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Property Law

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PROPERTY LAW

I. THE MEANING OF "KNOWLEDGE" UNDER THE INNOCENT OWNER DEFENSE

In *Ducworth v. Neely*[1] the South Carolina Court of Appeals determined the meaning of "knowledge" as it applies to the innocent owner defense under the South Carolina forfeiture statute.[2] The court ultimately held that seized property may be returned to an owner who proves that he or she had no actual knowledge of the illegal use that led to seizure.[3] The *Neely* Court's holding is broad beyond its facts. *Neely* expressly dictates the result when innocent ownership arises as a true defense in a state forfeiture action. Moreover, *Neely* impliedly indicates a result when innocent ownership is raised as an affirmative and remedial action.[4]

The Neelys owned a store known as the Snack Shop in Anderson, South Carolina. Due to his poor health, Mr. Neely turned over operation of the store to an employee in the fall of 1991. Thereafter, Mr. Neely returned to the store only a few times. Mrs. Neely went to the store each Saturday to collect rent, but she never entered the building. In January 1993, police officers raided the store and found drugs on the premises.[5] In conjunction with the raid, state law enforcement officers seized the property.[6] Such seizures are authorized by the South Carolina forfeiture statute.[7]

In accordance with section 44-53-520(c), George M. Ducworth, the solicitor for the Tenth Judicial Circuit, brought a forfeiture action against the Neelys and their store.[8] The Neelys responded that they were innocent owners

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1. ___ S.C. ___, 459 S.E.2d 896 (Ct. App. 1995).

2. S.C. CODE ANN. § 44-53-586 (Law. Co-op. Supp. 1995).

3. *See Neely*, ___ S.C. at ___, 459 S.E.2d at 899 (construing S.C. CODE ANN. § 44-53-586 (Law. Co-op. Supp. 1995)).

4. *See infra* notes 29-31 and accompanying text.

5. *Neely*, ___ S.C. at ___, 459 S.E.2d at 897.

6. *Id.* at ___, 459 S.E.2d at 897-98.

7. The statute states, in pertinent part:

> (a) The following are subject to forfeiture:
>
> . . . .
>
> (4) All property, both real and personal, which in any manner is knowingly used to facilitate . . . [the] sale . . . or trafficking . . . [of] controlled substances . . . .
>
> (b) Any property subject to forfeiture under [subsection (a)] may be seized . . . .
>
> (c) In the event of seizure pursuant to subsection (b), proceedings under [section] 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.

S.C. CODE ANN. § 44-53-520 (Law. Co-op. Supp. 1995).

8. *Neely*, ___ S.C. at ___, 459 S.E.2d at 897. The solicitor was also guided by S.C. CODE ANN. § 44-53-530 (Law. Co-op. Supp. 1995), which states, in pertinent part:

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and sought return of their property.[9] The innocent owner defense is provided for by statute:

> (a) Any innocent owner . . . may apply to the court of common pleas for the return of any item seized under the provisions of [section] 44-53-520. . . .
>
> (b) The court may return any seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence:
>
> (1) in the case of an innocent owner, that the person or entity . . . did not have *knowledge* of the use of the property which made it subject to seizure and forfeiture.[10]

Evidence at trial established that the Neelys were aware of drug activity outside the store and had even called police for assistance in controlling it. However, both Mr. and Mrs. Neely stated that they were unaware of any drug activity inside the store, and the prosecution provided no evidence to dispute their contention.[11]

The trial judge adopted a "reasonable person" standard to define the extent of knowledge necessary for forfeiture under section 44-53-586(b)(1).[12] Finding that the Neelys failed to do everything a reasonable person would have done to prevent the unlawful use of their property, the trial judge ruled in favor of the State.[13]

The court of appeals rejected the "constructive knowledge," or "reasonable person," standard adopted by the trial court. The court also rejected the "absence of willful blindness" standard proposed by the State.[14] Relying mainly on legislative intent as evidenced by the plain language of the statute, the court of appeals adopted an "actual knowledge" standard.[15] Furthermore, the court found that the statute places the burden on the property owner to

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> (a) Forfeiture of property defined in [s]ection 44-53-520 must be accomplished by petition of . . . the circuit solicitor . . . to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure and shall set forth the facts upon which the seizure was made. . . .
>
> The judge shall determine whether the property is subject to forfeiture . . . .

9. *Neely*, ___ S.C. at ___, 459 S.E.2d at 898.

