OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 24, 2002

ADVANCE SHEET NO. 21

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: The Department of Health and Environmental Control, Petitioner,

In Re: The State, Respondent,

v.

John Doe, Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
H. Dean Hall, Circuit Court Judge

Opinion No. 25486
Heard March 6, 2002 - Filed June 17, 2002

REVERSED IN PART;
AFFIRMED AS MODIFIED IN PART

E. Katherine Wells and Cheryl H. Bullard, both of South Carolina Department of Health and Environmental Control, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor Druanne D. White, of Anderson, for respondent.

Robert A. Gamble, of Anderson, for defendant.

CHIEF JUSTICE TOAL: This Court granted the Department of Health and Environmental Control's ("DHEC") petition for certiorari to review the Court of Appeals' decision in *Ex Parte: the Dep't of Health and Envtl. Control, In re: State v. John Doe*, 339 S.C. 546, 529 S.E.2d 290 (Ct. App. 2000) ("*State v. Doe*").

FACTUAL / PROCEDURAL BACKGROUND

In June 1997, John Doe ("Doe") was indicted by the Anderson County grand jury for criminal sexual conduct with a minor. The State also sought to prove Doe had knowingly exposed his victim to the Human Immunodeficiency Virus ("HIV") in violation of S.C. Code Ann. § 44-29-145 (2002).[1] On October

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[1]The statute provides,

> It is unlawful for a person who *knows* that he is infected with [HIV] to:
> (1) knowingly engage in sexual intercourse, vaginal, anal or oral, with another person without first informing that person of his HIV infection;
> (2) knowingly commit an act of prostitution with

28, 1997, the State filed a motion seeking to compel DHEC to release all of Doe's medical records pertaining to his HIV status, including the names and addresses of any possible chain of custody witnesses and Doe's acknowledgment of counseling form. After a hearing in November 1997, the circuit court ordered the release of the following information: (1) Doe's HIV test results; (2) the names of and access to all possible chain of custody witnesses; and (3) Doe's acknowledgment of counseling form. DHEC appealed those portions of the order directing it to provide the names and addresses of potential witnesses to establish a chain of custody and to release Doe's acknowledgment of counseling form.

The Court of Appeals initially dismissed DHEC's appeal as interlocutory, but then reversed its decision after DHEC's petition for rehearing. Briefs were filed and oral arguments were held on February 9, 2000. The Court of Appeals affirmed, as modified, the circuit court decision. *State v. Doe*, 339 S.C. 546, 529 S.E.2d 290. It reversed the circuit court to the extent that it required DHEC to

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> another person;
> (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids;
> (4) forcibly engage in sexual intercourse, vaginal, anal, or oral without consent of the other person, including one's legal spouse; or
> (5) knowingly share with another person a hypodermic needle, syringe, or both, . . . without first informing that person that the needle . . . has been used by someone infected with HIV.
>
> A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than 10 years.

S.C. Code Ann. § 44-29-145 (2002) (emphasis added).

disclose Doe's counseling records, but otherwise affirmed the circuit court's order directing DHEC to release the names and addresses of all possible chain of custody witnesses.

DHEC raises the following issues on appeal:

> I. Does the exception to the rule against hearsay contained in Rule 803(6) of the South Carolina Rules of Evidence ("SCRE"), allow Doe's HIV test results to be admitted into evidence as business records without the requirement of establishing a chain of custody?
>
> II. May the State obtain names of chain of custody witnesses and DHEC counseling records relating to HIV test results in order to establish Doe *knew* he was HIV positive as required under S.C. Code Ann. § 44-29-145 (2002), the statute imposing criminal sanctions for knowingly exposing another to HIV?

LAW/ANALYSIS

I. Business Records Exception

The State argues it is required by the SCRE to establish a chain of custody to admit Doe's HIV blood test at trial. We disagree. In the alternative, DHEC contends Doe's HIV test can be admitted at trial under the business records exception to the hearsay rule, Rule 803(6), SCRE. We agree.

There is an exception to the rule requiring DHEC to maintain strict confidentiality of its sexually transmitted disease records that all parties agree applies in this case. Section 44-29-135(c) of the South Carolina Code authorizes the release of "medical or epidemiological information to the extent necessary to enforce the provisions of this chapter and related regulations

concerning the control and treatment of sexually transmitted disease . . . ."[2] In this case, the State sought release of Doe's HIV test results and acknowledgment of counseling forms in order to prosecute him under section 44-29-145 of this chapter, for knowingly exposing his victim to HIV.

As the Court of Appeals noted, the legislature did provide confidentiality safeguards for disclosure of this information. Section 44-29-136(A)[3] requires the solicitor or state law enforcement agency to obtain a court order that the request for such information is valid and that there is a compelling need for the information. The authorities sought and received such an order in this case, and DHEC does not challenge the existence of a compelling need for the test results. However, DHEC does challenge that a chain of custody must be established for the test results to be admissible.

This Court has consistently required a chain of custody in criminal prosecutions to prove the samples analyzed are in fact the defendant's. In prosecutions for driving under the influence ("DUI"), "when moving to admit blood alcohol test results, the State must prove a chain of custody of the blood sample from the time its [sic] drawn until it is tested." *State v. Smith*, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997). In another DUI prosecution, this Court found the trial court abused its discretion in admitting the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood was not established. *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992). Similarly, in a wrongful death civil action resulting from a car wreck, the Court of Appeals required a chain of custody for the driver's urinalysis, taken for purposes of showing the defendant had marijuana and cocaine in his system at the time of the accident. *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999).

Although our precedent requires a chain of custody for blood and urine samples taken at the time of an accident or other crime for purposes of

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[2]S.C. Code Ann. § 44-29-135(c) (2002).

[3]S.C. Code Ann. § 44-29-136(A) (2002).

prosecution, HIV test results present a different set of circumstances. The DUI cases cited above involve time-sensitive tests taken at the time of an arrest or an accident that cannot be replicated outside of that time frame. *See Cribb; Stevens*. Although the blood drawn from Cribb was not drawn initially for prosecutorial purposes, it was used for those purposes ultimately, and, therefore, required a chain of custody because Cribb could not re-test his blood alcohol level later and get an accurate result. HIV test results, on the other hand, can be confirmed or proved false by re-testing at a later date, as HIV is a permanent condition, unlike the level of alcohol or drugs in the bloodstream. Based on this distinction, we find the admission of HIV test results is not controlled by the line of cases discussed above dealing with drug and alcohol tests.

Although our Court has not considered whether a chain of custody is necessary to admit evidence of HIV tests for prosecutions under section 44-29-145, courts in other jurisdictions have addressed the issue. The Supreme Court of Missouri held HIV blood tests admissible without a chain of custody under the business records exception in a prosecution for HIV endangerment. *State v. Mahan*, 971 S.W.2d 307 (Mo. 1998). Acknowledging that a chain of custody for blood tests is required in most situations, the Missouri court found certain features of HIV testing to be unique, and differentiated it from other cases in which blood samples are taken from a person at the scene of a crime. *Mahan.* In *Mahan*, the HIV tests were conducted before any charges were filed against the defendant. *Id.* As such, the Missouri court found there was no incentive for anyone to alter a blood sample or to favor a positive over a negative result, as there may be when blood samples are taken in the course of a criminal investigation. *Id.* In addition, the Missouri court noted there were other indicia of reliability, such as an admission by the defendant that he was HIV positive. *Id.*

DHEC argues the case at hand is analogous to *Mahan*, and contends HIV test results are admissible, without a chain of custody, under our business records exception, Rule 803(6), SCRE. We agree that the procedure for admitting business records would afford sufficient indicia of reliability to admit HIV test results without a chain of custody. Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form, of acts, events, conditions, or

diagnoses, are admissible as longs as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510 (Supp. 2001).

Medical records are admitted routinely as business records. *Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793 (1996); *Benchcoff v. Morgan*, 302 S.C. 116, 394 S.E.2d 19 (Ct. App. 1990); *Love v. Garcia*, 634 So.2d 158 (Fla. 1994). The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment. *See Love v. Garcia*. DHEC cites opinions from several other jurisdictions that have admitted laboratory test results as business records, including blood tests, based on the same rationale: if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record. *See Baber v. State*, 775 So. 2d 258 (Fla. 2000) (admitting blood test taken for medical purposes as business record in criminal case); *State v. Garlick*, 545 A.2d 27 (Md. 1988) (admitting hospital laboratory test as business record without extensive foundation when the blood sample was not taken for purposes of litigation, the test was performed in a neutral setting (not a police lab), and no discrepancies were apparent on the face of the record).

We find this rationale persuasive and hold Doe's HIV tests admissible as business records. The blood test was taken by DHEC personnel for the purpose of diagnosis and was relied upon for subsequent diagnosis, treatment, and counseling. Doe was not tested by DHEC for purposes of litigation. In fact, he was tested voluntarily before any charges were pending against him. Further, Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition. A person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody. Further, section 44-29-145 requires that the defendant *knowingly* expose his victim to HIV. To satisfy this knowledge element, the

HIV test results will be accompanied by other evidence, such as a signed acknowledgment of HIV counseling form, or other proof that defendant *knew* he was HIV positive.

In our opinion, HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody.[4] Accordingly, Doe's HIV test was reliable and is admissible as a business record.

II. Counseling Records

The Court of Appeals limited the admission of Doe's medical records to the information relating to chain of custody and Doe's notification of his HIV status. *State v. Doe,* 339 S.C. 546, 529 S.E.2d 290. The Court of Appeals held the State could not obtain Doe's counseling records or his acknowledgment of counseling form. *Id.* The Court of Appeals found this information irrelevant as the statute only requires proof that Doe knew he had HIV, and not that he knew *how* it could be transmitted to other people. *Id.* In our opinion, information in Doe's counseling records could be relevant to proving Doe knew of his HIV status before he allegedly endangered his victim with HIV. Any counseling records showing Doe was advised he had HIV may be obtained from DHEC under section 44-29-135(c) to enforce the provisions of that chapter.

Section 44-29-135(c) permits the release of medical information *to the extent necessary* to enforce the provisions of the chapter. Section 44-29-135 pertains exclusively to confidentiality of records of sexually transmitted diseases; therefore, it contemplates the release of medical records of sexually transmitted diseases *to the extent necessary* to enforce section 44-29-145. Section 44-29-145 requires the person charged with endangerment to have

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[4]We hold that a chain of custody is not necessary for admission of HIV test results, but do not hold that DHEC may withhold names of its employees if testimony by those employees is required to establish that a defendant knew he had HIV under section 44-29-145 as set forth in section II.

knowledge of his HIV status. In our opinion, any DHEC counseling records pertaining to Doe's notification of his HIV status are relevant to proving Doe's requisite knowledge, and, therefore, are admissible. The procedure in section 44-29-136(A) governs when and to whom this information can be released and provides appropriate safeguards for release of this information which were adhered to in this case.

CONCLUSION

In summary, for the foregoing reasons, we **REVERSE** the Court of Appeals' decision to the extent it required a chain of custody and, hold that HIV test results and other relevant medical information in DHEC's custody are admissible as business records without a chain of custody under Rule 803(6), SCRE, for purposes of S.C. Code Ann. § 44-29-145. In addition, we hold that the State may obtain the names of any chain of custody witnesses and DHEC counseling records, including the acknowledgment of counseling form, if necessary to prove a person knew he had HIV and exposed another to HIV in violation of section 44-29-145. Accordingly, we **AFFIRM AS MODIFIED** the remainder of the Court of Appeals opinion.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Ray Matthews, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Darlington County
John H. Waller, Jr., Trial Judge
Edward B. Cottingham, Post-Conviction Judge

Opinion No. 25487
Submitted December 13, 2001 - Filed June 17, 2002

REVERSED

Deputy Chief Attorney Joseph L. Savitz, III, of Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General David Spencer, all of

Columbia, for respondent.

JUSTICE BURNETT: David Ray Matthews ("Matthews") appeals the denial of post-conviction relief ("PCR"). We reverse.

FACTS/PROCEDURAL HISTORY

The State Grand Jury indicted David Ray Matthews ("Matthews") along with twenty-one others for trafficking cocaine in excess of 400 grams.[1] The solicitor, in addition to other errors,[2] vouched for the credibility of a State's witness by stating during her summation:

> Now, you may not have liked Bimbo Hudson. I didn't like Bimbo Hudson. I don't have to like him. All I have to do is determine whether or not he is a credible witness. I don't trust any of these people **until I corroborate their testimony**. And **once I**

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[1] Matthews and ten of his co-conspirators were tried together. A jury convicted seven of the co-conspirators of the indicted charge, convicted two of lesser offenses and acquitted two. The Court of Appeals reversed one conviction and affirmed six, including Matthews. State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995) (Barroso I). The six petitioned for a writ of certiorari to this Court.

