

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Louis E. Condon, Special Master

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Case No. 92-CP-18-774

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Whitfield Construction Company .....Appellant,

v.

The Bank of Tokyo Trust Company and  
Merit Realty Holding Corporation .....Respondents.

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**INITIAL BRIEF OF RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

I.

## STATEMENT OF THE CASE

Appellant Whitfield Construction Company ("Whitfield") filed this action against Respondents The Bank of Tokyo Trust Company and Merit Realty Holding Corporation (hereinafter collectively referred to as "BOTT") on September 9, 1992, seeking damages for an alleged trespass and interference with Whitfield's property committed by the original owner and developer of a shopping mall located adjacent to Whitfield's property. In the Complaint, Whitfield alleged that BOTT, as the construction lender and subsequent owner of the property by way of foreclosure, is liable for an alleged trespasses committed by the developer. BOTT filed an Answer denying the allegations.

BOTT and Whitfield each filed motions for summary judgment. The motions were heard on August 29, 1995. At hearing on the motions, the court requested that the case be referred to a Special Referee, and never issued an order ruling on the summary judgment motions. The parties heeded the court's request and referred this case with finality to G. Dana Sinkler, Esquire, as Special Referee, by Order dated March 11, 1996.

The trial of the case was scheduled to begin on April 30, 1996. On the day before the start of the trial, Whitfield requested that Mr. Sinkler recuse himself from the case because of an alleged conflict of interest when informed that Mr. Sinkler's partner had been retained to check the title to the foreclosed property by the party contracting to buy it from BOTT. The trial was continued and the case was referred with finality to Louis E. Condon, Esquire, as substitute Special Referee, by Order dated May

14, 1996. The Special Referee granted BOTT leave to amend its Answer to include a counterclaim for abuse of process, by Order dated June 19, 1996.

The trial of this case was held on July 22-24, 1996. At the close of the trial, BOTT moved the court to assess attorney's fees and costs against Whitfield under the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 to -50 (Law. Co-op. Supp. 1995). By Order of Judgment dated December 6, 1996, the Special Referee dismissed Whitfield's claims and awarded BOTT \$240,000 as attorney's fees and actual damages under its abuse of process and Frivolous Proceedings claims, plus \$480,000 in punitive damages under its abuse of process claim.

Whitfield filed a motion to reconsider, which was denied by Orders dated May 9, 1997, and June 9, 1997. Thereafter, a hearing was held to review the amount of attorney's fees awarded to BOTT under the Frivolous Proceedings Sanctions Act. By Order dated September 24, 1997, the Special Referee modified the original Order of Judgment and awarded BOTT \$286,463.32 in attorney's fees, which included an additional \$12,235.75 in attorney's fees incurred by BOTT in defending Whitfield's various post-trial motions. This appeal followed.

## FACTS

This lawsuit arises from the sale and option of a 231 acre tract of land by Whitfield Construction Company and Floyd Whitfield (hereinafter referred to collectively as "Whitfield") to Lincoln Developers and related entities (hereinafter referred to as "Developer"). Whitfield is a very successful developer, contractor, and speculator who has acquired a net worth in excess of \$40,000,000.

In early 1987, Developer investigated the feasibility of purchasing and developing Whitfield's property, along with an adjoining 18 acre tract of land belonging to a third party, Kenneth Willard. The properties, bounded on two sides by Ashley Phosphate and Dorchester Roads, are situated in North Charleston. The Whitfield and Willard tracts are shown on Plat entitled \_\_\_\_\_ (Exhibit One). Whitfield's property consisted of Tracts A, C, F, and G, and Willard's property consisted of Tract E. The combined properties total 249 acres.

For planning purposes, Developer had a site plan (Exhibit 11) prepared for the entire 249 acre tract. As the first phase of development Developer intended to construct a shopping center on Tracts A and E.

In keeping with this development plan, in July 1987, Developer entered into a purchase-option agreement (Exhibit 6) with Whitfield to purchase Tracts A, E, and C and the roadbed for the proposed Lincoln Boulevard, which extended through Tract G, totalling 61 acres. The agreement also contained a five year option for Developer to purchase the remaining Tracts F and G of

the Whitfield property, consisting of 170 acres. Developer planned to site the shopping center and related parking on Tracts A and E. In anticipation of exercising the option on the remaining property and developing it, contemporaneously with the purchase of Tracts A and E Developer made plans to install an infrastructure of roads, utilities, and drainage throughout the entire 249 acre tract. The Purchase-Option Agreement accommodated these plans by providing that:

Buyer [i.e. Developer], his agents, employees, or contractors shall have the right to enter upon the premises for the purpose of clearing trees, foliage, and other debris, to perform excavating work for storm water management and to take boring samples, make compaction, percolation, or other studies deemed necessary by Buyer....Buyer's right hereunder shall include the right to install all utilities in accordance with plans and specifications to be prepared by Fosburg Surveying and Engineering and seller shall provide all easements required for purposes. (Exhibit 6) (emphasis added)

Preparatory to constructing the infrastructure, as envisioned by the above quoted section of the Purchase Option Agreement, Developer retained Fosburg Engineering and Surveying, Inc. ("Fosburg") to prepare plans and specifications for the roads, water, sewer, and drainage systems throughout the 249 acre tract.

In August and October 1987, developer acquired title to Tracts E, A, and C. Contemporaneously with this acquisition, in accordance with the Fosburg plans, it commenced installing roadways, utilities and storm water drainage throughout both the purchased and optioned properties and filling in Tract E preparatory to construction of the shopping center with material from an

adjoining excavation, located primarily on Tract G. During development of the infrastructure plans, Fosburg met on two occasions with Whitfield and Developer to discuss and refine the proposed layouts of the roads, utilities, and drainage.

At the time that Developer and Whitfield entered into the Purchase Option Agreement, rainfall runoff from 250 offsite acres and from Tract F drained through a series of ditches and wetlands onto and through Tracts A and E, and ultimately through a culvert on Ashley Phosphate Road, where it entered drainage emptying into the Ashley River. Also a portion of Tract G drained through the ditch situated alongside Tract E.<sup>1</sup>

In order to site the shopping center and further develop the remaining property, Tract E had to be built up and drainage had to be rerouted so as to accommodate runoff from the 250 offsite acres, Tracts F, G, A, and E. To accomplish this Fosburg designed a series of detention ponds connected by the underground culverts from the upper boundary of Tract F down to the culvert on Ashley Phosphate Road. Included in this comprehensive design was an approximate 8 acre detention pond situated partially on the shopping center site of Tract E and mostly on the adjoining Tract G, then owned by Whitfield and under option to Developer. The design provided that the excavated material from the pond was to be used as foundation material for Tract E and the completed

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<sup>1</sup>Whitfield previously had acquired a portion of Tract A from Willard and contemporaneously with the purchase had obtained an easement appurtenant to drain this purchased property through the ditch system bordering Willard's Tract E.

excavation was to serve as a detention pond so that runoff from the drainage basin could be metered into the culvert at Ashley Phosphate Road.