10. S.C. CODE ANN. § 44-53-586 (Law. Co-op. Supp. 1995) (emphasis added).

11. *Neely*, ___ S.C. at ___, 459 S.E.2d at 897.

12. *Id.* at ___, 459 S.E.2d at 898.

13. *Id.* at ___, 459 S.E.2d at 898.

14. *See Neely*, ___ S.C. at ___, 459 S.E.2d at 899-900.

15. *Id.* at ___, 459 S.E.2d at 899 (citing other instances in which the legislature had enunciated a constructive knowledge standard).

prove the absence of actual knowledge.[16] Ultimately, the lower court's failure to apply the proper standard required reversal, and the lack of a credibility determination regarding the Neelys' testimony required remand.[17]

The innocent owner defense has met with difficult and inconsistent application.[18] One of the problems courts have faced is establishing the necessary elements of the defense.[19] Fortunately, South Carolina courts are guided by the elements expressly provided by statute. Under section 44-53-586(b)(1), an innocent owner is an owner who "was not a consenting party to, or privy to, or did not have knowledge of" the illegal use of the property.[20] *Neely* appears to be the first case in South Carolina to provide a definition of knowledge as it is used in this context.

An analysis of federal case law, as well as South Carolina policy regarding forfeitures, provides support for the adoption of an "actual knowledge" standard. Traditionally, the question considered by the federal courts has been limited to whether the innocent owner defense contemplates actual knowledge or constructive knowledge.[21] The essential difference between the two standards is the degree of proof required. The actual knowledge standard simply requires an innocent owner to show the absence of actual knowledge to recover his property.[22] The constructive knowledge standard, however, requires an owner to show not only the absence of knowledge, but also that his lack of knowledge was reasonable.[23]

The *Neely* Court noted that forfeitures are not favored in law or equity[24] and that a statutory provision that works a forfeiture should be strictly construed.[25] Conversely, a statute that is designed to provide relief from the rigors of forfeiture is looked upon favorably and construed liberally so as to afford maximum relief.[26] The court also noted that forfeiture statutes "must

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16. *Id.* at ___, 459 S.E.2d at 900.

17. *Id.* at ___, 459 S.E.2d at 900.

18. Stephen A. Spitz, *Forfeitures*, *in* 19 THOMPSON ON REAL PROPERTY § 77.04(b) (David A. Thomas ed., Supp. 1996).

19. *Id.*

20. S.C. CODE ANN. § 44-53-586(b)(1) (Law. Co-op. Supp. 1995).

21. *See* SPITZ, *supra* note 18, § 77.04(b).

22. *See, e.g.*, United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906-07 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

23. *See* Ducworth v. Neely, ___ S.C. ___, ___, 459 S.E.2d 896, 899 (Ct. App. 1995).

24. *Id.* at ___, 459 S.E.2d at 899 (citing South Carolina Tax Comm'n v. Metropolitan Life Ins. Co., 266 S.C. 34, 39, 221 S.E.2d 522, 523 (1975)).

25. *Id.* at ___, 459 S.E.2d at 899 (citing Commercial Credit Corp. v. Webb, 245 S.C. 53, 138 S.E.2d 647 (1964)). *See generally* Causey v. Guilford County, 135 S.E. 40, 46 (N.C. 1926) ("[A] strict construction refuses to extend the import of words used in a statute so as to embrace cases or acts which the words do not clearly describe.").

26. 37 C.J.S. *Forfeitures* §4(b) (1943) ("[W]here a liberal construction of a statute will avoid the imposition of a forfeiture it will be so construed."); *see also Causey*, 135 S.E. at 46 (A

be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose."[27] The court found that because this action was brought by the State under section 44-53-530 it was indeed a forfeiture action in the nature of a penalty and should bring strict statutory construction.[28] Thus, the court adopted the actual knowledge standard.[29] The court noted, however, that had the Neelys initiated the action themselves, it would have been classified as remedial, and the statute would have been liberally construed.[30]

The offensive/defensive distinction drawn by the court of appeals is confusing. A liberal construction appears to be the appropriate standard of interpretation for all applications of the innocent owner defense, including *Neely*. The innocent owner defense is designed to provide relief from the rigors of forfeiture, as it provides a means for an owner to recover seized property. As such, statutes like section 44-53-586 should be construed liberally independent of which side initiates the action. In *Neely* a liberal construction probably would have led the court of appeals to the same result; however, such a conclusion does not make the standard of interpretation a moot point. If a liberal construction had been applied in *Neely*, it would have given the decision more value because the actual knowledge standard would have been established for all applications of section 44-53-586 and not simply limited to the facts of the case.