Subsequently, Matthews and one co-defendant, moved to withdraw their petitions to pursue PCR. After warning the two of the dangers of withdrawing the petitions, this Court granted the motions. We subsequently granted certiorari to the remaining petitions and reversed the convictions. State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) (Barroso II).

[2] See Barroso II, supra. The solicitor improperly introduced a marijuana conspiracy involving several of the defendants throughout the trial. In her summation, the solicitor also made references to various unrelated crimes without objection from Matthew's counsel.

> **corroborate their testimony**, yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

(emphasis added). A jury convicted Matthews of the indicted charge. After unsuccessfully challenging his conviction on appeal, he instituted this PCR.

At the PCR hearing, Matthews' trial counsel testified he believed the remarks were improper but felt continual objections would adversely affect his client. The PCR judge denied relief finding Matthews failed to carry his burden of proof that counsel rendered ineffective assistance.

ANALYSIS

Matthews argues counsel rendered ineffective assistance by failing to object to solicitor's comments vouching for the credibility of the State's witness. We agree.

The applicant bears the burden to prove allegations in a PCR. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). To prove ineffective assistance of counsel, the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, supra.

The State argues counsel's failure to object was valid trial strategy. Counsel, at the PCR hearing, testified he did not object because he did not want the trial judge to scold him in front of the jury or give the prosecution any more time to make their closing. The record does reflect the trial judge admonished counsel for wrongfully objecting during the solicitor's summation. The trial judge also granted additional time to

solicitor's closing to compensate for the interruption.

Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. See Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(Counsel's failure to object to prejudicial hearsay because he did not want to "confuse or upset the jury" was not valid strategy); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992)(Trial counsel's failure to object to judge's comments inviting jury to prematurely discuss the case was not "strategic" where error of law involved and such comments are inherently prejudicial).

The solicitor's statement is improper. A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. Id. It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. Id.

The solicitor's summation led the jury to believe the government corroborated the witness' testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.

Counsel's failure to object was incorrect and prejudicial. The mass drug conspiracy trial created an environment where the jury faced an

overwhelming number of defendants, attorneys, witnesses, and evidence.[3] This Court, in the related case of Barroso II, supra, noted the evidence against Matthews' co-defendants was far from overwhelming, resting entirely on testimony of individuals, all higher in the cocaine conspiracy hierarchy, who testified for the State for reduced sentences. Morever, the State erroneously introduced voluminous testimony of other prior bad acts which served as a basis for this Court overturning the co-defendants' convictions. See Barroso II, supra.

Counsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness. His silence compounded the duty of a jury faced with a confusing, mass trial characterized by improperly admitted evidence. See id. We believe Matthews has carried his burden to establish prejudice by counsel's failure to object. For these reasons we **REVERSE**.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. WALLER, J., not participating.

[3] This case occurred before State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993), where this Court cautioned against mass drug conspiracy trials.

The Supreme Court of South Carolina

O R D E R

By Order dated January 9, 2002, the attached amendments to the the South Carolina Rules of Civil Procedure were adopted and were submitted to the Chairmen of the House and Senate Judiciary Committees on January 25, 2002. The amendments have not been disapproved by the General Assembly in the manner provided by Article V, § 4A, of the South Carolina Constitution. Accordingly, the amendments shall become effective on September 1, 2002.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 18, 2002

AMENDMENTS TO THE
SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

1. The second sentence of Rule 45(b)(1) is amended to read:

> Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j), and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance of $25.00 and the mileage allowed by law for official travel of State officers and employees.

2. The second sentence of Rule 45(e), SCRCP, is amended to read:

> An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend a deposition, permit an inspection, or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A); or if served without an adequate time to respond as provided in Rule 45(b)(1); or if service is made upon an individual under Rule 4(d)(1) and the individual did not receive or acknowledge the subpoena.

3. The following Note is added to Rule 45, SCRCP:

Note to 2002 Amendment

> The first 2002 amendment amends Rule 45(b)(1) to permit service of subpoenas by the same method as used to serve a summons and complaint. First, in addition to in hand service of the subpoena, service on an individual could be made by leaving the subpoena at the person's home or usual place of abode with a person of suitable age and discretion then residing there as provided in Rule 4(d)(1). Second, a subpoena could be served on an individual, a corporation, or a partnership by registered or certified mail, return receipt requested and delivery restricted to

the addressee under Rule 4(d)(8). In addition, the person or the person's attorney may accept service under Rule 4(j).

The second 2002 amendment amends Rule 45(e), to make clear the circumstances when service is effective and may be enforced through the contempt power.

4. The first two sentences of Rule 53 (b), SCRCP, are replaced with the following:

> In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

5. The following note is added after Rule 53:

Note to 2002 Amendment

The 2002 amendment permits referral of foreclosure cases to the master-in-equity by order of the clerk of court. If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court.

The Supreme Court of South Carolina

In re: Amendments to Rule 404, SCACR.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we amend Rule 404, South Carolina Appellate Court Rules, which addresses admission *pro hac vice*, to set forth with more specificity which attorneys can appear *pro hac vice*, to require attorneys seeking admission *pro hac vice* to file a detailed written application and pay a $100 fee, to state that attorneys appearing *pro hac vice* are subject to the jurisdiction of the South Carolina courts with respect to South Carolina law governing the conduct of attorneys, to set forth the duties of the South Carolina attorney of record, and to require the South Carolina Supreme Court Office of Bar Admissions to certify that an application and fee has been received and to maintain a record of all

admissions *pro hac vice*. The amendments shall be effective July 1, 2002. Rule 404, as amended, and the application form, is attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
June 18, 2002

RULE 404
ADMISSION PRO HAC VICE

(a) Admission. Upon written application, an attorney who is not admitted to practice law in South Carolina and who is admitted and authorized to practice law in the highest court of another state or the District of Columbia may appear *pro hac vice* in any action or proceeding before a court of this state if an attorney admitted to practice law in South Carolina is associated as attorney of record.

(b) Prohibitions on Admission. An attorney may not appear *pro hac vice* if the attorney is a resident of South Carolina, is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina, unless the attorney has filed an application for admission under Rule 402, SCACR.

(c) Application for Admission. An attorney desiring to appear *pro hac vice* shall file with the court in which the matter is pending, prior to making an appearance, an Application for Admission Pro Hac Vice which contains the following information:

(1) the applicant=s residence and office addresses;

(2) the state and federal courts to which the applicant has been admitted to practice and the dates of admission;

(3) whether the applicant is a member in good standing in those courts, and a certificate of good standing of the Bar of the highest court of the state or the District of Columbia where the applicant regularly practices law;

(4) whether the applicant is currently suspended or disbarred in any court, and if so, a description of the circumstances under which the suspension or disbarment occurred;

(5) whether the applicant has been formally notified of any complaints pending before a disciplinary agency in any other jurisdiction and, if so, provide a detailed description of the nature and status of any pending disciplinary complaints;

(6) an identification of all law firms with which the applicant is associated and a description of all the applicant's pending *pro hac vice* appearances in South Carolina;

(7) the names of each case in South Carolina in which the applicant has filed an application to appear as counsel *pro hac vice*, the date of each application, and whether it was granted;

(8) the name, address, and telephone number of the active member(s) of the South Carolina Bar who is (are) the attorney(s) of record; and

(9) an affirmation that the applicant will comply with the applicable statutes, law and procedural rules of the State of South Carolina; be familiar with and comply with the South Carolina Rules of Professional Conduct; and submit to the jurisdiction of the South Carolina courts and the South Carolina disciplinary process.

The court in its discretion may order a hearing on the application and shall enter an order granting or refusing the application. If the application is refused, the court shall state its reasons.

(d) Fee; Record of Appearances. Each time an application under this rule is made, the attorney seeking to appear *pro hac vice* shall provide a copy of the application to the South Carolina Supreme Court Office of Bar Admissions accompanied by a $100 fee. Upon receipt of the application, the Clerk of the South Carolina Supreme Court shall certify to the court in which a *pro hac vice* appearance has been requested that the fee has been received. The Office of Bar Admissions shall maintain a record of all *pro hac vice* applications as a public record.

(e) Conduct of Attorney Appearing *Pro Hac Vice*. An attorney appearing *pro hac vice* is subject to the jurisdiction of the South Carolina courts with respect to South Carolina law governing the conduct of attorneys to the same extent as an attorney admitted to practice in the courts of this state. The attorney shall comply with the South Carolina Rules of Professional Conduct and is subject to the disciplinary jurisdiction of the Supreme Court of South Carolina. The court in which an attorney is appearing *pro hac vice* or the Supreme Court of South Carolina may, for violations of South Carolina law, the South Carolina Rules of Professional Conduct, or orders of the court, withdraw its permission for an attorney to appear *pro hac vice*.

(f) Responsibilities of Attorney of Record. The South Carolina attorney of record shall at all times be prepared to go forward with the case; sign all papers subsequently filed; and attend all subsequent proceedings in the action, unless the court specifically excuses the South Carolina attorney of record from attendance.

VERIFIED APPLICATION FOR ADMISSION *PRO HAC VICE*
IN THE STATE OF SOUTH CAROLINA

_____,
Plaintiff

_____ _____
Case No. Court

vs.

Mailing Address of Court: _____

_____ _____
Defendant

Comes now_____, applicant herein, and respectfully represents the following:

1. Applicant resides at_____
Street Address

_____, _____,_____, _____
City County State Zip Code

_____, _____
Telephone Social Security Number

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of)

_____, with offices at_____,
Street Address

_____, _____, _____ , _____
City County State Zip Code

_____, _____
Telephone Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by _____ to provide legal representation in connection with the above case now pending before the above named court of the State of South Carolina.

4. Since_____ of _____, applicant has been, and presently is, a member in good standing of the bar of the highest court of the District of Columbia or the State of_____ where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:	Date Admitted:
_____	_____
_____	_____
_____	_____
_____	_____

Applicant is presently a member in good standing of the bars of those courts listed above, except as listed below: (List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

_____

_____

_____

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

_____

_____

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

_____

_____

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

_____

_____

9. Local counsel of record associated with applicant in this case is _____, of the _____ _____law firm, which has offices at _____,
Street Address

_____, _____, South Carolina.
County City

_____, _____.
Zip Code Telephone

If applicable list all other firms/attorneys you are associated with in this matter

_____

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

_____

_____

_____

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.

DATED this _____ day of _____, 20____.

_____
APPLICANT

VERIFICATION

STATE OF _____)

COUNTY OF **_____)**

I, _____ , do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter; that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

_____
APPLICANT/AFFIANT

Subscribed and sworn to before me this _____ day of _____, 20__.

_____

Notary Public for the State of **_____**

My Commission Expires: **_____**

LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

DATED this_____ day of _____, 20__.

_____
LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by mail addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the $100 filing fee payable to the South Carolina Supreme Court on this _____day of _____, 20__.

_____
APPLICANT/AFFIANT

The Supreme Court of South Carolina

In re: Amendments to Rule 405, Limited Certificate to Practice Law in South Carolina, SCACR.

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, the following amendments are made to Rule 405, SCACR:

1. Rule 405(b)(3)(ii) is amended to read:

(ii) a copy of the certificate is presented to the court or other tribunal.

2. Rule 405(l) and (m) are amended to read:

(l) An attorney granted a limited certificate to practice law under this Rule may, subject to the limitations contained in section (m) below, provide *pro bono* legal services if the attorney:

(1) is associated with an approved legal services organization which receives, or is eligible to receive, funds from the Legal Services Corporation or is working on a case or project through the South Carolina Bar Pro Bono Program;

(2) performs all activities authorized by this Rule under

the supervision of an attorney (Supervising Attorney) who is an active member of the South Carolina Bar employed by, or participating as a volunteer for, the legal services organization or the South Carolina Bar Pro Bono Program and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the attorney participates; and

(3) neither asks for nor receives compensation of any kind for the legal services provided to the client.

(m) In representing a client through an approved legal services organization or the South Carolina Bar Pro Bono Program, the attorney may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the Supervising Attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the Supervising Attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

These amendments shall be effective July 1, 2002.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 18, 2002

The Supreme Court of South Carolina

In the Matter of Warren
Stephen Curtis, Respondent.

O R D E R

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, because he has been charged with a serious crime, specifically, possession with intent to distribute cocaine, distribution of cocaine and distribution of cocaine within one-half mile of a school, and because he could pose a substantial threat of serious harm to the public and the administration of justice.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina
June 17, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry C. Chambers,

Respondent,

v.

Sumner Pingree, Jr.,

Appellant.

