot file a responsive pleading in order to contest liability but their participation is limited to cross-examining of witnesses at a damages hearing. Limehouse v. Hulsey, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013). Appellant filed an answer with a counterclaim. Respondent filed a reply and a motion for summary judgment relating to Appellants' *counterclaim.* This argument is entirely specious.

II. Respondent only has a legal remedy.

Appellants do not contest that Respondent has the right to levy and collect assessments. However, the Frankenstein monster that Respondent uses has the features of both contractual remedies (money damages and the imposition of attorneys' fees) and equitable remedies (foreclosure and no trial by jury) which Respondent picks and chooses when it is advantageous to do so.

Respondents clearly acknowledge that covenants are contractual in nature. The Supreme Court just reaffirmed the contractual nature of such covenants. Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 200, 821 S.E.2d 667, 670 (2018). Appellants also agree that the covenants are contractual. While recognizing the contractual nature of the covenants, Respondents then asserts that the covenants are enforceable through equity and flatly ignores contrary case law that makes clear the separation between legal remedies and equitable remedies.

The existence of a contract almost always provides as adequate remedy at law. Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011). An equitable lien is not available where there is an adequate remedy at law. Chase Home Fin., LLC v. Risher, 405 S.C. 202, 209, 746 S.E.2d 471, 475 (Ct. App. 2013) A mere breach of contract does not give rise to an equitable lien. Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct.App.2011) A court cannot impose an equitable lien where there is an adequate remedy at law." Nutt, supra. Respondent makes no attempt to explain why a suit for money damages is an inadequate remedy

The inherently contractual nature of the covenants is also demonstrated by Respondents' claim for money damages and attorneys' fees. A party that pleads money damages in the alternative to equitable relief has a duty to show why the money damages are inadequate. Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 8, 732 S.E.2d 876, 879–80 (2012).The point stressed in Respondent's brief is that Appellants acknowledge they owe the association some money. (Respondent's Brief, pg. 13.) The Respondent even pleads a specific amount of money owed—$827.04—in their Complaint plus attorneys' fees. (Complaint, ¶ 10.)

Attorneys' fees and costs are not recoverable unless authorized by contract or statute. Maybank v. BB&T Corp., 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016); Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). There is no common law right to recover attorney's fees." Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001). Respondent acknowledges that the basis for this action is contractual, not statutory. (Respondent's Brief, pg. 14.) There is likewise no equitable remedy that will impose attorneys' fees. For instance, the right to collect attorneys' fees in a mortgage foreclosure comes by statute, S.C. Code Ann. § 29-3-50(A), and not from the agreement of the parties.

III. No South Carolina appellate court has been asked to rule on validity of Association foreclosures.

Respondent acknowledges that no South Carolina appellate court has ruled on the validity of the foreclosure by a Homeowners Association. (Respondent's Brief, pg. 14.) It does not appear in cases cited by Respondent that the Court of Appeals or Supreme Court have been asked to do so. Respondent mentions Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander, 802 S.E.2d 635, 639 (Ct. App. 2017). However, it is abundantly clear from a casual reading that mentioning is all that occurred. As the South Carolina Supreme Court ruled:

> As Chief Judge Alex Sanders so aptly stated, "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 409 S.E.2d 811, 817 (Ct.App.1991).
>
> Kennedy v. S.C. Ret. Sys., 564 S.E.2d 322, 323 (2001).

Wachesaw is no more suggestive of a rule than is Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray, 799 S.E.2d 310, 314 (Ct. App. 2017) wherein the Court of Appeal affirmed the Master in Equity's setting aside of the foreclosure sale.

Respondents also cite orders in other cases from the Court of Common Pleas. The decisions of the Courts of Common Pleas are not binding on this court. Moreover, the orders cited by Respondents were not final dispositive orders binding to the litigants in their own cases. "[T]he denial of summary judgment does not finally determine anything about the merits of the case." Ballenger v. Bowen, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994). The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. Id.