Common-law interpretations of the federal forfeiture statute shed additional light on the matter.[31] The federal courts have applied the reasonable person standard to the innocent owner defense provided by the federal forfeiture statute, but the application has been to the "consent" term provided in the statute[32] and not to the "knowledge" term. Essentially, to avoid forfeiture under the federal statute an owner must prove that the illegal activity occurred on the property without the owner's knowledge of the activity, or if the owner had knowledge, that the activity occurred without his or her

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"liberal construction is that by which the letter of the statute is enlarged or restrained so as more effectually to accomplish the purpose intended."); South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978) (stating that a remedial statute should be liberally construed to effectuate its purpose).

27. *Neely*, ___ S.C. at ___, 459 S.E.2d at 899 (citing South Carolina State Law Enforcement Div. v. Crook, 273 S.C. 285, 255 S.E.2d 846 (1979)).

28. *See id.* at ___, 459 S.E.2d at 899.

29. *Id.* at ___, 459 S.E.2d at 899.

30. *Id.* at ___ n.3, 459 S.E.2d at 899 n.3.

31. The federal statutory definition of an innocent owner provides that "no property shall be forfeited . . . by reason of any act or omission established by that owner to have been committed or omitted without the *knowledge or consent* of that owner." 21 U.S.C. § 881(a)(7) (1994) (emphasis added).

32. *See* United States v. 3855 South April St., 797 F. Supp. 933, 937 (M.D. Ala. 1992).

consent.[33] In an attempt to define consent, one federal court has held that "an owner may avoid forfeiture if she can prove that she took 'all reasonable steps' to prevent the illicit use of her property."[34] The owner is not required to make all efforts but need merely make all reasonable efforts.[35] One way a claimant can satisfy reasonable-efforts criteria is by alerting and working with police personnel.[36]

Like the federal statute, the South Carolina statute also contains a "consent" provision.[37] *Neely* is silent on the application of "consent" in section 44-53-586. In future cases, however, South Carolina courts will likely follow the federal courts and apply the reasonable person standard to the consent term. This standard would permit the return of property to an owner who had knowledge of illegal activity on the property but who did "'all that reasonably could be expected to prevent the illegal activity once he learned of it.'"[38]

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33. United States v. 19 Castle St., 31 F.3d 35, 39 (2d Cir. 1994).

34. *3855 South April St.*, 797 F. Supp. at 937.

35. *Id.* at 937-38.

36. *Id.* at 937.

37. *See* S.C. CODE ANN. § 44-53-586(b)(1) (Law. Co-op. Supp. 1995).

38. *See 19 Castle St.*, 31 F.3d at 39 (quoting United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990)). The federal courts have also applied the willful blindness standard to the innocent owner defense, but only to statutes that specifically include it as part of the defense. That is, for statutes that do not specifically include willful blindness, willful blindness cannot be used as a substitute for knowledge. *See* United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1175 (8th Cir. 1992). In *Neely* the court of appeals took precisely this position. The court declined to adopt the willful blindness standard because it would broaden the meaning of knowledge as provided in the statute. *Neely*, ___ S.C. at ___, 459 S.E.2d at 900. The court stated that expanding the forfeiture statute is a matter for the legislature, not for the courts. *Id.* at ___, 459 S.E.2d at 900.

Specifically, the federal courts have addressed willful blindness under 21 U.S.C. § 881(a)(4)(C), which provides an innocent owner defense for aircraft, vehicles, and vessels. *See One 1989 Jeep Wagoneer*, 976 F.2d at 1174-75. The statute provides that "no conveyance shall be forfeited . . . by reason of any act or omission established by [the] owner to have been committed or omitted without the *knowledge, consent, or willful blindness* of the owner." 21 U.S.C. § 881(a)(4)(C) (1994) (emphasis added). The federal courts have defined willful blindness as involving an owner who "deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth." *One 1989 Jeep Wagoneer*, 976 F.2d at 1175.