Appeal From Beaufort County
Raymond E. McKay, Jr., Special Referee

Opinion No. 3518
Heard January 8, 2002 - Filed June 17, 2002

REVERSED IN PART AND MODIFIED IN PART

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, both of Richardson, Plowden, Carpenter & Robinson, of Columbia; James H. Moss and H. Fred Kuhn, Jr., both of Moss & Kuhn, of Beaufort, for appellant.

A. Parker Barnes, Jr., of Beaufort; and James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for respondent.

STILWELL, J.: Henry Chambers filed this action for a real estate commission, and Sumner Pingree, Jr. counterclaimed for recovery on a promissory note. The special referee found Chambers was entitled to the commission and Pingree was entitled to attorney's fees, though nothing on the promissory note. Pingree raises three issues on appeal. We reverse in part and modify in part.

FACTUAL/PROCEDURAL BACKGROUND

Pingree owned a 5,300 acre tract of land on the Beaufort County coast know as Brays Island. He decided to sell the entire tract, and granted Chambers, a real estate broker, an exclusive agency agreement with a minimum sales price of $12,000,000.[1] The agreement provided Chambers would receive a commission of 9% of the sale proceeds, or $1,080,000. Special Stipulation 6 of the agreement provided the commission "of 9% herein provided for shall be paid only if the Sale of the Property is consummated, and only out of the proceeds of such Sale." During the exclusive agency agreement, Pingree decided to develop the property himself with Chambers' help.[2] Pingree created Brays Island Company, Inc. (Company), wholly owned by Pingree, and conveyed the property to Company for development. The plan was to create 325 circular one-acre residential lots, with the remaining acreage conveyed to the property owners' association, the Colony Club, for outdoor pursuits, including equestrian sports, dog kennels, a gun club, a shooting course, a private golf course, and a multi-million dollar clubhouse.

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[1] A more detailed account of the underlying facts may be found in this court's prior opinion. Chambers v. Pingree, 334 S.C. 349, 513 S.E.2d 369 (Ct. App. 1999).

[2] Chambers was in charge of marketing and was instrumental in obtaining necessary permits. Pingree gifted one lot to Chambers independent of the brokerage agreement, which he later repurchased at Chambers' request.

In October 1988, Chambers and Pingree executed a "Memorandum of Agreement" (October Agreement) in which Pingree acknowledged owing Chambers a commission of $1,080,000 as a result of the conveyance of the property from Pingree to Company. The agreement further provided Pingree personally would not receive any money from Company for payment of the purchase price of the property until Company sold lots. Because Pingree expended $3,000,000 of his own money in developing Brays Island, the agreement provided:

> [a]fter Pingree has recovered from the sale of lots his development expenditures and the agreed interest thereon, he will pay the commission to Chambers as he receives money from the sale of lots, such payments to be at the rate of 9%, which is the relationship of $1,080,000 to the $12,000,000 sale price. These commissions will continue to be paid on a quarterly basis from Pingree's cash receipts from lot sales until Chambers has received the full $1,080,000.

Pursuant to the agreement, Chambers also received a prepaid commission of $38,000. The closing took place on January 10, 1989. The total purchase price was $12,000,000, and as part of the purchase agreement, Company paid off the $1,301,741.67 mortgage encumbering the property. Pingree paid Chambers a commission equaling 9% of the mortgage payoff, or $117,156.75.

In February 1989, the parties executed another "Memorandum of Agreement" (February Agreement) in which they agreed that the unpaid portion of the $1,080,000 would begin to draw interest at a rate of 10% per annum. The agreement provided the commission would become payable "only if, as and when Pingree is actually paid for the Plantation by the Company." It specifically provided that Pingree would have no obligation to pay the commission except from payments actually received by him "on account of such Sales Price." The parties agreed that since a development loan was outstanding to South Carolina National Bank (SCN), and to comply with SCN's requirements, Pingree would only be paid $40,000 from the sale of each lot.

In May 1989, Chambers executed a promissory note payable to Pingree for $250,000. The note provided that interest would accrue at 10% per annum and payment in full was due by January 2, 1995. The note further provided that all interest payments due by Pingree to Chambers on his commission would be applied to the payment of the note as the interest became payable. Later, an additional $80,000 was added to the note, increasing the amount due to $330,000.

Nearly ninety-four lots were sold while Chambers was broker-in-charge from January 1989 to April 1992. During the year and a half after Pingree took over the management of lot sales, six more lots were sold. By January 1993, Pingree had been paid over $7,400,000 toward the purchase price and Chambers had been paid $462,356.75 toward his original commission. December 29, 1992 was the last date Company paid Pingree for the sale of lots, and Pingree paid Chambers his final commission on January 7, 1993. As lot sales began to slow, the enormous expenses of developing and operating the amenities began to mount. By 1993, Company owed SCN nearly $3,700,000 on the development loan. Pingree, as guarantor of the loan, sought a single buyer for the remaining lots. In July 1993, Pingree sent letters to homeowners informing them of the financial difficulties Company was experiencing and assuring them that he would not seek an auction or a "fire sale" of the remaining lots because it would adversely affect property values. In response, a group of homeowners formed a limited partnership called Shelbray Associates to purchase 180 of the remaining 195 lots from Company. The total consideration for the sale of the 180 lots was approximately $4,800,000. However, Pingree received the consideration in the form of loan forgiveness and the assumption of tax obligations. Pingree did not receive cash for the purchase.

Chambers sued Pingree to recover the remainder of his commission, and Pingree counterclaimed for repayment of the $330,000 promissory note. The court granted Pingree's motion for summary judgment on his counterclaim, but this court reversed on appeal. Chambers v. Pingree, 334 S.C. 349, 513 S.E.2d 369 (1999). On remand, the special referee ruled Chambers was entitled to the remaining unpaid portion of his commission plus accrued interest for a total of $916,500.93. The special referee further found that although Chambers owed

Pingree on the promissory note, the interest accruing on the unpaid commission had paid off the balance of the promissory note by December 1995. He found Pingree was entitled to attorney's fees of $17,000 for pursuing payment of the promissory note and applied this amount as a setoff to Chambers' commission.

STANDARD OF REVIEW

An action for a broker's commission is an action at law. See United Farm Agency v. Malanuk, 284 S.C. 382, 383, 325 S.E.2d 544, 545 (1985). An action to recover on a promissory note is also an action at law. See Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 95, 394 S.E.2d 5, 6 (Ct. App. 1990). In law actions tried before a special referee, our review is limited to correcting errors of law, and we are required to uphold the special referee's findings of fact unless there is no evidence to support it. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference. Cf. Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 126, 74 S.E.2d 575, 578 (1953) (where meaning of words in contract presented a purely legal question, the appellate court drew its own conclusions without particular deference to the judge below).

LAW/ANALYSIS

I. Commission Agreement

Pingree first argues the special referee erred in finding Chambers was entitled to the unpaid portion of his broker's commission. We agree.

Chambers argues the agreement only affected the timing of commission payments, not whether they were due. The special referee found the February agreement created a condition precedent to payment of the broker's commission. Neither party has appealed this finding, and it is therefore the law of the case. Charleston Lumber Co. v. Miller, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (an unchallenged ruling, right or wrong, is the law of the case). Thus,

the sole issue before us is whether Pingree prevented or hindered the occurrence of the condition precedent.

The special referee found Pingree's decision to assign to Shelbray his note and mortgage from Company and to receive forgiveness on his note to SCN as compensation for the sale of the remaining lots to Shelbray prevented his receipt of cash for the sale of the remaining lots. Thus, the special referee reasoned that by preventing the occurrence of the condition precedent to Chambers' right to collect his commission, Pingree effectively or impliedly waived or excused the occurrence of the condition. The special referee based his findings on the monetary benefits Pingree received from the transaction: (1) Shelbray purchased from SCN and then forgave Pingree's $3,750,000 note; (2) Pingree realized a capital loss of $4,670,000 for income tax purposes when he conveyed his purchase money note and mortgage from Company to Shelbray and then used the loss to offset a capital gain of $3,490,000 from an unrelated sale of low-basis stock; and (3) Company was able to retain fifteen unencumbered lots.[3] Because Pingree rejected the possibility of an auction of the remaining lots instead of the sale to Shelbray and voluntarily relinquished his mortgage on the fifteen lots retained by Company, the special referee concluded Pingree prevented the receipt of cash for the lots. Because the special referee found Pingree waived the condition precedent, the nonoccurrence of the condition precedent was excused.

Generally, a broker is entitled to a commission "when he procures a purchaser who is accepted by the owner of the property and with whom the latter enters into a valid and enforceable contract." Champion v. Whaley, 280 S.C. 116, 119, 311 S.E.2d 404, 406 (Ct. App. 1984). A broker and the owner of the property may "'make the payment of the broker's commission dependent upon the full performance of the contract of purchase or sale, or postpone the payment of the commission, or make the broker's right to the commission

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[3] Company eventually sold the lots for $1,913,381. These proceeds were used to pay legitimate corporate debts, and Pingree did not personally receive any proceeds from these sales.

contingent upon the happening of future events.'" Hamrick at 124, 74 S.E.2d at 577. A broker assumes the risk of the purchaser's nonperformance where the purchaser's performance is a condition precedent to the owner's duty to pay the broker's commission. Champion, 280 S.C. at 119, 311 S.E.2d at 406. A broker suing to recover his commission has the burden of proving all the conditions precedent to his right to performance have occurred. Champion, 280 S.C. at 120, 311 S.E.2d at 406. Where a seller prevents or hinders the condition from occurring, the lack of occurrence of the condition precedent is excused and the seller's obligation to pay the broker's commission becomes unconditional. Id.

In Champion, a broker had an exclusive agency with the sellers of a house which provided that the broker would be entitled to his commission if he sold the house. The broker presented the sellers with an acceptable purchaser, and a contract of sale was executed which was conditioned upon the purchaser obtaining a loan. The sellers subsequently sold the house to a third party who refused to allow appraisers for the original purchaser into the home. Because the home could not be appraised, the original purchaser did not obtain a loan and the original contract of sale became void. The sellers argued the broker was not entitled to his commission because the condition precedent, completing the sale, did not occur.

> It is sufficient for the plaintiff to present evidence that the defendant's prevention "substantially contributed" to the nonoccurrence of the condition. Once he has made such proof, the burden shifts to the defendant. If the defendant can show that the condition would not have occurred regardless of the prevention, then the prevention did not contribute materially to its nonoccurrence and the condition is not excused.

Champion, 280 S.C. at 122, 311 S.E.2d at 407 (citation omitted). Here, the special referee improperly shifted the burden of proof to Pingree, citing Champion for the proposition that he created "uncertainty . . . by his wrongdoing." As noted above, Chambers bears the burden of proving Pingree's actions substantially contributed to the prevention of the occurrence of the condition precedent. Only after Chambers satisfied this requirement would

Pingree be required to defend his actions and prove that the condition precedent would have occurred regardless.

There is no question the condition precedent did not occur. Although Pingree received benefits in the form of the SCN loan forgiveness from Company's sale of the lots to Shelbray, this did not amount to actual proceeds for payment on the sale of the lots. Company was primarily responsible on the loan, which was used to pay the substantial upkeep costs of the amenities, and Pingree was only secondarily liable as a guarantor. Thus, while Pingree obtained some benefit by being relieved of contingent personal liability, the benefit inured primarily to Company. Because Pingree's personal liability would be triggered only if Company failed to make lot sales, the very event which would result in an actual financial benefit to Pingree would also serve to defeat the condition precedent to payment of Chambers' commission.

Further, there is no evidence in the record to support the special referee's finding that Pingree intentionally conveyed his purchase money note and mortgage to Shelbray so that he would receive a tax loss to offset capital gains. Pingree testified that the purchase money mortgage he waived had no real value, and Shelbray required the assignment to close the deal and obtain clear title. The tax loss does not count as proceeds from the sale of lots. After Pingree realized the sale would result in a sizable capital loss, he decided to use the opportunity to sell stock in which he had a low basis and from which he would realize a substantial capital gain. Good tax planning does not make this any less of a loss or any more of a benefit. Neither party envisioned this scenario in drafting the agreement, and Pingree's primary purpose was not to defeat Chambers' commission. That is merely a collateral effect, on which the broker bore the risk.

Finally, allowing Company to retain the fifteen lots free and clear of any mortgage was part of the business transaction between Company and Shelbray which did not amount to proceeds to Pingree. The fifteen lots were retained by Company at Shelbray's insistence to prevent any successful claim by Company's creditors that the transaction was fraudulent and thereby set aside

the sale or reach Shelbray's assets. Additionally, the transaction allowed Company to retain enough liquidity to pay off its remaining debts.