Upon acquisition of Tracts A, E, and C, in anticipation of obtaining a construction loan and commencing construction of the shopping center in the Fall of 1987, Developer, following the Fosburg plans, began installing the infrastructure throughout the entire 249 acres, including removing trees, grading roadways, installing water and sewer lines and excavating the detention ponds, including the 8 acre one, and connecting them by culverts.

Throughout excavation of the 8 acre pond, which continued through the Spring of 1988, Whitfield regularly visited the site, reviewed construction drawings, walked through the excavation which was situated primarily on Tract G. He consulted with Developer's construction superintendent about the placement of a portion of the excavated material to form a berm to shield the pond from neighboring warehouses. He also consulted with Developer's grading contractor about being careful not to destroy developable lots located between the pond and West Association Drive as additional fill material was taken from the excavation in order to provide an adequate foundation for the shopping center on Tract E.

All of the infrastructure expenditures were made by Developer from its own funds. Thereafter, in January 1988, Developer secured a \$20,000,000 loan to construct the shopping center. None of these funds were used by Developer for installation of infrastructure on the optioned property, including the excavation of the 8 acre detention pond. All construction loan funds were

restricted to the construction of the shopping center and related parking on Tracts E and A.

In June of 1988, Developer completed the sewer system and conveyed it to Dorchester County, which has owned and operated it since that time. The system consists of gravity lines which run under roadbeds throughout the property to a pump station located on the shopping center site. From there, sewerage is pumped through a forced (i.e. pressurized) main, which runs under West Association Drive to a gravity line under Lincoln Boulevard near its intersection with Ashley Phosphate Road. From there, sewerage flows by gravity into the main branch of Dorchester County sewer system.

In February 1989, Developer conveyed the water system, which parallels the sewer lines throughout both purchased and optioned properties, to the Commissioner of Public Works for the City of Charleston (hereinafter referred to as "CPW"). Before accepting the waterlines, CPW required both Developer and Whitfield to grant it a written easement through the purchased and optioned properties. The CPW water easement executed by Whitfield references a Fosburg plat, which shows the roadways designated as utility easements extending throughout the entire 249 acre tract.

In further keeping with the plan for comprehensive development of the optioned and purchased property, Whitfield signed three plats for the purpose of dedicating the roadways to the public which were constructed on the optioned property. One of these signed plats shows the boundaries of the 8 acre detention pond situated primarily on Tract G.

From the time of the execution of Purchase-Option Agreement to the later part of 1988, Developer made monthly option payments of \$23,770 to Whitfield, for a total of about \$300,000. At that point Developer ran into financial difficulties and discontinued the option payments. As a result, Developer's option to purchase Tracts F and G was never exercised. Consequently, Whitfield retained title to this property, which had been improved by Developer by the construction of an integrated drainage system, grading of roads, and installation of sewer and water lines. In 1989, Developer defaulted on its construction loan and the group known as Festival Center Associates (hereinafter referred to as "Associates") assumed the note and mortgage and became the owner of the shopping center.

During construction of the shopping center, the portion of Lincoln Boulevard running from Dorchester Road along the northern boundary of the shopping center was paved. The remainder of Lincoln Boulevard running through Tract G from the far corner of the shopping center around to Ashley Phosphate Road remained unpaved. Because Tract G was never purchased for development, Developer did not pave that portion of the road. As a result, it was never opened to the public.

This fact became a matter of concern to Whitfield after Developer failed to exercise its option on Tract G and he found himself owning improved property bisected by an unpaved, abandoned roadway owned by Associates. In an attempt to remedy this situation, rather than approaching Associates for permission to pave the road, Whitfield conceived of a plan to acquire from

Associates a 2 acre wetlands outparcel situated on the shopping center property at the intersection of Lincoln Boulevard and Dorchester Road, filling it in, selling it, and using the proceeds to pave the road. In pursuit of this plan, Whitfield obtained approval from the Army Corp of Engineers to fill in the wetlands by agreeing to mitigate the loss by enlarging wetlands on the formerly optioned property still owned by him. He then approached Associates and pointed out that the wetland parcel was of no economic benefit to it, but that he was in a position to fill it in and create a salable lot which he proposed purchasing from Associates for \$25,000, with the understanding that Associates would apply the proceeds to the cost of paving the unpaved portion of Lincoln Boulevard. He was then to sell the parcel and use the proceeds to pay the remainder of the paving costs. Associates agreed to this proposition.

Whitfield then reconsidered his proposal. Obviously, the greater basis he had in the property at the time of sale, the less tax consequences. He, therefore, again approached Associates and proposed that rather than pay \$25,000 for the lot, he would pay \$75,000, which in turn Associates would apply to the paving costs.

This proposal enhanced his position, since the money paid to Associates for the lot, which it in turn would apply to paving costs, would correspondingly decrease his obligation to pave the road, while at the same time would provide an enhanced basis in the property and consequently less tax consequences from its ultimate sale.

Associates, on the other hand, was faced with the proposition

that if it were required to apply the \$75,000 to paving costs it would end up with phantom taxable income of around \$70,000. Since the paving was a capital expenditure, Associates would have to depreciate the investment over the life of the road, which was probably around 15 years. Consequently, in the year that it received the \$75,000, it would be able to write off no more than about \$5,000, leaving it with \$70,000 of income subject to taxation without compensating revenue. As a result, it refused to execute the latest proposed agreement.

While these negotiations were taking place over a 7 or 8 month period, Associates' financial condition deteriorated and it defaulted on BOTT's loan. As a result, in July 1991, BOTT foreclosed on the shopping center and assigned its foreclosure rights to its wholly owned subsidiary, Defendant, Merit Realty Holding Company (hereinafter both BOTT and Merit are collectively referred to as "BOTT").

After foreclosure, Whitfield contacted BOTT with a proposition similar to the Associate's one about acquiring the outparcel and having Lincoln Boulevard paved. BOTT was not interested.<sup>2</sup> Whitfield, being determined to have the remainder of

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<sup>2</sup>The value of shopping center at the time of foreclosure was in the 5 to 6 million dollar range, and in fact, BOTT sold the shopping center shortly before trial for \$5,800,000, thereby incurring an approximate \$20,000,000 loss on its loans on the property. It was of the opinion that paving the remainder of Lincoln Boulevard would not enhance the value of the shopping center, and hence, it had no interest in Whitfield's proposal of disposing of 2 acres of its property in exchange for having the remainder of the road paved.

Lincoln Boulevard paved without incurring expense to himself, began a series of calls to BOTT and its New York counsel. He informed counsel that Associates had agreed to the proposition and that he expected BOTT to live up to the agreement. Receiving no satisfaction from these calls, Whitfield informed counsel that if BOTT refused to honor the agreement, there would be litigation and that he wanted BOTT to be aware of the fact that drainage from the shopping center, without his consent, was being directed into the 8 acre detention pond situated primarily on his property.