The legislative history surrounding section 881(a)(4)(C) shows that Congress intentionally included willful blindness as a concept to be kept separate and apart from knowledge. Section 881(a)(4)(C) was initially introduced in the House of Representatives without the term willful blindness and only required the owner to establish his lack of "knowledge or consent." *Id.* (citing 134 CONG. REC. 22,672 (1988)). During debate, some representatives complained that the original bill "would lead to a 'look-the-other-way' defense," *id.* (citing 134 CONG. REC. 24,086 (1988) (statement of Rep. Archer)), and the bill was amended to include the willful blindness language. *Id.* (citing 134 CONG. REC. 33,193 (1988)). The amended version was described as "virtually identical to the existing [provisions, such as 21 U.S.C. § 881(a)(7) and S.C. Code

In addition to establishing the actual knowledge standard, the court of appeals in *Neely* also held that the burden of proof is on the owner who asserts the innocent owner defense.[39] The court placed the onus upon the owner to come forward with evidence showing an absence of actual knowledge of the illegal use of the property.[40] This approach is clearly supported by the plain language of the statute, which provides: "The court may return any seized item to the owner *if the owner demonstrates* . . . that [he or she] . . . did not have knowledge" of the illegal use of the property.[41] The federal statute and federal case law take a parallel approach. The federal statute provides that "no property shall be forfeited . . . by reason of any act or omission *established by that owner* to have been committed or omitted without the knowledge . . . of that owner."[42] As in *Neely*, the federal courts have recognized that the statute places the burden of proving absence of actual knowledge on the owner.[43]

In conclusion, *Neely* provides that seized property will be returned to an innocent owner if the owner can prove a lack of actual knowledge of the illegal use of the property. This rule clearly applies in cases when the innocent owner defense is asserted in response to a state forfeiture action. Although the *Neely* decision creates some confusion, it seems likely that South Carolina courts would apply the same standard to cases when an owner commences an action and asserts innocent ownership as an affirmative remedy to forfeiture.[44] Unfortunately, the *Neely* decision stops short of full guidance; only the knowledge element of the innocent owner defense is analyzed. In addition to an innocent owner without knowledge, however, the South Carolina statute also provides relief to an innocent owner who is "not a consenting party to, or privy to," the illegal use of the property.[45] *Neely* is silent on the application of "consent" and "privy." The meaning of those elements of the defense must be determined by future cases.

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Ann. §44-53-586(b)(1)] . . . , except that the concept of willful blindness is incorporated." *Id.* (citing 134 CONG. REC. 33,313 (1988) (statement of Rep. Jones)). If the willful blindness standard is to be incorporated as part of the innocent owner defense in South Carolina, the state legislature can follow the lead of the United States House of Representatives and specifically include it as part of section 44-53-586(b)(1).

39. *Neely*, ___ S.C. at ___, 459 S.E.2d at 900.

40. *Id.* at ___, 459 S.E.2d at 900.

41. S.C. CODE ANN. § 44-53-586(b)(1) (Law. Co-op. Supp. 1995) (emphasis added).

42. 21 U.S.C. § 881(a)(6) (1994) (emphasis added); *see also* 21 U.S.C. § 881(a)(7) (1994) (requiring owner to establish lack of knowledge or consent).

43. *See, e.g.*, United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906-07 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

44. *See supra* notes 29-31 and accompanying text.

45. *See* S.C. CODE ANN. § 44-53-586(b)(1) (Law. Co-op. Supp. 1995).

II. COURT OF APPEALS RECOGNIZES SLANDER OF TITLE ACTION

The South Carolina Court of Appeals recognized an action for slander of title for the first time in *Huff v. Jennings*.[1] Following the lead of other states, the court held that to succeed on a slander of title claim a plaintiff must prove: "(1) 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."[2] In practical terms, a party filing an unreasonable lien, an unfounded lis pendens, an invalid deed, or making any other bad faith claim that casts a cloud over someone's title to property can be held liable for slander of title.[3] The damages available to a victorious plaintiff include not only the special damages required to maintain the action but also attorneys' fees incurred in removing the cloud from title[4] and punitive damages.[5]

Huff brought an action for slander of title against Jennings, an attorney who represented Huff's former wife in their divorce suit. Huff's claim arose out of a lien that Jennings had filed on the Huffs' marital home because Huff's former wife had not paid her attorney's fees.[6] Subsequent to Jennings's having the lien recorded, Mr. Huff purchased his former wife's interest in the home.[7]

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1. ___ S.C. ___, 459 S.E.2d 886 (Ct. App. 1995).

2. *Id.* at ___, 459 S.E.2d at 891 (citing TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993)); *see* F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 309 n.13 (1990).

3. *See* W. E. Shipley, Annotation, *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 A.L.R.2d 840 (1955).