For the condition precedent to be waived or excused, the burden was on Chambers to show that the sale of lots to Shelbray "substantially contributed" to the nonoccurrence of that condition. Chambers failed to meet this burden. We do not find Pingree's actions "substantially contributed" to the nonoccurrence of the condition precedent. The decision to sell to Shelbray was clearly a valid business decision and prevented the imminent possibility of bankruptcy. Champion clearly implies that the prevention of the condition precedent must be intentional or entail wrongdoing. There is no such wrongdoing here. Whereas the sellers in Champion deliberately repudiated their contract to pay a commission to the broker by preventing the fulfillment of the contract, Pingree continued to abide by the commission agreement by paying Chambers each time Pingree received proceeds from the sale of lots. It was only after the lots failed to sell that Pingree, as chairman for Company, decided to sell the remaining lots to Shelbray.

We decline to impose an obligation on Pingree to do everything in his power to maximize Chambers' commission. In our view, the law does not so require. He does not have to put all his assets at risk to assure Chambers is paid his commission. The special referee found that Pingree's disposition was reasonable and preserved his vision for the development. We find no indication of bad faith. The law does not require that the highest possible price be Pingree's exclusive or even primary concern. The seller is not required to put the broker's interests ahead of his own. In a case with virtually identical facts, another court reached this same conclusion. See Brown v. Watt, 63 Cal. Rptr. 815 (Cal. Dist. Ct. App., 1967) (Where agreement provided broker would receive commission only as and when lots were sold, no further commissions were due where broker failed to prove condition precedent occurred or was excused and unanticipated rapid decline of local housing market was beyond control of either party.). We find the good faith decision to prevent the bankruptcy of Company and to attain Pingree's vision for the completion of this unique development was a valid business decision and did not amount to interference in the occurrence of the condition precedent.

Breach of contract is an action at law, and we must adopt the special referee's findings of fact if they are supported by any evidence. However, where the wrong legal conclusions are drawn or the law misapplied, we are obligated under our standard of review to correct such errors.[4] These are two sophisticated businessmen, each capable of protecting his own interests. Chambers assumed the risk that Company would be unable to sell the lots, thus preventing Pingree from receiving payments from the proceeds and preventing Chambers from receiving further commissions. Because we find Pingree did not purposefully interfere with or avoid Chambers' commission, we reverse the judgment in favor of Chambers.

II. Promissory Note

Pingree argues the special referee erred in finding Chambers owed nothing on the promissory note. We agree.

The terms of the promissory note specified that the interest payments owed to Chambers on his commission would be applied to the payment of the promissory note "as that interest became payable." Otherwise, payment on the promissory note was due in full by January 2, 1995. The promissory note also provided that Pingree would be entitled to recover attorney's fees if he had to seek the services of an attorney to collect payment on the promissory note. The special referee awarded Pingree $17,000 as attorney's fees, but used that sum as an offset against the amount Chambers was awarded against Pingree.

The special referee calculated the balance remaining on the promissory note was $119,793.01 as of January 7, 1993, when the last commission payment was made by Pingree to Chambers. The special referee then had to determine,

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[4] Normally we are limited by our scope of review to correcting errors of law. However, in the special referee's order, he noted that some items listed in the findings of fact may be better considered conclusions of law. Where the special referee made conclusions of law in his findings of fact, we have so construed them.

consonant with his other rulings, when that promissory note would have been paid off by applying accrued but unpaid interest due on the remaining commission. Since we have determined that no future commission payments were due, that is unnecessary. We agree with the special referee that interest payments were due as the commission payments were due. Since no commission payments were due after January 7, 1993, no interest payments were due.

The parties do not dispute that the only payments made on the note were the interest applied by virtue of commissions paid by Pingree to Chambers. Because the commission interest only became payable on the promissory note as Chambers received commission payments, the amount due on the promissory note as of January 7, 1993, $119,793.01, is still owed by Chambers to Pingree, plus accrued interest from that date, together with the attorney's fees awarded by the special referee. We accordingly modify the special referee's order to award judgment to Pingree in such amount.

REVERSED IN PART AND MODIFIED IN PART.[5]

CURETON and SHULER, JJ., concur.

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[5] Pingree's remaining issue on appeal concerns the admissibility of a legal research memo produced in discovery to show Chambers' understanding of when the commission was due under the parties' agreement. Because we reverse, we decline to reach this issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Malcolm D. Jeffcoat,

Appellant.

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 3519
Heard January 10, 2002 - Filed June 17, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorneys General Toyya Brawley Gray and Christie Newman

Barrett, all of Columbia; Solicitor Donald V. Myers and Deputy Solicitor C. Dayton Riddle, both of Lexington, for respondent.

SHULER, J.: Malcolm Jeffcoat appeals his convictions on four counts each of criminal sexual conduct with a minor in the first degree and committing a lewd act upon a minor, arguing the trial court erred in admitting into evidence prior consistent statements of the victim. We affirm.

FACTS/PROCEDURAL HISTORY

The victim in this case is Malcolm Jeffcoat's step-granddaughter by virtue of his marriage to her paternal grandmother. Victim visited the Jeffcoats often, spending two or three Saturdays a month at their home and occasionally accompanying them on camping trips.

At some point in early 1997, Victim's mother noticed that when Victim returned from visiting the Jeffcoats she was irritable and "sassy," which did not reflect the child's normal personality. Victim also began exhibiting odd behavior, such as licking herself and the walls and windows of the family's home. According to Mother, one evening she discovered Victim, then just three years old, "masturbating with [her] baby doll." Concerned, Mother asked Victim about the incident and Victim eventually told her Jeffcoat had "put his weenie on her toodie."

Mother contacted Victim's pediatrician the next day, and two days later the family went to a local center for sexually abused children. The center's staff notified authorities and scheduled appointments for Victim with Margaret Taylor, a post-trauma therapist, and Dr. Dwight Reynolds, a pediatrician. Among other things, Victim told Taylor Jeffcoat had "hurt [her] hiney with his weenie" and "put his weenie in [her] mouth." Upon examination of Victim, Reynolds noted an unusual lack of a gag reflex and both anal and vaginal physical abnormalities "indicative of recurrent penetration."

In March 1999, a Lexington County grand jury indicted Jeffcoat on five counts of criminal sexual conduct with a minor, first degree, and five counts of committing a lewd act on a minor. At the time of trial in September 1999, Victim was five years old. She testified, describing the incidents of abuse and naming Jeffcoat as the perpetrator. Following Victim's testimony, Mother and then Taylor, Victim's therapist, testified. Over defense objections and pursuant to Rule 801(d)(1)(B), SCRE, both repeated Victim's statements describing the abuse by Jeffcoat.

A jury convicted Jeffcoat on four counts of each offense, and the trial court sentenced him to twenty years imprisonment on each criminal sexual conduct charge and ten years on each charge of committing a lewd act upon a minor. This appeal followed.

LAW/ANALYSIS

The sole issue on appeal is whether the trial court erred in permitting Mother and Taylor to testify in detail about Victim's out-of-court statements regarding the alleged abuse, thereby improperly bolstering Victim's credibility with inadmissible hearsay testimony.

In South Carolina, a sexual assault victim's prior consistent statements limited to the time and place of the alleged incident are not hearsay if the victim testifies at trial and is subject to cross-examination. Rule 801(d)(1)(D), SCRE. This rule incorporates our state's previously recognized hearsay exception for "limited corroborative testimony in a sexual conduct case." State v. Whisonant, 335 S.C. 148, 154, 515 S.E.2d 768, 771 (Ct. App. 1999); see Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (recognizing corroborative statements of alleged criminal sexual conduct victims that are limited to time and place of the alleged assault as a well-settled exception to the rule against admitting hearsay testimony).

The rule expressly allows other witnesses to testify the victim complained of the assault, but only as to "time and place"; it specifically circumscribes such testimony by "excluding details or particulars." State v. Schumpert, 312 S.C.

502, 506, 435 S.E.2d 859, 862 (1993). Among the details which must be excluded under the rule is the identity of the alleged perpetrator. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). The record clearly reflects the testimony offered by Mother and Taylor encompassed detailed aspects of Victim's statements, including naming Jeffcoat as her abuser. By going beyond mere time and place, neither Mother's nor Taylor's testimony relating the statements falls within the scope of admissibility under Rule 801(d)(1)(D). See Whisonant, 335 S.C. at 155, 515 S.E.2d at 771 (finding testimony containing detail exceeding the parameters of the rule constitutes hearsay).

The trial court, however, admitted the testimony of both witnesses under rule of evidence 801(d)(1)(B). This rule renders a hearsay statement potentially admissible if it is consistent with the declarant's trial testimony and "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Rule 801(d)(1)(B), SCRE; see State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998). When all requirements of the rule are met, the whole of the prior statement, including specific details, is admissible in evidence. Fulton, 333 S.C. at 364, 509 S.E.2d at 821 ("Pursuant to Rule 801, the prior consistent statement is nonhearsay and comes in as substantive evidence, i.e., it is admissible for the truth of the matter asserted.").

Jeffcoat contends the trial court erred in allowing Mother and Taylor's testimony because defense counsel conducted "just normal cross-examination" that neither attacked Victim's character nor implied fabrication. In response, the State asserts counsel "clearly and repeatedly implied" Victim had been "coached," thereby alleging an improper influence such that her prior statements to both Mother and Taylor fell within the ambit of Rule 801(d)(1)(B).

We agree with the State that defense counsel raised the issue of improper influence or "coaching" by asking Victim whether she "practiced" before testifying and whether anyone had told her what to say. Counsel specifically inquired whether Victim had talked to Mother about what she was going to say in court and whether the solicitor told Victim "what things to say in the courtroom." These questions impliedly charged improper influences by Mother and the prosecution. See State v. Wells, 522 N.W.2d 304, 309 (Iowa Ct. App.

1994) (finding alleged victim's prior consistent statements admissible where defense counsel asked "whether others had suggested his testimony"); State v. Mensing, 991 P.2d 950 (Mont. 1999) (noting prosecutor's alleged coaching of a sexual assault victim could constitute an assertion of improper influence if the victim was asked about the substance of her conversations with the prosecutor or whether she had discussed the content of her trial testimony with anyone).

Jeffcoat's allegation of improper influence, however, does not end our inquiry. As a prerequisite to admissibility under 801(d)(1)(B), the party offering a prior consistent statement must demonstrate the statement was made "before the alleged fabrication, or before the alleged improper influence or motive arose." Rule 801(d)(1)(B), SCRE; see Fulton, 333 S.C. at 374, 509 S.E.2d at 827 ("[W]hen a prior consistent statement is offered for the purpose of rebutting an express or implied charge that the witness's testimony is the result of a recent fabrication or improper influence or motive, the statement must predate any alleged improper influence or motive."); State v. Phillipo, 623 A.2d 1265, 1268 (Me. 1993) ("As the party offering the prior consistent statements, it is the State's burden to establish that the statements were made before the motive arose."); State v. Carlson, 392 N.W.2d 89, 91 (S.D. 1986) ("Before a prior consistent statement will qualify as nonhearsay under [801(d)(1)(B)], the *proponent* must demonstrate . . . the prior consistent statement was made prior to the time the proposed motive to falsify arose.") (emphasis added) (citations omitted).

This requirement modifies federal rule 801(d)(1)(B) in light of the Supreme Court's decision in Tome v. United States, 513 U.S. 150 (1995). See Note, Rule 801(d)(1)(B), SCRE. In Tome, the Court found the temporal requirement expressed in our rule implicitly "imbedded" in the federal rule, and therefore held prior consistent statements could be introduced to rebut an allegation of improper influence or motive "only when those statements were made before the charged . . . improper influence or motive." Tome, 513 U.S. at 166, 167. In so doing, the Court reasoned a prior consistent statement "has no relevancy to refute the charge" of improper influence unless the statement "was made before the source of the bias, interest, influence or incapacity originated." Id. at 156 (citation omitted). As the Court explained: "A consistent statement

that predates the [influence] is a square rebuttal of the charge that the testimony was contrived as a result of that [influence]." Id. at 158.

Here, the trial court properly admitted the statement made by Victim to Mother that Jeffcoat "put his weenie on her toodie." Since this statement constituted Victim's initial disclosure of Jeffcoat's abuse, it obviously was made prior to any contact with the judicial system and thus could not have been the result of either Mother or the solicitor's alleged coaching of her court testimony. Similarly, Victim's prior consistent statements related in Taylor's testimony predate the family's exposure to the judicial branch; Mother testified the family only became involved with the solicitor's office and subsequent prosecution after Victim stopped seeing Taylor for therapy. Accordingly, the trial court properly found Victim's statements to Taylor admissible to rebut the charges of improper influence. See Fulton, 333 S.C. at 364, 509 S.E.2d at 821; State v. Street, 551 N.W.2d 830, 839 (Wis. Ct. App. 1996) ("[C]onsistent statements made prior to the alleged coaching of the children are admissible.").

AFFIRMED.

CURETON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alice Mae Pilgrim,

Respondent,

v.