At the time of these conversations, BOTT was unaware of the fact that Developer and Whitfield had entered into the Purchase Option agreement which empowered Developer to install infrastructure throughout the purchased and optioned properties, or for that matter who owned the optioned tracts. As a lender, it was only interested in the state of the titles to Tracts E and A, and the construction which took place thereon, which provided the security for its loan. Consequently, it had no background upon which to assess Whitfield's threats. Nevertheless, having merely acquired title by foreclosure, and not being involved in any of the activities complained of, it continued to refuse to accede to Whitfield's demands.

Finally, becoming frustrated with the lack of progress with BOTT, Whitfield contacted Fosburg and inquired whether a sewer easement, such as the water easement required by CPW, had ever been signed by him. Fosburg researched the subject and advised Whitfield that he could not locate such an easement. At this time, Whitfield informed Fosburg that he had an agreement with

Associates to obtain title to the wetlands outparcel and have the remainder of Lincoln Boulevard paved and that BOTT had reneged on this agreement. As a result, he intended to hire a lawyer and get "those boys' attention."

After these conversations, Whitfield commenced this litigation in September 1992. In his complaint, Whitfield alleged that Developer, with the Bank's knowledge and consent, had: (1) negligently and recklessly destroyed Whitfield's drainage easement located on Tract E, which was an appurtenant easement Whitfield obtained from Willard to drain the acquired Willard property through a ditch located on the side of Tract E. (2) committed trespass by installing a forced main sewer and constructing the detention pond on a portion of Whitfield's property without Whitfield's knowledge or consent. (3) converted the dirt excavated from the detention pond by using it to construct the foundation of the shopping center; and (4) committed a continuing trespass by collecting surface water runoff from the shopping center and casting it in a concentrated form into the detention pond which accommodated drainage from 250 acres off site and Tracts F and G owned by Whitfield, as well as Tracts E and A which were acquired by BOTT by way of foreclosure.<sup>3</sup> During the trial, Whitfield abandoned all claims except those relating to the detention pond.

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<sup>3</sup>The entire comprehensive drainage system had been permitted by the City of North Charleston at the time of construction and the pond had probably become a jurisdictional wetlands.

## ARGUMENT

Whitfield's Brief is lengthy and raises numerous issues. In essence, however, the issues fall basically into four categories.

They are:

1. Did the Special referee err in finding for BOTT on Whitfield's trespass claim?

2. Did the special referee err in holding that Whitfield had no basis to reasonably believe that his claim was valid under either existing or developing law and hence should be sanctioned under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et seq?

3. Did the Special Referee err in holding that Whitfield's institution of this action constituted an abuse of process?

4. Did the Special Referee err in awarding BOTT's New York (REWORD) attorneys (Brian Doran and the Jones Day law firm) the cost of attorney's fees they incurred in defending the frivolous and abusive claim Whitfield filed against the BOTT?

Each of these issues is addressed in turn below.

**I. THE SPECIAL REFEREE PROPERLY DISMISSED WHITFIELD'S TRESPASS CAUSES OF ACTION AGAINST BOTT.**

Trespass is an action at law. Butler v. Lindsey, 293 SC 466, 361 S.E.2d 621 (Ct.App. 1987). In an action at law tried before a judge without a jury, the judge' findings are equivalent to a jury's findings and will not be disturbed on appeal unless found to be without any evidence to reasonably support the judge's findings. Moorehead v. Doe, \_\_\_ S.C. \_\_\_, 479 S.E.2d 817 (Ct. App. 1997)

**A. The activity Whitfield complained of was funded by the**

**Developer and substantially completed before BOTT made its construction loan.**

The short answer to Whitfield's trespass claim relative to the placing of the detention pond on his property is that this was done by Developer with its own funds and the work was substantially completed before BOTT made its construction loan. None of the construction funds were used for this purpose. BOTT had nothing to do with this activity. Further, when BOTT acquired title to the shopping center, the pond had been permitted by the City of North Charleston as an integral part of the drainage system for 250 acres of offsite property, and for lands of Whitfield, as well as that on which the shopping center was situated. Additionally, at that time it had probably become a jurisdictional wetlands under the control of the Army Corps of Engineers. Further, none of the BOTT construction loan was used for the excavation of the pond.

**B. Whitfield contractually granted Developer the right to construct the detention pond on its property.**

Equally compelling Whitfield, by virtue of the Purchase Option Agreement, was contractually obligated to permit the contractor to excavate for storm water drainage on his optioned property. One who enters the upon the land of another with the consent or authorization of the owner does not commit a trespass.

Peace v. Southern Bell Telephone & Telegraph Co., 208 F.2d 901 (4th Cir. 1958). The Special Referee found and concluded that Whitfield, in the Purchase-Option agreement with the Developer, contractually authorized the Developer to construct the detention pond on a portion of its property. (Order of Judgment dated

at p.12)

- C. Further, Whitfield's knowledge and acquiescence in Developer's activity in excavating the pond and using the excavated material to create the foundation of the shopping center constituted both waiver and estoppel. (cite)
  
- D. Ignoring the above, BOTT, as construction lender, would not be liable solely because it made a loan to Developer.

Lender liability law generally arises out of the issue of when, if ever, a lender has a duty to protect owners from the construction defects created by contractors. It generally does not apply to acts of contractors in relation to third parties such as Whitfield. Nevertheless, even ignoring this fact, and further assuming loan proceeds were used to fund the excavation of the 8 acre detention pond, BOTT would still not be liable to Whitfield for the acts of Developer.

A lender for a construction project is not responsible for the acts of the borrower unless the lender is involved in the construction to an extent which exceeds activities normally practiced by a commercial lender in protecting its interest in a loan. Kennedy v. Columbia Lumber & Manufacturing Co., 299 S.C. 335, 384 S.E.2d 730 (1989); Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984); Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, \_\_\_ S.C. \_\_\_, 425 S.E.2d 764, 770 (Ct. App. 1992).

The public policy reasons for refusing to impose . . . liability on a mere lender are myriad. . . . The imposition of . . . liability on all lenders would discourage lending, and thus, economic growth. Further, it is unduly punitive to impose potential . . . liability on a lender that is searching for some way to recover the losses it has suffered by the default of the debtor.

Kennedy v. Columbia Lumber & Manufacturing Co., 384 S.E.2d at 734.

The loan documents for the project (Exhibit \_\_\_) required Developer to construct the shopping mall on Tract E in accordance with the plans "approved" by BOTT. In addition, BOTT retained a construction consultant, Construction Analysis Systems, Inc. ("CASI") to monitor construction of the project and submit monthly inspection reports (Exhibit \_\_\_) to it. The CASI inspection reports described and verified the progress of work reported by the Developer on site (Tract E) in support of its monthly loan draw made applications to BOTT.

Whitfield contends that BOTT is liable for the offsite location of the detention pond because BOTT, through its loan documents and CASI inspection reports, knowingly required the Developer to construct the pond on Whitfield's land. Ignoring the fact that excavation of the the pond was started and substantially completed by the Developer before BOTT became involved as a lender, BOTT's loan documents and CASI inspection reports did no such thing. They relate solely to development of the shopping center site and did not govern the Developer's off-site activities, such as excavation of the drainage system, and installation of roads, sewer lines and water lines throughout the optioned property.