Also, none of the associations took the actions through foreclosure to completion:

HOA	Homeowner	Case Number	County	Judge	Status
Crickentree	Eric Manning and Tiffany J. Manning	2011-CP-40-07557	Richland	Strickland	Case settled at mediation
Farming Creek	Deirdre R. Barnes	2013-CP-32-1262	Lexington	Russo	Still pending
Summit	Edwin Mullen	2013-CP-40-1553	Richland	Cooper	Still pending
South Wood	Xavier T. Samuel and Sharon Samuel	2013-CP-40-000147	Richland	Lee	Dismissed
Woodcreek Farms	Kristopher A. Weiss	2014-CP-40-00036	Richland	Lee	Dismissed

Respondent's citation of cases from other states is unhelpful because some the states mentioned have adopted statutes that allow for the foreclosure of a homeowners' association lien. Alabama, Florida, Indiana, Texas, New Jersey and Nebraska have adopted statutes which allows homeowners associations like HOA Defendants to file liens and foreclosure. Ala. Code § 35-20-1, et. seq.; Fla. Stat. Ch. 720.301, et. seq.; Ind. Code Ann. § 32-25.5-1-1; Tex. Prop. Code Ann. Title 11 § 209.001 et. seq.; N.J. Stat. Ann. § 45:22A-21 et seq; Neb. Rev. Stat. Ann. § 52-2001 et. seq. Other states like New York, Arkansas, and Washington recognize contractual and common law liens. Hoffman v. KSB Broadway Assocs., 880 N.Y.S.2d 873 (Sup. Ct. 2009); Hite v. Pub. Util. Dist. No. 2, 772 P.2d 481, 484 (1989); Pac. Gamble Robinson Co. v. Chef-Reddy Foods Corp., 710 P.2d 804, 806 (1985); Burnett v. Palmer, 233 Ark. 205, 206, 343 S.W.2d 570, 571 (1961); Nakdimen v. Royal Stores, 81 S.W.2d 853, 854 (1935).

IV. The validity of the debt is inconsequential to whether there is an abuse of process.

The validity of some of the debt which Respondent is attempting to collect does not provide a defense to Appellant's claim for abuse of process.

The abuse of process tort has been interpreted to consist of three different components: 1) an act that is either willful or overt; 2) in the use of the process; 3) that is ultimately reprehensible because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. Swicegood v. Lott, 379 S.C. 346, 353–54, 665 S.E.2d 211, 215 (Ct. App. 2008); Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 351 S.C. 65, 71, 567 S.E.2d 251, 254 (Ct.App.2002). The essence of the tort of abuse of process centers on events occurring outside of the process, namely:

> "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort."
>
> Huggins v. Winn–Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967).

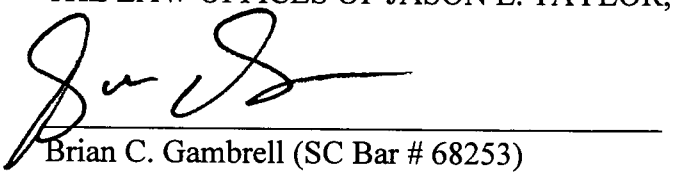
The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system. Food Lion, Inc., supra. "Process," as used in this context, has been interpreted broadly to include the entire range of procedures incident to the litigation process. Id. at 70, 567 S.E.2d at 253. The fact that process was properly instituted does not foreclose an action for abuse of process if Respondents have, in fact, committed acts outside the normal process that are improper. Pallares v. Seinar, 407 S.C. 359, 372, 756 S.E.2d 128, 134 (2014).

CONCLUSION

For the reasons set forth herein, Appellants herein requests this Court REVERSE the order of the Master-in-Equity.

Respectfully submitted,

THE LAW OFFICES OF JASON E. TAYLOR, P.C.



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PROOF OF SERVICE

I, Brian C. Gambrell, the attorney for Appellant, do hereby certify that I served via U.S. Mail the Reply Brief on Respondents' counsel on March 18, 2019.

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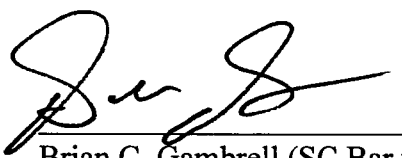

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CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies the final briefs of Appellants comply with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

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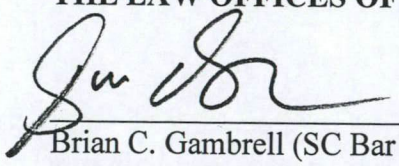

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