Yvonne Wardlaw Miller,

Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3520
Heard May 8, 2002 - Filed June 17, 2002

AFFIRMED

Robert E. Davis, of The Ward Law Firm, of Spartanburg, for appellant.

Andrew N. Poliakoff, of Spartanburg, for respondent.

GOOLSBY, J.: Alice Mae Pilgrim sued Yvonne Wardlaw Miller to recover for injuries she allegedly sustained in an automobile accident. Miller

defaulted and, after a damages hearing, Pilgrim was awarded a judgment of $50,000. Miller appeals the trial court's denial of her motion to set aside the default. We affirm.

FACTS

This action arises out of an automobile accident that occurred on April 11, 1997. Pilgrim was stopped at a red light when the YMCA van she was driving was rear-ended by Miller. Pilgrim served a summons and complaint on Miller almost three years later on March 24, 2000. The next day, Miller took the suit papers to an attorney, who instructed her to take them to her insurance company. Miller promptly delivered the summons and complaint to an agent for Allstate Insurance Company.

Allstate failed to timely file an answer on behalf of Miller, and Pilgrim obtained an entry of default on May 17, 2000. Miller moved for relief from the default pursuant to Rule 55(c), SCRCP. Pilgrim opposed the motion on the basis that it stated no grounds in support of the request and "good cause" did not exist to set aside the entry of default. Pilgrim asserted her attorney had been in "continuous contact" with Allstate adjusters since the day after the accident and they had been fully apprised of the pending claim for almost three years.

At the hearing to set aside the entry of default, Miller's counsel advised the court that Miller would admit liability, but contested the extent of damages that Pilgrim allegedly suffered as a proximate result of the accident.

The trial court denied Miller's motion to lift the entry of default. The court stated, "No specific reason was offered for the lack of response to the Summons and Complaint" and "[i]t is the finding of this Court that the Court has been presented with no reason to set aside this Default."[1]

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[1] The grant or denial of a Rule 55(c) motion is not directly appealable. Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988).

The matter proceeded to a hearing on damages, after which the trial court awarded Pilgrim actual damages of $50,000. The court denied Miller's motion to set aside the default judgment under Rule 60(b)(1), SCRCP or, alternatively, to grant her a new trial, finding there had been no showing of excusable neglect.

LAW/ANALYSIS

I. Default

Miller first contends the trial court erred by not finding "good cause" existed to lift the entry of default where she gave the summons and complaint to Allstate, which did not file a timely answer. We disagree.

Rule 55(c), SCRCP provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted.[2]

"The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court."[3] "An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support."[4] "The issue before this Court, therefore, is not whether we believe good cause existed to set aside the default, but rather,

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[2] Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989); see also Top Value Homes, Inc. v. Harden, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995).

[3] Wham, 298 S.C. at 465, 381 S.E.2d at 501.

[4] Id.

whether the [trial judge's] determination is supportable by the evidence and not controlled by an error of law."[5]

At the hearing on Miller's motion to lift the entry of default, Miller testified she turned the summons and complaint over to her attorney the day after she received them, and upon her attorney's instruction, took the suit papers to Allstate. Miller testified her agent, Ken Kirkland, told her Allstate would "handle it from there."

Miller did not offer any testimony from Allstate representatives at the hearing; however, Miller's attorney advised the trial judge:

> Your Honor, I've got no excuse and I'm not trying to make an excuse for what happened. The ball was dropped by Allstate at some point. Whether it was the adjuster that didn't do something when they received the complaint or whether it was the agent who didn't send it to the adjuster, I have no idea and I have no way of telling because no one knows.

[Emphasis added.]

Counsel for Pilgrim submitted seventeen exhibits detailing the fact that Pilgrim had been in "constant contact" with Allstate for the nearly three years that elapsed before this action was filed.

The trial court noted during the hearing that, "[i]f the complaint was taken to Allstate Insurance Company, they had an obligation to defend. They had an obligation to act diligently, they had an obligation to take up this matter. The default is on their side . . . ." In its order denying Miller's motion to set aside the entry of default, the court observed that, although Miller had turned the pleadings over to Allstate, "[n]o specific reason was offered for the lack of

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[5] Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

response to the Summons and Complaint."

The dispositive issue here is whether the trial court abused its discretion in refusing to set aside the entry of default. We hold it did not. As noted by the trial court, Allstate undertook the defense of this case on Miller's behalf and was responsible for answering the complaint and presenting any and all available defenses to the claim.

"The courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant."[6] In this case, Allstate's failure to answer the complaint is imputed to Miller.[7] Accordingly, because no explanation was offered for Allstate's failure to respond to the complaint, we find no abuse of discretion here and affirm the trial court's refusal to set aside the default.[8]

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[6] Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987).

[7] See id. (noting, in a case involving the failure of a school official to answer a complaint on behalf of a school employee, that "the negligence in the failure to act was more excusable, we think, than the cases involving attorneys or insurance companies"); see also Williams, 312 S.C. at 375, 440 S.E.2d at 409 (affirming the master's refusal to set aside an entry of default in a mechanic's lien case and finding the defendants/owners were chargeable with their attorney's failure to answer the complaint, the court stating whether the defendants or their attorney committed the act of negligence was not critical to the determination).

[8] Cf. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 230 S.E.2d 900 (1976) (holding, on appeal of an order vacating a default judgment, that an insurance company attorney's failure to answer the complaint was not such mistake or excusable neglect as to warrant vacation of the default judgment).

II. Damages Hearing

Miller next contends the trial court committed reversible error "by refusing to strike medical bills" that she alleges Pilgrim's doctors did not relate to the April 11, 1997 accident. Miller argues the bills occurred after Pilgrim was involved in a second automobile accident in March 1998, and the last date for which Pilgrim sought treatment for injuries caused by the 1997 accident was on July 16, 1997. Consequently, all bills after that date should have been "struck." We disagree.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal."[9] "Proof that an error caused the appellant prejudice is a prerequisite to reversal based on error where the trial court's discretion is involved."[10]

We find no clear abuse of discretion by the trial court. Pilgrim testified that, from the date of the first accident in April 1997 until the second accident in March 1998, the medical problems she was experiencing with her neck and left shoulder never cleared up and she missed eight or nine weeks of work. Pilgrim had experienced no neck or shoulder problems prior to the first accident. Pilgrim maintained the second accident involved only a slight "tap" from behind by another vehicle, which resulted in no bodily injury and approximately $200 in property damage. Pilgrim submitted a chart listing total medical bills of $9,452.10, but did not seek recovery for two bills of $150 and $55 out of that total. There was also testimony from at least one of the doctors who treated Pilgrim that she was still having pain in her back and shoulder after July 1997.

Miller cross-examined Pilgrim about her injuries and the relevancy of her medical bills. In addition, Miller extensively questioned her doctors regarding

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[9] Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996).

[10] Carlyle v. Tuomey Hosp., 305 S.C. 187, 192, 407 S.E.2d 630, 633 (1991).

their treatment as well as perceived flaws in the evidence. The question of whether the medical bills were, in fact, sufficiently related to the injuries Pilgrim allegedly sustained in the April 11, 1997 motor vehicle accident was for the fact finder to consider in determining the amount of recoverable damages. Under these circumstances, Miller's arguments go to the weight and credibility of the evidence, rather than its admissibility.[11] Accordingly, we find no reversible error in this regard.

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

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[11] Cf. Pearson v. Bridges, 344 S.C. 366, 373, 544 S.E.2d 617, 620 (2001) ("Whether Pearson proved the [medical] expenses were 'reasonably certain' to occur so she would be entitled to an award of future damages was a question for the jury to determine."); Bailey v. MacDougall, 251 S.C. 290, 297-98, 162 S.E.2d 177, 180 (1968) (finding the sufficiency of medical evidence affected the weight, but not the competence or admissibility of the evidence, as "[t]he weight and credibility of all the evidence were for the lower court and we are satisfied that the findings of the lower court are supported by competent and legally sufficient evidence").

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pond Place Partners, Inc., American Federal Bank, FSB, as trustee for Mary M. Pearce, and Edwin P. Collins,

Respondents,

v.

David C. Poole, Mary T. Cruikshank, Estate of Robert J. Maxwell, Jr., Faust Nicholson, through his Guardian ad Litem, Laurens C. Nicholson, II,

Defendants,

Of Whom

David C. Poole is,

Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3521
Heard May 8, 2002 - Filed June 17, 2002

REVERSED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, of Columbia; and James R. Gilreath, of Greenville, for appellant.

W. Francis Marion, Jr. and J. Ben Alexander, both of Haynsworth, Sinkler, Boyd, of Greenville, for respondents.

ANDERSON, J.: This is an action for slander of title. Initially, David C. Poole ("Poole"), along with the other named Defendants, filed a declaratory judgment action against a plethora of individuals and entities, including the named Respondents. The Poole group challenged an amendment to the restrictive covenants on the subject property, which reduced the minimum lot size restriction from 5 acres to 1 acre lots. The Poole group concurrently filed a lis pendens covering the property. The Respondents, et. al, answered and counterclaimed, alleging causes of action for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. The trial court granted Pond Place's motion for summary judgment on Poole's declaratory judgment action. The court found the modification to the restrictive covenants was valid. We subsequently affirmed the trial court in our unpublished opinion Poole, et. al v. Pond Place Partners, Inc., et. al, Op. No. 1997-UP-129 (S.C. Sup. Ct. App. filed Feb. 12, 1997), cert. denied (Jan. 12, 1998). Thereafter, the Pond Place group prosecuted their actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. After a multi-day trial, the jury found only Poole liable for slander of title and awarded actual and punitive damages to Pond Place Partners and Edwin P. Collins. Poole appeals. We reverse.

FACTS/PROCEDURAL BACKGROUND

I. Underlying Grant of Summary Judgment

In his order filed January 16, 1995, the circuit judge explains:

> The controlling facts in this case are not in dispute. In January 1954, a subdivision known as "Parkins Lake Development" was created. Originally, this development consisted of 15 lots in differing amounts of acreage. On March 30, 1954, the owners of the property in the Development agreed to restrict the property such that no tract would be divided in lots of less that five acres. By agreement these Restrictive Covenants continued unabated until April 1, 1974. Thereafter, the Covenants would automatically be extended for successive ten (10) year periods unless the property owners agreed to change the Covenants by a "vote of a majority of the then owners of the tracts." The property owners abided by these restrictions until March 31, 1994. At that time, a majority of the **then** property owners entered into the "Amendment to Subdivision Restrictions." Effective April 1, 1994, the Restrictive Covenants were amended permitting lots to be subdivided into tracts of not less than one acre. The signatures on the Amendment to the Subdivision Restrictions were witnessed and properly probated. The Amendment was duly filed with the Greenville County RMC Office.

(emphasis in original, internal footnotes omitted).

On July 19, 1994, Poole[1] brought an action pursuant to the Uniform

[1] Poole was not the only original plaintiff in the underlying action. The original complaint was captioned: David C. Poole, Mary T. Cruikshank, Robert J. Maxwell, Jr., Faust Nicholson, Carol V. Daves, Robert G. Schwartz, Sherri E. Schwartz, John J. Randall, Angela M. Randall vs. Pond Place Partners, Inc.,

Declaratory Judgment Act[2] to have the court determine if the "Amendment to the Subdivision Restrictions" was valid and enforceable. On the same day, Poole filed a lis pendens "pursuant to the Declaratory Judgment Act to affirm and validate restrictive covenants and enforcement thereof." The then defendants answered and counterclaimed, alleging violation of the South Carolina Frivolous Civil Proceedings Sanctions Act[3] and an action for slander of title.

On November 15, 1994, the original defendants filed their notice and motion for summary judgment "on the basis that there is no genuine dispute as to any material fact, in that it is undisputed that a majority of the property owners voted to amend the Deed Restrictions to allow development of the property on one (1) acre tracts." The Circuit Court granted the motion for summary judgment. Concurrently, the court ordered the lis pendens filed by

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American Federal Bank, FSB, as Trustee for Mary M. Pearce, William V. McCrary, Jr., Esta B. McCrary, Edwin P. Collins, Helen D. Wells, AMP-AKZO Company, A General Partnership of State of New York, Inc., Lydia W. Kellett, Harold Gallivan, Betty C. McCoy, Max W. Kennedy, Gwen W. Kennedy, Lenore N. Chambers, J. E. Chambers, Robert L. Creech, Karen B. Creech, and J.M.S., Inc. (Named Respondents and Defendants in the present appeal are underlined.). Later, however, "due to agreement between the parties," the circuit judge states in footnote number three in his January 16, 1995, order, only four of the original nine plaintiffs remained: David C. Poole, Mary T. Cruikshank, Robert J. Maxwell, Jr., and Faust Nicholson.