BOTT's use of the CASI consultant to monitor construction to protect its interests is consistent with typical lender practices approved by the South Carolina Supreme Court:

The transaction involved a typical construction loan. The Lender monitored the construction project to protect its loan investment and to be assured that it was built according to plans and specifications. The Lender required the builder

to employ an engineer to inspect the project periodically and submit a written certification confirming that it had reached certain stages of completion so that the Builder could qualify for advances of proceeds from the construction loan.

Roundtree Villas Ass'n v. 4701 Kings Corp., 321 S.E.2d at 48-49.

Such inspections by the lender for the purpose of protecting its interest does not create a duty to third parties. Id.

The construction plans and specification for the shopping center were prepared by the Developer and submitted to BOTT as part of the loan request. The loan documents merely required the Developer to comply with the plans and specifications which it had submitted to BOTT. The loan documents in this case were typical for a loan of this type and size. (Tr. 138) The requirement in the loan documents that the Developer construct the project in accordance with the plans and specification submitted by the Developer in the loan application is a typical lender practice and does not subject BOTT to liability as a co-developer on the project. See, e.g., Roundtree Villas Ass'n v. 4701 Kings Corp., 321 S.E.2d at 48-49 (finding only "a typical construction loan" where "[t]he Lender monitored the construction project to protect its loan investment and to be assured that it was built according to plans and specifications."); Atlanta Skin & Cancer Clinic v. Hallmark General Partners, Inc., \_\_\_ S.C. \_\_\_, 463 S.E.2d 600, 607 (1995) (holding lender's right, derived from the construction loan agreement, to approve changes in construction only suggested the potential for control and, because there was no evidence the lender exercised actual control of the project, the lender was not liable to the developer for construction defects). Moreover, the

loan documents specifically required the Developer to obtain all permits, licenses and authorizations needed for the project, which would include obtaining Whitfield's permission to construct the detention pond on his property.

The purpose of the loan documents and the CASI inspection reports was to protect BOTT's interest by ensuring that the Developer actually built what it said it was going to build (Tr. p.32), not to protect Whitfield, who was perfectly capable of protecting himself. Whitfield failed to demonstrate that BOTT had any control over the alleged trespasses committed by the Developer, nor that BOTT's involvement exceeded the scope of activities normally practiced by a commercial lender in protecting its interest in a loan. Accordingly, BOTT, as subsequent owner by way of foreclosure, would not be liable to Whitfield for any completed acts committed by the Developer of the project.

**I. THE SPECIAL REFEREE DID NOT ERR IN CONCLUDING THAT WHITFIELD'S PROSECUTION OF THIS ACTION WAS SANCTIONABLE UNDER THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT.**

S.C. CODE ANN. § 15-36-10 provides that:

Any person who takes part in the procurement, initiation, continuation or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and costs and court costs of the other party if:

1) He does so primarily for a purpose other than that of securing proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

2) The proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

Unlike abuse of process, this remedy is not premised on the fact that an action was commenced for an ulterior purpose not incorporated in the claim. Rather, if a party even though he commences the action for the purpose of seeking the relief set forth in the pleading, does not reasonably believe in the existence of the facts upon which his claim is based, §15-36-20, he is subject to sanctions of an award of attorneys fees and costs. §15-36-30.

**A. There was no basis for Whitfield to reasonably believe in the existence of the facts upon which his claims were based.**

1. Under the terms of the Purchase Option Agreement, he unambiguously granted developer authority to perform the acts complained of in the complaint.
2. BOTT had nothing to do with the complained of acts. The Developer was responsible for all of them. Furthermore, none of the funds from the construction loan made by BOTT to Developer were used for the projects complained of.
3. Whitfield was aware of, and actually participated in the complained of acts of the Developer.
  - a) drainage easements

In his complaint, Whitfield asserts that BOTT was responsible for the blocking of a drainage easement which he had obtained through Tract E. Prior to conveying the property to Developer for construction of the mall, Whitfield had purchased a portion of the triangular tract of land identified as the "10.311 AC" and "6.126 AC" Tracts on Exhibit\_\_\_\_\_ from Willard. At the time of acquisition, Whitfield obtained an easement appurtenant from Willard for the drainage of surface water from the acquired

property across Williard's lower adjoining property identified as Tract E on Exhibit\_\_\_\_. Thereafter, Developer, in purchasing Tracts A and E from Whitfield acquired both the dominant and serviant estates. It was the alleged destruction of their easement which was the subject matter of the claim against BOTT.

It is black letter law in South Carolina that the drainage easement passed to Developer along with the conveyance of Whitfield's dominant estate to it. Smith v. Commissioners of Public Works, \_\_\_\_S.C.\_\_\_\_, 441 S.E.2d 331 (Ct. App. 1994), and that this drainage easement was extinguished under the doctrine of merger when Developer acquired both the dominant and serviant estates. Hazelton v. Schein, 167 S.C. 534, 166 S.E. 634 (1932).

Moreover, the Purhcase Option Agreement authorized developer to excavate as necessary for proper drainage of the entire properties, both purchased and optioned. In this regard, Whitfield sat in on at least two conferences with Developer and Fosburg during which the drainage plans were discussed and refined. Additionally, Whitfield visited the construction site weekly during the period that the property through which the drainage easement passed was excavated and modified to encompass a comprehensive drainage plan for the entire area. In view of these facts, Whitfield could not reasonably believe in the existence of facts upon which this claim was based.

b) Sewer Lines

The Complaint asserts a cause of action of trespass because of the location of the sewer lines throughout his property. At

the time of trial, however, he narrowed his complaint to the force main running from the shopping center site to the gravity feed line near Ashley Phosphate Road. He contended that the location of this line prevented him from using the property as he desired (It was located parallel to water mains that \_\_\_\_\_ to line was a force one it could not be connected to and hence was of no value to him. These assertions were made in the face of his obvious expertise gained from over 40 years in the development and construction business.

At trial, he acknowledged that one does not connect a force main, but rather to the gravity mains which drain to the pump station, from which the sewerage is pumped through the forced main to a point where gravity can flow again. Aside from this, the main ran within the confines of West Association Drive and Lincoln Boulevard, both of which were designated as utility right ways by the Fosburg plats as provided in the Purchase Option Agreement.

Additionally, aside from the fact that BOTT had nothing to do with the installation of these sewer lines, they had been owned and operated by Dorchester County since June of 1988. If Whitfield had any complaint about their locations, it was obviously with the County or the Developer; not BOTT.

c) Detention Pond and Fill Dirt

As with the other of his baseless claims, aside from being contractually obligated to permit the excavation of the drainage system on the optioned property, Whitfield was present throughout the time that the 8 acre detention pond was being excavated and

its material used for the shopping center foundation. He visited the site at least weekly, reviewed construction drawings, observed excavation of the pond and consulted with Mr. Pace, the construction superintendent, about taking a portion of the excavated material and berming it in such a fashion that it screened the pond from adjoining warehouses. Additionally, he cautioned Mr. Platt, the grading supervisor, against extending the boundaries of the detention pond too close to West Association Drive and thereby making the property situated between the two unsuitable for development purposes. Aside from that, he signed a plat in 1988, Exhibit \_\_\_\_, which clearly showed the detention pond, being situated on his property. For these reasons, the Special Referee found and concluded that Whitfield has no basis to reasonably believe this his claims were valid under either existing or developing law.

**B. BOTT's motion for sanctions against Whitfield under the Frivolous Proceedings Sanctions Act was properly raised at the conclusion of the trial.**

In its Brief, Whitfield alleges that BOTT's motion for sanction under the Frivolous Proceedings Sanctions Act was "premature," and that the Special Referee failed to review the attorney's fees requested by BOTT. (Appellant's Brief § IV, p.38). BOTT properly made a motion for sanctions under the Act at the conclusion of the trial as required under § 15-36-30, and the Special Referee held a special post-trial hearing to review the amount attorney's awarded to BOTT under the Act. (See Order dated September 24, 1997). Whitfield's argument thus lacks merit.

**C. The holding of Hanahan v. Simpson does not bar BOTT's**

**recovery of attorney's fees under the Frivolous Proceedings Sanctions Act.**

Whitfield contends that the holding of Hanahan v. Simpson, \_\_\_ S.C. \_\_\_, 485 S.E.2d 903 (1997), decided after the trial of this case, precludes the award of attorneys fees under the South Carolina Frivilous Proceedings Sanction Act, S. C. Code Ann. §15-36-10, et seq. Hanahan stands for the proposition that the denial of summary judgment motion based upon the existence of material issues of fact established by independent witnesses, as a matter of law precludes a claim being deemed frivilous under the terms of the Act. In Hanahan, Mrs. Hanahan contested her father's will on the grounds of undue influence and mental incapacity. The estate moved for summary judgment which she opposed through the submission of the opinions of two experts that the testator in fact was incompetent at the time of execution of the will. On the basis of this opinion evidence, summary judgment was denied and the matter was submitted to the jury. After a jury verdict in favor of the validity of the will, the estate's counsel moved for sanctions under §15-36-10 et seq., which the trial judge imposed.

Upon appeal the Court noted:

Section 15-36-20 of our Frivilous Proceedings Act creates the presumption of a proper purpose if the person initiating litigation "reasonably believes under the facts that his claim may be valid under existing or developing law." Here Hanahan clearly submitted evidence supporting her claim. (i.e. the testimony of two experts) which is evidenced by the trial court's denial of summary judgment on her claims for undue influence and lack of testamentary capacity. It is simply untenable to suggest that notwithstanding the trial court was convinced the issue was one for the jury, Hanahan did not reasonably believe in the existence of her claim. (emphasis added)

Based upon the foregoing reasoning, the Court reversed the imposition of sanctions.

**1. The trial court did not issue an order denying summary judgment in this case.**

Unlike Hanahan, no order denying BOTT's motion for summary judgment was ever issued by the trial court in this case. BOTT made a motion for summary judgment based principally upon the terms of the Purchase Option Agreement and a subsequent Release of Restrictions Agreement executed by Whitfield. Whitfield also moved for summary judgment. BOTT's motion was supported by an extensive memorandum.

Upon receipt of the motion roster, the Clerk was contacted and informed that the motions were involved and a two hour hearing was requested. Counsel and New York Counsel travelled to St. George prepared with overhead projector and transparencies of relevant documents.

It immediately became apparent that the judge was neither familiar with the subject matter of the motion nor the inclined to hear the it. He announced to counsel that he was in the midst of trial and would give each side ten minutes. After short arguments the Court interrupted with the following colloquy:

I think I've heard enough. I'm not convinced that this case is ripe for summary judgment after hearing all of the potential issues that you have in it . . . . Give me your proposed orders. But I think y'all ought to consider having this case heard non-jury and getting it resolved or either having a mediator or arbitrator -- This has gone on so long; there are so many issues involved. There ought to be something that if you could sit down with an impartial party, you ought to be able to resolve it . . . .(Tr. August 29, 1995,

Subsequently proposed orders were submitted, but never acted on. After the lapse of considerable time, the judge's clerk was contacted by both counsel, who were informed that the judge was inclined not to grant either order. As a result, counsel decided to request that the case be referred so that the issues could be resolved.

The trial judge never made a finding that material issues of fact existed which had to be resolved by the trier of fact. Rather, he concluded that the case contained more issues than he had either the time, or the inclination, to tackle. Unlike Hanahan, there was no independent evidence upon which Whitfield could reasonably base a belief that his claims were valid. The documents executed by him clearly refute this assumption.

**2. The factual dispute created by Whitfield's discredited testimony concerning when he became aware of the infrastructure construction does not fall within the ambit of Hanahan.**

In view of the contractual obligations contained in the Purchase Option Agreement, the fact that Whitfield testified that he was unaware that the 8 acre detention pond had been placed on his property until three or four years later, which conflicted with the testimony of Daniel Fosburg, Jim Pace and William Platt, did not create a relevant issue of fact concerning the legitimacy of his claims. The only issue of fact ever raised in this case was at what time did Whitfield become aware of Developer's construction on the optioned property(?). When he became aware of the construction is relevant only as additional evidence of the

frivolousness of his claims.

He contended at trial that he had no knowledge of the construction taking place on the optioned property by Developer until three or four years later. He introduced no corroborating testimony. On the other hand, BOTT elicited testimony from Whitfield to the effect that his office was only several miles from the site and that he visited it from time to time during this period to take Developer's principals to lunch. Additionally, BOTT introduced testimony about Whitfield's familiarity with the infrastructure's construction from three independent witnesses.

Mr. Fosburg testified that he prepared a site plan for the entire property based upon a previously existing one and, from that plan, prepared plans and specifications for construction of the drainage system and installation of water mains, sewer lines, and roads throughout the 249 acres. During the process, he attended two meetings with principals of Developer and Whitfield to discuss and refine the plans. Based upon this fact it was his opinion that Whitfield was thoroughly familiar with the progress of construction as it occurred throughout the 249 acre tract.

Jim Pace, the Developer's construction superintendent, testified that Whitfield visited the site at least weekly from the start of construction activity, went over the construction drawings, walked the 8 acre detention pond excavation and suggested that part of the excavated material be bermed at a specific location in such a manner as to obstruct the view of neighboring warehouses.

William Platt, the grading contractor, testified that Whitfield, from the time that he began work on the site, was a frequent visitor, and as additional excavation was required to provide fill material for the foundation of the shopping center, he assisted in locating the contours of the detention pond so they did not encroach too closely upon West Association Drive and thereby destroy developable lots situated between the pond and the road. Hanahan does not impact this factual dispute. This dispute was created solely by Whitfield's unsupported denial of contemporaneous knowledge. Hanahan, on the other hand, stands for the proposition that a party is entitled to rely upon evidence submitted by independent witnesses and consequently pursuit of a claim in reliance thereon cannot be deemed frivolous. It does not stand for the proposition that unsupported testimony of a party which is subsequently refuted can remove him from the reach of the Act.