For simplicity, because Poole is the only party now appealing, we will use the name "Poole" to mean himself and, where appropriate, the other three plaintiffs in the original declaratory judgment action.

[2] S.C. Code. Ann. §§ 15-53-10 to -140 (1977 & Supp. 2001).

[3] S.C. Code Ann. §§ 15-36-10 to -50 (Supp. 2001).

Poole dissolved.[4]

The circuit judge granted summary judgment primarily upon a finding that the signed and probated document purporting to amend the covenants constituted a proper "vote" to change the covenants. He noted that Poole failed to cite any authority to support his contention that a secret ballot "vote" was required and that, even if the restrictive covenants could be so read, they must be construed in favor of the construction that will least restrict the property:

> The facts to which the parties agree are controlling in this instance. The Restrictive Covenants at issue dated March 30, 1954 were effective until April 1, 1974. Thereafter, the Covenants were extended for successive ten year periods "unless by vote of a majority of the then owners of the tracts agreed to change the Covenants either in whole or in part." The current owners of the tracts of land are a matter of public record. The document known as "Amendment to Subdivision Restrictions" dated March 31, 1994, is equally clear and unambiguous in its terms. The Amendment modifies Paragraph 3 of the original restrictive covenants dated

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[4] The lis pendens was not actually dissolved at the time of the court's order:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 225, SCACR.

> March 30, 1954, such that the land within the Subdivision can be subdivided into lots of no less than one acre. The signatures appearing on the Amendment represents a majority of the present owners of the tracts within the subdivision. Despite these undisputed facts, Plaintiffs urge this Court to find the word "vote" ambiguous because the methodology of how the vote is to be taken is not defined in the document. The Court declines to accept this offer.

Poole petitioned the court to vacate, reconsider, alter and/or amend his order. The judge declined, finding in an order filed April 5, 1995, that it was clear the majority of property owners had voted to amend the covenants. The circuit judge explained:

> Despite tallying the votes by four alternative methods (by assigning votes to each of the twenty-two lots, by assigning votes only to owners with five acres or more, by assigning votes to the original remaining fourteen lots, and by assigning votes to each individual owner), the Court arrived at the same result: the majority of land owners voted to change the property restrictions from a five acre minimum to a one acre minimum.

Poole appealed. While this appeal was still pending, Pond Place applied to the Circuit Court to have the automatic stay lifted, which would "allow[ ] them to freely alienate their property during the pendency of the appeal, subject to the restrictions found in the AMENDMENT TO SUBDIVISION RESTRICTIONS, filed with the Greenville County RMC, and dated March 31, 1995," or, alternatively, "require the appellants to post sufficient bond to compensate defendants for any economic damages which they might suffer if they cannot sell the property during the automatic stay, yet ultimately prevail on the appeal."

The circuit judge declined to grant this relief because neither of the counterclaims had yet been addressed by the court and, in his discretion, the judge did not "find bond appropriate in this case." Pond Place moved for reconsideration of this order because the "[s]tay imposed by the Appeal [of

Poole to the Court of Appeals] effectively enjoins these Defendants from freely selling their land." The court disagreed and denied Pond Place's motion for reconsideration; however, it granted leave to petition the appellate court for supersedeas. On October 13, 1995, the South Carolina Supreme Court filed its order refusing to lift the automatic stay or require a bond. The Court stated:

> Because there appears to be a legitimate dispute as to whether appellants were misled by respondents into believing that they would be able to vote on any changes in the subdivision restrictions at a subsequent meeting, we deny respondents' request to lift the automatic stay and their request to require the posting of a bond.

Thereafter, in our unpublished opinion of Poole, et. al v. Pond Place Partners, Inc., et. al, Op. No. 1997-UP-129 (S.C. Ct. App. filed Feb. 12, 1997), cert. denied (Jan. 12, 1998), we affirmed the grant of summary judgment in favor of Pond Place. We concluded our opinion, stating: "We find no evidence to refute the methods used by the trial judge. Clearly, the trial judge thoroughly reviewed the evidence. We note that none of the property owners wish to remove their signatures from the Amendment. Therefore, the order of the trial judge is affirmed."

By order dated January 12, 1998, the Supreme Court denied Poole's petition for writ of certiorari. In the appeal now before this Court, Poole acknowledges the covenant amendments were deemed properly adopted. In fact, Poole writes at length in his brief that he is not attempting to re-litigate the resolution of the vote amending the covenants.

II. Present Litigation

After Poole's declaratory judgment action was dismissed by summary judgment, Pond Place Partners, et. al, prosecuted their actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. On April 9, 1999, the circuit judge merely denied both Pond Place's motions for summary judgment on its two causes of action, as well as Poole's motion to dismiss the counterclaims. However, in a subsequent order filed on October 4,

1999, denying Pond Place's motion for reconsideration, the circuit judge wrote:

> After carefully reviewing the Motion and the case file including appellate briefs to the South Carolina Court of Appeals, this Court finds that counterclaiming Defendants have not proven by a preponderance of the evidence that Plaintiffs' initiation and continuation of this lawsuit is being done so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based.

Thereafter, during pre-trial motions, Poole argued the October order effectively dismissed the counterclaim for violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. The court disagreed. However, the trial judge removed the claim from jury consideration. Essentially, the judge found that a ruling on the frivolous proceedings depended on the resolution of the underlying legal cause of action for slander of title. "I couldn't grant [Pond Place's summary judgment] motion under the frivolous proceedings act … because I considered this slander of title action still being alive." Apparently, therefore, the frivolous proceedings claim is still pending.

The slander of title action was tried before a jury. There, Pond Place presented testimony attempting to show that, as the trial court and this Court eventually found, there was never an issue regarding the clear outcome and propriety of the vote amending the restrictive covenants in the Parkins Lake Subdivision. Also, Pond Place elicited testimony that the lis pendens interfered with the marketability of the lots in the subdivision which caused substantial damages to those parties attempting to dispose of or develop their property under the amended version of the covenants.

Poole, on the other hand, tried to demonstrate that, in 1994 when he heard of the covenant amendments, he was justified in testing these amendments with his declaratory judgment action. He essentially defended his actions by showing he prosecuted the case upon the advice of competent attorneys. For example, Poole submitted affidavits from his past and present legal counsel. James R. Gilreath, in a July 27, 1998, affidavit, averred that he has advised Poole "with

regard to various aspects of [the underlying declaratory judgement action." Gilreath stated:

> Prior to this case being filed I advised Mr. Poole that in my opinion there was a serious issue regarding the manner in which the subdivision restrictions had been amended. Prior to this opinion I had done some research, reviewed the public records and plats relating to the subdivision restrictions and discussed these issues with several attorneys in Greenville who are experienced real estate attorneys. In short, I believe this was a meritorious action which needed to be brought in order to clear up numerous issues which were raised by the method and manner in which the subdivision restrictions were amended.

Dana C. Mitchell, III, who was initial counsel to Poole until a conflict of interest arose, avowed in an affidavit dated July 28, 1998, that he researched the law and also met with experienced attorneys regarding the case:

> Based on the above, I advised the Plaintiffs (prior to the initiation of this litigation) that there was a serious legal issue regarding the manner in which the subdivision restrictions have been amended which could, in good faith, be the subject of litigation to resolve the disputed issues which were involved. Further, I advised the Plaintiffs that I believed their position had legal merit, at least sufficient to warrant it being submitted to a court or jury for determination.

Lastly, John G. Cheros, an attorney who was consulted by Gilreath before the underlying declaratory judgment action was filed, declared in an affidavit dated August 4, 1998, that he reviewed the public records of the Park Lake Development:

> After reviewing these records I advised Mr. Gilreath that in my opinion there was a significant issue regarding the manner in which the subdivision restrictions had been amended. From my review of

> these records it appeared there was a serious question involved in the manner in which the owners of the property voted and that short of a declaratory action, there was, in my opinion, a cloud on the title of Mr. Poole's property. While I am not familiar with the issues raised in this particular action, I believe that an action for declaratory judgment to determine the validity of the amendments to the Parkins Lake Subdivision restrictions was meritorious, involved real issues, and was necessary to clear up questions raised by the method and manner in which these restrictions were amended.

At the close of Pond Place's case, among other motions, Poole moved for a directed verdict. He argued the lis pendens was authorized by law, was properly filed, and was absolutely privileged. The motion was denied. Then, at the close of his own case, Poole renewed his motion for directed verdict. The trial judge likewise denied this motion, finding that the filing of a lis pendens is not absolutely privileged, but is qualifiedly privileged.

In its closing arguments, Pond Place argued the trial was essentially about "Mr. Poole." Pond Place effectively dismissed all but "Mr. Poole" as a defendant to the slander of title action and requested a full judgment against only him. The jury rendered its verdict in favor of Pond Place and Edwin Collins against Poole alone. The verdict reads:

> Verdict for Pond Place Partners, Inc for $157,584.^{00}/_{100}$ special damages and $75,000.^{00}/_{100}$ punitive damages against David C. Poole.
>
> Verdict for Edwin P. Collins for $220,416.^{00}/_{100}$ special damages and $75,000.^{00}/_{100}$ punitive damages against David C. Poole.

After the jury was excused, Poole moved for a JNOV, a new trial, and a new trial nisi. Poole's attorney argued there was no evidence in the record to support the jury's finding of malice and the filing of the lis pendens was absolutely privileged. The court denied the motions for JNOV and new trial

absolute and scheduled a hearing to consider remittitur arguments. At the later hearing, the circuit judge commented he "[thought Poole] could have filed a lawsuit without filing a lis pendens…. and there wouldn't be any slander of title action." He declined to adjust the jury's verdict. Poole appeals.

STANDARD OF REVIEW

Poole argues he was entitled to a directed verdict because: (1) the elements of slander of title were not established; and (2) because the filing of his lis pendens was absolutely privileged. Alternately, Poole argues he is entitled to a new trial based on various evidentiary errors and the denial of some requested charges. We determine the action on the former arguments; thus, we need not address Poole's arguments for a new trial.

"When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (citing Steinke v. South Carolina Dep't of Labor, 336 S.C. 373, 520 S.E.2d 142 (1999)). "If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted." Wintersteen, at 35, 542 S.E.2d at 729 (citing Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000)).

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001). The trial court can only be reversed by this Court when there is no evidence to support the ruling below. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126 (1999). If the evidence as a whole is susceptible of more than one reasonable inference, the case should be submitted to the jury. Gamble v. International Paper Realty Corp. of S.C., 323 S.C. 367, 474 S.E.2d 438 (1996); Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000); see also Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993) (illustrating an appellate court must apply the same

standard when reviewing the trial judge's decision on such motions). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), cert. granted.

LAW/ANALYSIS

I. Declaratory Judgment Action and Lis Pendens

Poole filed the underlying action attempting to invalidate the amendments to the covenants pursuant to the Uniform Declaratory Judgments Act.[5] "The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949)); S.C. Code Ann. § 15-53-130 (1977).

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a … contract or franchise may have determined any question of construction or validity arising under the instrument, … contract or franchise and obtain a

[5] S.C. Code. Ann. §§ 15-53-10 to -140 (1977 & Supp. 2001).

declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRCP.

Poole concurrently filed a lis pendens on the property of the Parkins Lake Subdivision. It is undisputed that Poole, as well as every other party listed in the caption sub judice, has some ownership interest in the subdivision. The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985); Wooten v. Seanch, 187 S.C. 219, 196 S.E. 877 (1938). "A properly filed lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation." South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987). Generally, the filing of a lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved. Shelley Constr., 287 S.C. at 24, 336 S.E.2d at 491-492.

A lis pendens may be filed "[i]n an action affecting the title to real property … not more than twenty days before filing the complaint or at any time afterwards … with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby." S.C. Code Ann. § 15-11-10 (1977). Since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. See Cook, 291 S.C. at 532, 354 S.E.2d at 563 (1987) (finding a complaint filed more than twenty days after the filing of the lis pendens renders the lis pendens invalid).