Here, Whitfield did not rely upon testimony of any independent witness in pursuit of his claims. The only support of his position was his unsubstantiated, discredited testimony which the Special Master found, in the face of overwhelming evidence, unbelievable. Consequently, the Court concluded that there was no legitimate basis for Whitfield to reasonably believe that a valid cause of action existed.

To construe Hanahan as standing for the proposition that a party could evade sanctions solely by creating an issue of fact through his own perjured testimony is untenable. This would

encourage perjury as a means of evading the reach of the Frivilous Proceedings Sanction Act. It is one thing to hold that independent supporting testimony creates the presumption that a claimant has a reasonable basis to believe in the existence of facts to support his claim. It is another to hold that unfounded, discredited testimony by a party can be the basis of such a presumption in the face of overwhelming evidence of its falsity.

For these reasons, the Special Referee properly found and concluded that Whitfield had no basis to reasonably believe that his claim was valid under either existing or developing law, and the Referee thus properly awarded attorney's and costs to BOTT under the Frivolous Civil Proceedings Sanctions Act.

Following the trial of the case, the Special Referee awarded BOTT a judgment for \$240,000 in actual damages and attorneys fees, plus punitive damages in the amount of \$480,000. (Order of Judgement dated December 6, 1997). In a subsequent Order, the Special Referee clarified the damages he awarded BOTT as follows:

As to damages, although my [original Order of Judgment] could have been more clearly stated, I awarded the defendants attorney's fees and costs under the South Carolina Frivolous Proceedings statute.<sup>4</sup> On the abuse of process claim, I took the attorney's fees and costs as the measure of damages in awarding punitive damages. (Order dated May 6, 1997).

In other words, on the abuse of process claim, the Special Referee found that BOTT had incurred actual damages of \$240,000 in the form of the attorney's fees it incurred in defending Whitfield's

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<sup>4</sup>S.C. Code Ann. § 15-36-10 to -50 (Law. Co-op. Supp. 1995).

abusive claim. The Special Referee thus award BOTT \$240,000 in actual damages, together with \$480,000 in punitive damages on BOTT's abuse of process counterclaim. The Special Referee also found and concluded that BOTT was entitled to \$240,000 in attorney's fees under the South Carolina Frivolous Proceedings Sanctions Act. The Referee thus awarded BOTT a total of \$240,000 as actual damages and attorney's fees under both the abuse of process and frivolous proceedings claims.<sup>5</sup> Contrary to Whitfield's assertions (Appellant's Brief § VI), the Special Referee did not award BOTT punitive damages under the frivolous proceeding claim, and the Referee's Order states that the punitive damages were awarded only under the abuse of process claim.

**\*II. THE SPECIAL REFEREE PROPERLY ORDERED WHITFIELD TO PAY THE COSTS OF BOTT'S ATTORNEY'S UNDER THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT.**

Describe and distinguish actual, punitive, and attorney's fees damages awarded by Special Referee.....:

Referee did not award punitive damages under FPSA as argued by Whitfield at §VII)

**A. Whitfield had no basis to reasonably believe that his claim was valid under either existing or developing law.**

Facts:

Described each cause of action alleged by Whitfield (easement, dirt from pond, location of pond, and sewer lines)

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<sup>5</sup>Following the hearing on Whitfield's motion to reconsider, the Special Referee awarded BOTT an additional \$12,237.75 in attorney's incurred in defending the motion, for a total actual damages and attorney's fee award of \$286,463.32. (Order dated September 24, 1997).

Abandoned all claims except pond during trial.

BOTT's summary judgment motion showed location of sewer lines, but Whitfield continued to assert claim through trial.

Black letter law that appurtenant drainage easement collapsed as a matter of law.

Jim Pace, the Developer's construction superintendent, testified that Whitfield visited the site at least weekly from the start of construction activity, went over the construction drawings, walked the detention pond excavation and suggested that part of the excavated material be bermed in such a manner as to obstruct the view of neighboring warehouses.

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The finding of the Special Referre are supported by the record and should not be disturbed on appeal. ?CITE? ...add footnote re if equitable.....

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Subsequently proposed orders were submitted, but never acted on. After the lapse of considerable time, the judge's clerk was contacted by both counsel, who were informed that the judge was inclined not to grant either order. As a result, counsel decided to request that the case be referred so that the issues could be resolved.

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In view of the contractual obligations contained in the Purchase Option Agreement, the fact that Whitfield testified that he was unaware that the 8 acre detention pond had been placed on his property until three or four years later conflicted with the testimony of Messrs. Fosburg, \_\_\_\_\_, and \_\_\_\_\_, and did not create a relevant issue of fact concerning the legitimacy of his claims. The only issue of fact ever raised in this case was at what time did Whitfield become aware of Developer's construction on the optioned property. His contemporaneous knowledge of the actual construction is relevant only as additional evidence of the frivolousness of his claims.

He contended at trial that he had no knowledge of the construction taking place on the optioned property by Developer until three or four years later. He introduced no corroborating testimony. On the other hand, BOTT elicited testimony from Whitfield to the effect that his office was only several miles from the site and that he visited it from time to time during this period to take Developer's principals to lunch. Additionally,

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Here, Whitfield did not rely upon testimony of any independent witness in pursuit of his claims. The only support of his position was his unsubstantiated, discredited testimony which the Special Master found, in the face of overwhelming evidence, unbelievable. Consequently, the Court concluded that there was no legitimate basis for Whitfield to reasonably believe that a valid cause of action existed.

**III. THE SPECIAL REFEREE PROPERLY AWARDED BOTT DAMAGES ON ITS COUNTERCLAIM FOR ABUSE OF PROCESS ON THE BASIS THAT WHITFIELD FILED AND MAINTAINED THIS LAWSUIT FOR THE IMPROPER ULTERIOR PURPOSE OF COERCING THE BANK INTO CONVEYING AN OUTPARCEL OF PROPERTY TO HIM AND PARTICIPATING IN THE COMPLETION OF PAVING LINCOLN BOULEVARD.**

The leading South Carolina case on abuse of process is Huggins v. Winn Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), affirmed \_\_\_\_ S.C. \_\_\_\_, 166 S.E.2d 297 (1969). In this case, the cause of action for abuse of process was defined as follows:

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purposes, and second, a wilful act in the use

of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and, there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. 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 of any formal use of the process itself, which constitutes the tort.

(emphasis added).

Id. at \_\_\_\_, 153 S.E.2d at 694. In other words, "[I]f the suit is brought not to recover on the cause of action stated in the complaint, but to accomplish a purpose for which the process was not designed, there is an abuse of process." 1 Am. Jur. 2d, Abuse of Process § 11 (1994). "[A]buse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect -- the improper use of a regular process." Huggins, \_\_ S.C. at \_\_\_\_, 153 S.E.2d at 695.

Whitfield's actions in this case mirror the above quoted definition and is a classic case of abuse of process. By bringing

this action against BOTT, Whitfield embarked upon a calculated course of legal extortion, not to recover for his obviously bogus claims, for the collateral purpose of coercing BOTT into conveying the 2 acre wetlands parcel to him and participating in the completion of the paving of Lincoln Boulevard. These facts have been found by the Special Referee and are fully supported by the record. This being an action at law, this Court is therefore bound by the findings below. Haines v. American Medical International, Inc., 320 S.C. 316, 465 S.E.2d 112 (Ct.App. 1996).

**A. The filing of this lawsuit constitutes the abuse of process.**

Whitfield contends that the filing of of a complaint can never constitute abuse of process. Rather, it is his position that abuse of process can only arise from taking further legal action once suit is initiated and, hence the Court erred in finding Whitfield's filing of the complaint herein constituted an abuse of process. His position has been expressly rejected by the

S. C. Court of Appeals:

[We disagree with Appellant's substantive assertion that there must be some action by a party after process has been issued for there to be a cause of action for abuse of process. . . .

. . . .

The appellants rely upon language in two cases to support their contention. In Scott v. McCain [275 S.C. 599, 274 S.E.2d 299 (1981)] and Rycroft v. Gaddy, [281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984)], there is language that the focus in the abuse of process action is only improper use of process after it has been issued. [citations omitted] In reviewing these cases in connection with prior and subsequent opinions of the appellate courts of this state, we do not conclude that the basic precept expressed in Huggins has been modified. Rather, we agree with the analysis of a

recognized treatise that cases which indicate an improper act committed before process is issued is insufficient to support an action for abuse of process stand only for the narrower proposition that there must be an overt act and bad purpose alone is insufficient. W. Page Keeton, et. al, Prosser & Keaton on the Law of Torts 898 (5th ed. 1984). Such an analysis is in accord with Scott v. McCain and Rycroft v. Gaddy. In Scott, the Supreme Court held there was no indication of wayward acts seeking collateral advantage. [citation omitted] In Rycroft, the court of appeals found no use of the subpoena as a form of coercion to obtain a collateral advantage. [citations omitted] We do not find the Scott and Rycroft cases to have substantially modified Huggins so that only acts occurring after process has been issued may be considered an abuse of process claim.

Sierra v. Skelton, \_\_\_ S.C. \_\_\_, 414 S.E.2d 169, 172-73 (Ct. App. 1991) (emphasis added).

**B. BOTT's abuse of process counterclaim is not barred by the statute of limitations.**

Whitfield next contends that the Court erred in granting BOTT's motion to amend its answer to insert the abuse of process counterclaim, because the statute of limitations had run at the time of the Court's order granting BOTT's motion to amend. BOTT's abuse of process claim arose out of Whitfield's conduct in regard to the facts out of which this litigation arose. S. C. Rules of Civil Procedure, Rule 15(c) states in pertinent part:

**(c) Relation Back of Amendments. Whenever the claim of defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.**

This rule has been construed as follows:

The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations. See Heirs v. Heirs, 310 S.C. 63, 425 S.E.2d 57 (Ct. App. 1992). The test

to be used in determining whether or not an amendment should be allowed to relate back under Rule 15(c) to the date of the original pleading to avoid the statute of limitations, is found in the language of the Rule; specifically, whether the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading.

Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleadings. [citation omitted]

Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377, 380 (1995).

Whitfield's contention that the Relation Back provision of Rule 15(c) does not apply to situations such as this where the amendment introduces a different or additional claim or cause of action arising out of the same subject matter is without substance. The authority relied on by Whitfield predates both the relevant Federal Rules of Civil Procedure and the controlling S. C. Rules of Civil Procedure. The Wright Millan cite has no application. The abuse of process counterclaim arises out of the identical transactions complained of in the complaint.

C. **Whitfield was not prejudiced by the addition of the abuse of process conflict.**

Whitfield also contends that the Special Referee erred in allowing BOTT to amend its answer to include a counterclaim for abuse of process because he "had no opportunity to prepare a proper defense of the claim." (Initial Brief of Appellant, p.26).

This is incorrect. Whitfield's counsel had previously deposed Mr. Fosburg on that very issue. (June 1996 Order of Special

Referee, p.2) Furthermore, Whitfield admitted at trial that Mr. Fosburg's testimony quoting him was correct. (Trial Transcript, p. 324, l. 2-22) The Special Referee granted Whitfield leave to depose Brian Duran, the other witness concerning Whitfield's coercive behavior, prior to trial. (July 18, 1996 Order of Special Referee, p. \_\_\_\_).

[L]eave to amend a pleading shall be freely given when justice so requires and does not prejudice the other party. S. C. Rules of Civil Procedure, Rule 15(a). The decision of whether to allow a party to amend a pleading rests with the sound discretion of the trial judge. Forester v. Smith and Steel Builders, Inc., 295 S.C. 504, 369 S.E.2d 156, 157 (Ct.App. 1988). Whitfield was granted permission to, and did, depose the two key witnesses on the abuse of process claim prior to trial. Hence, Whitfield was not prejudiced by the amendment and the special referee did not abuse his discretion in authorizing it.

D. **The Special Referee did not abuse his discretion in denying Whitfield's motion to compel an answer to his request to admit.**

Shortly before the trial of this case, Whitfield served a Request to Admit that he had rejected a settlement proposal from BOTB to pave Lincoln Boulevard. The special Referee granted BOTB's motion for \_\_\_\_\_. Immediately after Whitfield had forced the postponement of the trial of this case by having a Special Referee recuse himself, the parties had settlement discussions. The thrust of Whitfield's request to admit was that an offer to pave Lincoln Boulevard was made by BOTB in settlement

of this case and rejected by Whitfield.

A settlement proposal is not admissible as evidence at trial. S. C. Rules of Evidence, Rule 408. Hence, the Special Referee did not err in refusing to compel BOTT to respond to this request to admit.

Since Whitfield has improperly raised this issue, an explanation is appropriate. The case was originally referred with finality to Dana Sinkler, Esquire, as Special Referee, on \_\_\_\_\_, the case was scheduled for trial. The day before BOTT's counsel met with BOTT's vice president responsible for the litigation and BOTT's New York counsel in Charleston to prepare for trial. About 3:00 p.m. that day, Mr. Sinkler informed counsel that he had just learned that his partner had been retained to check the title to the shopping center property by the party contracting to buy it from BOTT. Whitfield's counsel had been informed of this of this fact, and Whitfield insisted that this relationship created a conflict and hence, Mr. Sinkler should recuse himself. Based on Whitfield's demand, he did so.

At this time, BOTT was in the process of merging with another bank and was anxious to have the law suit resolved as soon as possible. When faced with the delay of finding another Special Referee and rescheduling the trial, BOTT's vice-president decided it would be preferable to pay for the paving of Lincoln Boulevard, which Whitfield had always demanded as a condition to settlement, than go through with the merger with the litigation untried. Accordingly, counsel was instructed to make an offer of BOTT's

counsel that BOTT would pay for the paving of Lincoln Boulevard in exchange for the dismissal of the litigation. This information was given to Whitfield's counsel the next day. Both counsel assumed that this offer would resolve the dispute. Several days later, however, Whitfield's counsel called and, in an apologetic tone, informed BOTT's counsel that Whitfield was now demanding that BOTT not only pay for the cost of paving the road, but also to reimburse him for approximately \$50,000 of attorney's fees incurred by him in this litigation. BOTT refused the counteroffer and Louis Condon, Esquire, was selected as Special Referee. The matter then proceeded to trial.