Moreover,

> The lis pendens mechanism is not designed to aid either side in a dispute between private parties. Rather, lis pendens is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, i.e., the fact of a suit involving property. Thus, it notifies potential

> purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

51 Am. Jur. 2d Lis Pendens § 2 (2000).

Therefore, an action "affecting the title to real property" clearly allows the filing of a lis pendens by an interested party in order to protect their ownership interest in the property subject to the litigation. Such actions include actions attempting to set aside a fraudulent conveyance of real property, see Lebovitz v. Mudd, 293 S.C. 49, 358 S.E.2d 698 (1987); Dickerson v. Oliphant, 160 S.C. 288, 158 S.E. 546 (1931); Berger v. Shea, 258 S.E.2d 621 (Ga. Ct. App. 1979); and actions to establish a constructive trust over real estate, see Finley v. Hughes, 106 F.Supp. 355 (E.D.S.C. 1952); Kelly v. Perry, 531 P.2d 139 (Ariz. 1975). They also include actions to quiet title, see Stewart v. Fahey, 481 P.2d 519 (Ariz. Ct. App. 1971); actions to establish the existence of an easement, see Procacci v. Zacco, 402 So.2d 425 (Fla. Dist. Ct. App. 1981); actions to reform deeds to resolve a boundary dispute, see Houska v. Frederick, 447 S.W.2d 514 (Mo. 1969); actions for specific performance, see Panfel v. Boyd, 371 S.E.2d 222 (Ga. Ct. App. 1988); Haupman v. Edwards, Inc., 553 P.2d 975 (Mont. 1976); Wendy's of South Jersey v. Blanchard Mgmt. Corp. of N.J., 406 A.2d 1337 (N.J. Super. Ct. Ch. Div. 1979); and actions for mortgage foreclosures, see Palmer v. Shelby Plaza Motel, Inc., 443 So.2d 285 (Fla. Dist. Ct. App. 1983). Where no real property is implicated, however, like when the enforcement of a lien is against the substitute security under the "bonding out" procedure of the mechanic's lien statute rather than against the original real property itself, a notice of pendency of action need not be filed. Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985); see also Hansen v. Kohler, 550 P.2d 186 (Utah 1976) (distinguishing the case of Birch v. Fuller, 337 P.2d 964 (Utah 1959), in which the court found no privilege for filing a lis pendens because no court action was filed in conjunction with the lis pendens making it not filed in accordance with the law and, therefore, not actionable under slander of title); Atkinson v. Fundaro, 400 So.2d 1324 (Fla. Dist. Ct. App. 1981) (finding no privilege for the filing of a lis pendens on property that had absolutely no involvement in the underlying litigation); Ex

parte Boykin, 656 So.2d 821, 826 n.4 (Ala. Civ. App. 1994) (Noting that "[o]ne who places a lis pendens notice on property without a 'colorable claim' of right to or interest in the property subjects themselves to a claim for slander of title.").

II. Slander of Title

"The term 'slander of title' is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him injury." 50 Am. Jur. 2d Libel & Slander § 548 (1995). Generally, an action under slander of title may only be maintained by one who possesses an estate or interest in the affected property. See generally Jeffrey F. Ghent, Slander of Title: Sufficiency of Plaintiff's Interest in Real Property to Maintain Action, 86 A.L.R.4th 738 (1991). "The tort of slander of title is almost identical to the tort of product disparagement, the only difference being that the former tort involves aspersing the quality of one's title to property and the latter tort involves aspersing the quality of one's property." Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of N.J., 406 A.2d 1337, 1338 (N.J. Super. Ct. Ch. Div. 1979).

Slander of title is grounded in the tort of injurious falsehood. See id. ("Both torts are specific examples of the general tort of injurious falsehood and the same privileges which apply to the torts of personal defamation apply to the tort of injurious falsehood."); Zamarello v. Yale, 514 P.2d 228 (Alaska 1973); Procacci v. Zacco, 402 So.2d 425 (Fla. Dist. Ct. App. 1981). In this light, the first comment of section 624 of the Restatement (Second) of Torts explains:

> The particular form of injurious falsehood that involves disparagement of the property in land, chattels, or intangible things, is commonly called "slander of title." The earliest cases in which it arose involved oral aspersions cast upon the plaintiff's ownership of land, as a result of which he was prevented from selling or leasing it; and the decisions went upon an analogy to the kind of oral defamation of the person that is actionable only upon proof of special harm. (See § 569). The extension of the liability to other kinds of injurious falsehood has left the terms "slander of title," and

> "disparagement," merely as special names given to this particular form of the tort.
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> The association with personal defamation through the word "slander" has unfortunately tended to lead the courts to regard the plaintiff's property interest as somehow personified, and so defamed, and thus to look to the law of defamation. "Slander of title," however, differs from personal defamation in at least three important respects. One is that proof of special harm is required in all cases. (See § 633). Another is that there must be proof of a greater amount of fault than negligence on the part of the defendant regarding the falsity of the statement. (See § 623A, especially Comment d). The third is that because of the economic interest involved the disparagement of property may in a proper case be enjoined, whereas defamation normally cannot.

Id. at cmt. a, quoted in Lone v. Brown, 489 A.2d 1192, 1195 (N.J. Super. Ct. App. Div. 1985). The Supreme Court of Rhode Island explained the history of the action slander of title in its state:

> Shortly before the turn of the century our predecessors in Hopkins v. Drowne, 21 R.I. 20, 23, 41 A. 567 (1898), recognized the common-law action of slander of title. The court emphasized that damages could be recovered in an action for slander of title upon a showing that the defendant maliciously uttered false statements about the plaintiff's ownership of real estate which resulted in the plaintiff sustaining an actual pecuniary loss.
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> The court in Hopkins emphasized that in using the term malice it was not using the term in its 'worst sense,' but described malice as an intent to deceive or injure and emphasized that in order to establish malice, the record must present evidence of the making of a false statement that is made with full knowledge of its falsity, and for the specific purpose of injuring the plaintiff.

Brough v. Foley, 572 A.2d 63, 67 (R.I. 1990).

By contrast, our modern history with the tort for slander of title is relatively brief. The case of Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995), sets forth for the first time in South Carolina the specific elements of the common law action for slander of title. The action itself, through our reception statute, has always been a part of the law of South Carolina. Section 15-1-50 provides that "[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." S.C. Code Ann. § 14-1-50 (1976); see also State v. Charleston Bridge Co., 113 S.C. 116, 126, 101 S.E. 657, 660 (1919) (the reception statute is "merely declaratory in its nature" in stating that South Carolina courts are guided by the principles of the settled common law from England). Slander of title has long been considered a common law action in England. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 877-879 (W. Va. 1992), aff'd, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (citing authority from the Queen's Bench and King's Bench from the sixteenth and seventeenth centuries). Therefore, it is the common law of South Carolina as well. See Huff, 319 S.C. at 148, 459 S.E.2d at 890. In Huff, we merely clarified its position in our jurisprudence.

Huff noted that the second Restatement of Torts provides the general guidelines "which modern courts generally follow in identifying the elements of slander of title." Id. at 149, 459 S.E.2d at 891. Restatement (Second) of Torts § 623A (1977) provides:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> > (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

> (b) he knows that the statement is false or acts in reckless disregard to its truth or falsity

Additionally, Restatement (Second) of Torts § 624 (1977) annunciates:

> The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

In light of these Restatement provisions, the Supreme Court of Appeals of West Virginia, in TXO Production Corporation v. Alliance Resources Corporation, 419 S.E.2d 870 (W. Va. 1992), aff'd, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993),[6] devised a six point test that a plaintiff must establish to prove an action for slander of title. We adopted this test. Huff, 319 S.C. at 149, 459 S.E.2d at 891. Therefore, to maintain an action for slander of title in South Carolina, the plaintiff must establish: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Id. (citing TXO, 419 S.E.2d at 879).

In Huff, Husband asserted a cause of action for slander of title against Wife's divorce attorney. Wife's attorney had filed a lien for attorney's fees against property that Husband had elected to buy out Wife's interest in, as was provided for in the divorce decree. Wife's attorney filed her lien pursuant to a statutory provision this Court found was not applicable to the facts of the case. That is, § 20-3-145 stated that only attorney fees awarded by the court, which

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[6] The appeal to the United States Supreme Court involved only whether the award of punitive damages was so grossly excessive as to violate due process. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-466, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

these fees were not, constitute an lien on the debtor spouse's property. Id. at 145 n.1, 459 S.E.2d at 888 n.1. Husband satisfied Wife's debt to remove the cloud on the property so that he could have it refinanced. We found this was an adequate example of slander of title. The "[w]rongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Id. at 149, 459 S.E.2d at 891.

III. Pleadings are Privileged

Privileged communications are either absolute or qualified. "When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." Hainer v. American Med. Intern, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (citations omitted). A statement is made with actual malice when the speaker acts with knowledge that the statement is false or with reckless disregard of whether it was false or not. Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000), cert. granted; Huff , 319 S.C. at 150, 459 S.E.2d at 891; accord Hainer, 328 S.C. at 135, 492 S.E.2d at 107 ("Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights.").

"The [absolute] privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." W. Prosser & W. Keeton, The Law of Torts, § 114, at 817 (5th ed. 1984). "At common law, parties to judicial proceedings were granted an absolute privilege to use defamatory language because of the overriding public interest that persons should speak freely and fearlessly in litigation, 'uninfluenced by the possibility of being brought to account in an action for defamation.'" Stewart v. Fahey, 481 P.2d 519, 520-521 (Ariz. Ct. App. 1971). Nearly three score years ago, the New York Supreme Court explained:

> The interest of society requires that whenever men seek the aid of courts of justice, either to assert or to defend rights, of person, property or liberty, speech and writing therein must be untrammelled and free. The good of all must prevail over the

> incidental harm to the individual. So the law offers a shield to the one who in a legal proceeding publishes a libel, not because it wishes to encourage libel, **but because if men were afraid to set forth their rights in legal proceedings for fear of liability to libel suits greater harm would result, in the suppression of the truth**. The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation, that is, is pertinent, relevant, germane thereto.

Kraushaar v. LaVin, 39 N.Y.S.2d 880, 883 (N.Y. Sup. Ct. 1943) (emphasis added) (citation omitted).

South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged. McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945); Texas Co. v. C.W. Brewer & Co., 180 S.C. 325, 185 S.E.2d 623 (1936); Rogers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940); Sanders v. Rollinson, 33 S.C. Law (2 Strob.) 447 (1848) (stating an action for slander based on a defamatory affidavit was a non-suit; the proper attack is under malicious prosecution); accord Lone v. Brown, 489 A.2d 1192, 1195 (N.J. Super. Ct. App. Div. 1985) ("It is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, which have some relation thereto, are absolutely privileged from slander or defamation actions, even if the statements are made with malice."); Kropp v. Prather, 526 S.W.2d 283, 286 (Tex. Civ. App. 1975) ("Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot form the basis for a cause of action in libel or slander.").

In Texas Company v. C.W. Brewer & Company, 180 S.C. 325, 185 S.E.2d 623 (1936), the Supreme Court established that pleadings, although they may constitute libel on their own, are absolutely privileged if they are relevant and legitimately related to the issues and inquiry at trial. That is,

> Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged; and it is immaterial that the allegations are false and malicious and are made under a cover and pretense of a wrongful or groundless suit…. The weight of American authority is that the privilege is absolute when, and only when, the matter tendered is pertinent or material or relevant.

Id. at 327, 185 S.E. at 623.

The Court later confirmed in the case of McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945), that pleadings, even if defamatory, are absolutely privileged. "Libelous or defamatory statements in pleadings, when pertinent or material or relevant to real issues involved, are privileged, that the pertinency or materiality or relevancy of such statements is for the determination of the Court and not a jury, and that in determining this issue pleadings must be liberally interpreted and all doubt resolved in favor of relevancy." Id. at 275, 33 S.E.2d at 587.

The above authority accords with the Restatement (Second) of Torts § 587 (1977), which provides:

> A party to a private litigation … is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Recently, this Court reiterated that the "common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation is well recognized in this jurisdiction." Crowell v. Herring, 301 S.C. 424, 429, 392 S.E.2d 464, 467 (Ct. App. 1990) (citations omitted). That is, an "absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable

relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relationship to it." Id. at 430, 392 S.E.2d at 467 (citing Restatement (Second) of Torts § 587, cmt e).

IV. Other Jurisdictions

"[T]he majority of cases from other jurisdictions that have dealt with the question have held that such filing [of a lis pendens] enjoys the absolute privilege that is accorded to judicial proceedings." Superior Constr. Inc. v. Linnerooth, 712 P.2d 1378, 1380 (N.M. 1986) (citing Albertson v. Raboff, 295 P.2d 405 (Ca. 1956); Stewart v. Fahey, 481 P.2d 519 (Ariz. 1971); Haupman v. Edwards, Inc., 553 P.2d 975 (Mont. 1976); Hansen v. Kohler, 550 P.2d 186 (Utah 1976); Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of N.J., 406 A.2d 1337 (N.J. Super. Ct. Ch. Div. 1979); Zamarello v. Yale, 514 P.2d 228 (Alaska 1973); Procacci v. Zacco, 402 So.2d 425 (Fla. App. 1981)). The rationale set forth by these jurisdictions is:

(1) With few exceptions, any publication made in a judicial proceeding enjoys absolute privilege from later charges of defamation.

(2) The sole purpose of recording a notice of lis pendens is to give to prospective buyers constructive notice of the pendency of the proceedings.

(3) The notice of lis pendens is purely incidental to the action wherein it is filed, and refers specifically to such action and has no existence apart from that action.

(4) The recording of a notice of lis pendens is in effect a republication of the proceedings in the action and therefore, it is accorded the same absolute privilege as any other publication incident to the action.

Linnerooth, 712 P.2d at 1381; see also Brough v. Foley, 572 A.2d 63 (R.I. 1990) (holding that since the filing of a lis pendens is incident to the filing of the complaint, if the plaintiff had probable cause to bring the action, then neither of these actions can be considered slander of title.); Kropp v. Prather, 526 S.W.2d 283, 287 (Tex. Civ. App. 1975) ("Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice … the filing of a notice of lis pendens … is a part of [a] 'judicial proceeding'" and thus forms no basis for an action for libel or slander.); Dethlefs v. Beau Maison Dev. Corp., 511 So.2d 112, 117 (Miss. 1987) ("The lis pendens notice was a privileged communication and therefore not actionable for slander of title."); Louis v. Blalock, 543 S.W.2d 715, 718 (Tex. Civ. App. 1976) ("[A] claim, either oral or written, asserted in the course of a judicial proceeding, cannot be made the basis of a civil action for slander of title."); Manders v. Manders, 897 F.Supp. 972 (S.D.Tex. 1995) (finding no basis for a slander of title action arising out of the filing of a lis pendens); Palmer v. Shelby Plaza Motel, Inc., 443 So.2d 285 (Fla. Dist. Ct. App. 1983) (lis pendens describing only the property covered by the mortgage which is being foreclosed is absolutely privileged); Pryor v. Findley, 949 P.2d 1218 (Okla. Civ. App. 1997) (ruling the filing of a divorce petition, which purportedly caused a cloud on title, was protected by absolute privilege for slander of title claim); Lone v. Brown, 489 A.2d 1192 (N.J. 1985) (stating the filing of a lis pendens is merely a republication of the complaint and is, therefore, absolutely privileged).

Several courts cite the seminal California case of Albertson v. Raboff, 295 P.2d 405 (Ca. 1956), for the proposition that the filing of a lis pendens is absolutely privileged. Berger v. Shea, 258 S.E.2d 621 (Ga. Ct. App. 1979); Houska v. Frederick, 447 S.W.2d 514 (Mo. 1969); Stewart v. Fahey, 481 P.2d 519 (Ariz. Ct. App. 1971); see also Kelly v. Perry, 531 P.2d 139 (Ariz. 1975) (citing Stewart v. Fahey). Generally, however, where courts do not find that an absolute privilege applies to the filing of a lis pendens in a slander of title action, they find a qualified privilege subject to a finding of malice. Westfield Dev. Co. v. Rifle Inv. Assocs., 786 P.2d 1112, 1116-1118 (Colo. 1990) (finding that "a party has only a qualified privilege to interfere with an existing contract by means of initiating litigation and filing pleadings and notice of lis pendens"

because the need to restrict lawsuits brought in bad faith outweighs the policy of encouraging free access to the courts under an absolute privilege); Kensington Dev. Corp. v. Israel, 419 N.W.2d 241, 244 (Wis. 1988) (declaring the filing of a lis pendens is only conditionally privileged; "[i]f the absolute privilege rule is applied, the slander of title statute … would be nullified because it would be virtually impossible to assert a claim if all communications in judicial proceedings relating to property were absolutely privileged"); see also Annotation, Recording of instrument purporting to affect title as slander of title 39 A.L.R.2d 840 (1955).

In Superior Construction, Inc. v. Linnerooth, 712 P.2d 1378 (N.M. 1986), Superior Construction filed a lis pendens in conjunction with an action brought to have a deed of property from a third party to the Linnerooths declared null and void. This action was ultimately dismissed and the Linnerooths were subsequently awarded damages on their counterclaim for slander of title. After discussing the law of privilege from other jurisdictions, the court noted it is "only in extreme cases that a publication made in connection with a judicial proceeding will serve as the basis for a defamatory action." Id. at 1382 (citation omitted). These cases include judicial proceedings "in which the defamatory material is irrelevant or immaterial to the cause or subject of inquiry." Id. However, since a lis pendens "may be properly filed only if plaintiff pleads a cause of action which involves or affects the title to, or any interest in or a lien upon, specifically described real property," the filing of the lis pendens in conjunction with the underlying complaint, "no matter how malicious or false, was relevant and material to the claim by Superior … of an ownership interest in the land." Id. at 1381-82.

Likewise, in Wendy's of South Jersey, Inc. v. Blanchard Management Corporation of New Jersey, 406 A.2d 1337 (N.J. Super. Ct. Ch. Div. 1979), the court identified the public policy reasons why the filing of a lis pendens should be privileged. "[T]he notice of Lis pendens exists … for the proper administration of justice …. [and it] has no existence apart from a judicial proceeding since an action [brought in New Jersey] must be pending for the notice to be filed." Id. at 1340. The court explained that the underlying requirement that the privileged statements must be made in the course of the

proceeding and have some relation thereto; moreover, the statement must be given a "liberal construction":

> "[F]or otherwise the speaker or writer would have to decide the question of jurisdiction at his peril, and the sweep of the privilege would be inhibited at the cost of the policy considerations which give it life." The relation to the proceeding "thus required is not a technical legal relevancy, such as would, necessarily, justify insertion of the matter in a pleading or its admission into evidence, but rather a general frame of reference and relationship to the subject matter of the action." There is no doubt that a notice of Lis pendens satisfies this requirement of the privilege. Under our Lis pendens statute … a notice of Lis pendens Can be filed in any action affecting real estate. This written notice shall contain the title of the action, the general object of the action and the description of the real estate involved. **The notice is in effect a republication of some of [the] essential information contained in the complaint filed in the action.** Thus, since all of the information contained in the notice of Lis pendens directly relates to the action, this requirement of the privilege is met.

Id. at 1339 (emphasis added, citations omitted).

In Albertson v. Raboff, 295 P.2d 405 (Ca. 1956), the Supreme Court of California expanded the analysis, stating "[t]he publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of lis pendens is similarly privileged." Id. at 408; see also Zamarello v. Yale, 514 P.2d 228, 230 (Alaska 1973) (citing Albertson). Raboff brought an action against Albertson in which he sought a money judgment and either a lien on real property owned by Albertson or a judgment declaring that her title in the property was obtained by fraud to avoid creditors. Raboff also filed a lis pendens in conjunction with his action. At trial, although Raboff won a money judgment, the actions involving an interest in the property were resolved in Albertson's favor. In addressing Albertson's action for slander of title, the court found that a recorded notice of

lis pendens was expressly authorized by statute. Id. at 408. Moreover, the court explained, "[i]t would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets any one know that he has brought it, particularly when he is expressly authorized by statute to let all the world know that he has brought it." Id. at 409 (citation omitted); accord Hansen v. Kohler, 550 P.2d 186 (Utah 1976), and Houska v. Frederick, 447 S.W.2d 514 (Mo. 1969) (both quoting this proposition).

The Superior Court of New Jersey agreed. "It would be incongruous indeed to say that the complaint and notice of appeal are privileged but the notice of lis pendens filed in the same pending judicial proceeding, designed to give notice and preserve the status quo, would not also be privileged." Lone v. Brown, 489 A.2d 1192, 1196 (N.J. 1985).

Again, the Supreme Court of California summarized:

> It is our opinion that the privilege applies to any publication, such as the recordation of a notice of lis pendens, that is required … or permitted … by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked. **Thus, it is not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits. If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches.** It therefore attaches to the recordation of a notice of lis pendens, for such a publication is permitted by law, and like other documents that may be filed in an action, it has a reasonable relation thereto and it is immaterial that it is recorded with the County Recorder instead of being filed with the County Clerk.

Albertson, 295 P.2d at 409 (citations omitted).

In the case sub judice, it is undisputed that all of the litigants involved in

this and its underlying declaratory judgment action had some ownership interest in the Park Lake Subdivision. In fact, the action is itself only between the various property owners within the subdivision. Restrictive covenants, by their very nature, clearly affect a property owner's ownership of their subject land. Here, Poole testified at length about the amendment to the covenants and the feared change to the neighborhood it will bring in the future. Thus, under the statutory authority alone, we find the filing of a lis pendens in this case was authorized. We note our Supreme Court inherently agrees with this holding in that it refused to dissolve the lis pendens before a full adjudication of the declaratory judgment action was completed.

Generally, in South Carolina, an unqualified privilege does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy. See Corbin v. Washington Fire & Marine Ins. Co., 278 F.Supp. 393 (D.S.C. 1968) (stating this proposition after a brief review of privilege in South Carolina). Corbin involved an action for libel brought against a party to an arbitration proceeding for statements in a letter which were submitted to the board of arbitrators. The court, however, ultimately found these statements privileged, explaining if "arbitration is to be safely utilized as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all 'indispensable proceedings, such as the receipt of evidence and argument thereon." Id. at 398. The Court continued: "The absolute privilege attaching to judicial proceedings embraces communications between counsel, statements made by counsel to a prospective witness, arguments or statements by counsel in course of proceeding, any statements made by witnesses in the course of proceedings, and even statements in the course of negotiation of a settlement." Id.

We find a lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading. It is premised upon and must be filed in time in conjunction with an underlying complaint involving an issue of property. See South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 354 S.E.2d 562 (1987) (finding a complaint filed more than twenty days after the filing of the lis pendens renders the lis pendens invalid). In Rogers v. Wise, 193

S.C. 5, 7 S.E.2d 517 (1940), the South Carolina Supreme Court found that an attorney's allegedly libelous and slanderous statements which were first dictated to his stenographer and then included in a letter sent to another attorney were absolutely privileged. See id. at 6-7, 7 S.E.2d at 516-517 ("If attorneys cannot freely and frankly discuss their client's business between themselves, by word of mouth when they are face to face, or by letter when separated, and thereby evaluate and determine the client's rights, then, it seems to me, that the rights of all clients before the Courts are seriously endangered and the administration of justice is handicapped.").

V. Alternative Relief

Lastly, we are not unmindful of the fact that our holding above may limit the prosecution of actions for slander of title in South Carolina. However, it does not extinguish every form of relief when a party files a lis pendens which is motivated by some malicious intent. The jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution. See Sanders v. Rollinson, 33 S.C. Law (2 Strob.) 447 (1848) (stating an action for slander based on a defamatory affidavit was a non-suit; the proper attack is under malicious prosecution); Superior Constr. Inc. v. Linnerooth, 712 P.2d 1378, 1382 (N.M. 1986) ("[A]lthough slander of title may not provide a remedy to persons in the Linnerooths' position who have been wronged by a filing of a notice of lis pendens, such wrongful filing may support an action for abuse of process."); Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of New Jersey, 406 A.2d 1337, 1340 (N.J. Super. Ct. Ch. Div. 1979) ("[T]here is authority to indicate that while one may not be able to recover damages for the filing of a notice of Lis pendens in a slander of title action, he may be able to recover the same in an action for malicious prosecution if the elements of that tort are satisfied."); Albertson v. Raboff, 295 P.2d 405 (Cal. 1956) (reversing the decision below for further proceedings regarding an action for malicious prosecution; "a defendant cannot escape liability for a malicious prosecution of an unjustified charge by joining with it a justified charge."); Brough v. Foley, 572 A.2d 63 (R.I. 1990) (although filing of lis pendens is not actionable under slander of title, the case is remanded for further proceedings regarding the parties alternative counterclaim for abuse-of-

process.); Houska v. Frederick, 447 S.W.2d 514 (Mo. 1969) (although no action for slander of title follows the filing of a lis pendens, the same elements, if presented to the court below and preserved, may prove a cause of action for malicious prosecution); Palmer v. Shelby Plaza Motel, Inc., 443 So.2d 285 (Fla. Dist. Ct. App. 1983) (although appellees were not entitled to damages for slander of title after successfully defending a mortgage foreclosure action, nothing precludes the appellees from filing a suit for malicious prosecution); but see Asarki v. R & R Land Co., 225 Cal.Rptr. 285, 291 n.3 (noting that, although the recording of a lis pendens, which is privileged, cannot be the basis of an action for slander of title, but may, in some cases be the subject of an action for malicious prosecution, "no reported decision … has upheld an award of damages for malicious prosecution for recording a notice of lis pendens.").

CONCLUSION

We find the filing of a lis pendens is **ABSOLUTELY** privileged in South Carolina. The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens **CANNOT** form the basis of an action for slander of title.

To hold otherwise would clearly endanger an untold number of transactions in this state that require the filing of a lis pendens for its intended purpose of providing notice to the world of a potential conflict involving the subject property.

For the foregoing reasons, the trial judge should have granted Poole's motion for directed verdict as to the cause of action for slander of title.

REVERSED.

CURETON and CONNOR, JJ., concur.