Whitfield's conduct in rejecting this settlement offer was consistent with his conduct throughout the litigation. Just as he did with Associates in trying to increase his advantage in having Lincoln Boulevard paved, he did the same in relation to BOTT's settlement offer; if a demand is made and accepted, the demand was too low. Hence, up the ante and attempt to renegotiate from that point. Whitfield's rejection of BOTT's demand was not evidence that the institution of this action was not for the ulterior purpose of coercing BOTT into conveying the Wetlands parcel to him and participating in the paving of Lincoln Boulevard. Rather, it is evidence of his negotiating style making a demand which if accepted, is rejected and replaced with a greater one.

**E. The Special Referee properly awarded BOTT actual and punitive damages on its counterclaim for abuse of process.**

OUTLINE:

NOMINAL ACTUAL DAMAGES ARE PRESUMED

ATTORNEY'S FEES ARE PROPERLY RECOVERABLE AS ACTUAL DAMAGES IN AN ABUSE OF PROCESS CLAIM.

PUNITIVES THUS SUPPORTED BY ACTUAL.

As stated in the Order of Judgment, the cases of Patterson v. Bogan, 261 S.C. 87, 198 S.E.2d 586 (1973) and Jones v. Ingles Supermarket, Inc., 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1987), overruled on other grounds by, O'Neal v. Bowles, \_\_\_ S.C. \_\_\_, 431 S.E.2d 555 (1993), allow the recovery of actual damages, punitive damages, and attorney's fees in a cause of action for abuse of process. At the hearing on its motion for reconsideration, Whitfield asserted that these cases concern an action for malicious prosecution, and thus do not apply to an abuse of process claim. However, "once the tort [of abuse of process] is proved, the damages recoverable are in general much the same and in cases of malicious prosecution." Huggins v. Winn-Dixie Greenville, Inc., \_\_\_ S.C. \_\_\_, 166 S.E.2d 297, 301 (1969) (emphasis added). Moreover, "(d)amages recoverable for abuse of process are compensatory for the natural results of the wrong, and may include recompense for physical or mental injury; expenses; loss of time; and injury to business, property, or financial standing." Id. at \_\_\_, 166 S.E.2d at 301. In Huggins, the court concluded there was no error in submitting an abuse of process claim to the jury for consideration of damages, even though there was no specific proof as to the nature or extent of the damages. Id.

ADD CONCLUSION FOR SECTION  
**IV. THE SPECIAL REFEREE PROPERLY INCLUDED FEES PAID BY BOTT TO**

**ITS NEW YORK COUNSEL FOR SERVICES RENDERED IN DEFENSE OF THIS ACTION IN ITS AWARD OF ATTORNEYS FEES IN THE ABUSE OF PROCESS AND FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACTS.**

The New York firm of Jones Day Reavis & Pogue ("Jones Day") represented BOTT in this case and was actively involved from the time that Whitfield filed this lawsuit in 1992.

**A. Brian Doran, Esquire of Jones Day acted only as a witness and not as an advocate for the Bank at trial.**

Whitfield contends that Mr. Doran violated the South Carolina Rules of Professional Conduct, Rule 3.7(a), when he allegedly acted in the dual capacity of advocate and witness on behalf of BOTT at the trial of this case. (Appellant Br. ) As a threshold matter, Whitfield failed to make any objection when Mr. Doran was called to testify at trial, and thus has failed to preserve this issue for appeal. E.g., SSI Medical Services, Inc. v. Cox, 301 S.E. 493, 392 S.E.2d 79 (1990) (an issue not raised or ruled upon by the trial judge cannot properly be presented to an appellate court). Moreover, Mr. Doran never acted as an advocate at the trial. Although Mr. Doran attended the trial in order to monitor the proceedings on behalf of BOTT, the trial transcript clearly indicates that Mr. Doran never acted as an advocate at the trial. He did not participate in opening or closing arguments, examination of witnesses, or any other matters presented to the Court during the trial. Mr. Doran's only active participation in the trial itself was when called to testify about Mr. Whitfield's ulterior purpose in filing this lawsuit. In fact, in its Brief, Whitfield concedes that the law firm of Nexsen Pruet Jacobs Pollard & Robinson actually conducted the direct and cross

examinations of the witnesses as well as any arguments to the Court. (Appellant's Brief p.47)

**B. Brian Doran participated in settlement discussions directly with Whitfield only at the direction of and consent by Whitfield's counsel.**

Whitfield's attorney, Charles Altman, testified that he had authorized Whitfield to contact Mr. Doran directly to engage in settlement negotiations. (Tr. p. 585 and Aff. of Charles S. Altman). Mr. Altman clearly understood that Mr. Doran was an attorney representing BOTT. He admitted that BOTT's attorneys paid "special attention" to obtaining his permission for Doran and Whitfield to speak directly to each other. (Aff. of Charles S. Altman). Thereafter, Mr. Doran engaged in settlement negotiations with Whitfield in an effort to resolve the lawsuit. Whitfield called Doran one or two times a month for about six months. (Tr. p. 556). At trial, Mr. Doran testified that during the course of the phone calls he received from Whitfield, he formed the opinion that Whitfield was engaged in abuse of process by filing and pursuing this lawsuit. (Tr. p. 562).

Although Whitfield's own attorneys admit they were aware that Whitfield was speaking directly with Mr. Doran, and approved the communication, Whitfield now claims that Mr. Doran violated the South Carolina Rules of Professional Conduct by do so. (Appellant's Brief pp. 47-48) Specifically, Whitfield contends that during the course of the settlement negotiations, Mr. Doran engaged in dishonest conduct and failed to disclose a fact necessary to avoid misleading the other party. (Appellant's Brief

p. \_\_\_) The record is absolutely devoid of any evidence that Mr. Doran either mislead or attempted to deceive Whitfield during the course of their settlement negotiations. Whitfield makes only the vague assertion that Mr. Doran had a duty to disclose his opinion to Whitfield or his attorneys, and that Doran "lured" Whitfield into a false sense of security. (Appellate's Brief p. 49).

In effect, Whitfield now claims that, during the course of their settlement negotiations, Doran had a duty to tell Mr. Whitfield: "I believe you are a liar, you knew and authorized Developer to construct the pond on your property, your lawsuit lacks any merit whatsoever, and you filed this lawsuit for the ulterior and improper purpose of coercing the Bank to conveying an outparcel of property to you." Mr. Doran had no such obligation.

#### **CONCLUSION**

For all of the reasons discussed above, the findings and conclusions of the Special Referee should be affirmed, and the case should be remanded to the Special Referee to award the additional attorney's fees and costs incurred by BOTT in defending this appeal.

Respectfully submitted,

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