4. *See, e.g.*, Michelsen v. Harvey, 866 P.2d 1141, 1142 (Nev. 1994) (holding that although attorney's fees are an element of damages in a slander of title action, the award is "permissible," within the discretion of the court); *see generally* James O. Pearson, Jr., Annotation, *What Constitutes Special Damages in Action for Slander of Title*, 4 A.L.R.4th 532, 560-63 (1981).

5. *See, e.g.*, *TXO*, 419 S.E.2d at 890; *see also* Timothy S. Lykowski, *Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO What it Means, and Suggestions that Address Remaining Concerns*, 68 S. CAL. L. REV. 203 (1994); Charles C. Marvel, Annotation, *Allowance of Punitive Damages in Action for Slander of Title or Disparagement of Property*, 7 A.L.R.4th 1219 (1981).

6. Jennings filed the lien pursuant to S.C. CODE ANN. § 20-3-145 (Law. Co-op. 1976), which provides: "In any divorce action any attorney fee awarded by the court shall constitute a lien on any property owned by the person ordered to pay the attorney fee . . . ." In deciding on Huff's former wife's request for attorney's fees the divorce judge ruled: "I find it fair and equitable for each party to be fully and completely responsible for the prompt discharge and payment of their own attorney's fees and costs associated with this action." *Huff*, ___ S.C. at ___, 459 S.E.2d at 888.

7. Jennings had notice of the transaction because Huff attempted to complete this transaction

Mr. Huff did not, however, become aware of the lien until three years later when he tried to refinance the outstanding debt on the home. Huff's bank refused to refinance the debt with Jennings's lien unsatisfied. After personally paying off Jennings's lien, Huff filed suit for the cloud on title that Jennings created on the property. The circuit court granted Jennings's motion for summary judgment, holding that the lien had been properly filed, that the validity of the lien was moot because Huff had paid it off, that Huff lacked standing to challenge the lien, and that Huff could not establish a claim of slander of title.[8]

The court of appeals began its review by systematically overruling the circuit court's assessment of the lien's validity,[9] mootness[10] and Huff's lack of standing.[11] The court then turned to Jennings's contention that South Carolina did not recognize an action for slander of title. The court held that slander of title was not, in fact, new to South Carolina but had always been a part of the state's common law as a result of the "Reception Statute" by which South Carolina adopted all of the common law of England.[12]

Indeed, the English common law has recognized an action for slander of title for over 400 years. As far back as the thirty-second and thirty-third years of Elizabeth I, the Queen's bench sanctioned defendants for claiming a non-existent lease on a plaintiff's land.[13] The criteria used by the early English courts in finding slander of title has unmistakably influenced the modern

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through Jennings' office. *Huff*, ___ S.C. at ___, 459 S.E.2d at 888.

8. *Id.* at ___, 459 S.E.2d at 889.

9. "Simply declaring that each party will be responsible for their own attorney's fees does not, as Jennings contends, equate to an 'attorney fee awarded by the court' for purposes of the statute." *Id.* at ___, 459 S.E.2d at 890.

10. "The fact that the lien was thereafter removed does not extinguish any claim for slander of title Huff may have for the thirty-two months the lien was attached to the property." *Id.* at ___, 459 S.E.2d at 890.

11. *Id.* at ___, 459 S.E.2d at 890.

12. *Id.* at ___, 459 S.E.2d at 890. Originally enacted in 1712, S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976), provides as follows: "All, 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." It is interesting to note that the West Virginia Supreme Court used a similar statute in *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 877-78 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993), to adopt slander of title into its common law. *See also* State v. Charleston Bridge Co., 113 S.C. 116, 101 S.E. 657 (1919) (stating that South Carolina is guided by the English common law); 6 S.C. JURIS. *Common Law* §§ 3-8 (1991) (discussing S.C. CODE ANN. § 14-1-50).

13. Gerrard v. Dickenson, 78 Eng. Rep. 452, 453 (c. 1591) ("At common law, if one sue a forged obligation knowing it to be so, an action of the case lay. And although (defendant) claimeth a lease . . . knowing it to be forged, an action lieth."); *see also* Earl of Northumberland v. Byrt, 79 Eng. Rep. 143 (c. 1608) (defendant falsely claimed that owner made a conveyance before death).

development of the law. For example, section 623A of the Restatement (Second) of Torts, which adopts the same elements for a cause of action for slander of title as enunciated by the English court in *Gerrard v. Dickenson*, states:

> 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 of its truth or falsity.[14]

Section 624 of the Restatement (Second) of Torts applies the elements of section 623A to situations when "the publication of a false statement disparag[-es] another's property rights in land."[15]

The early English cases are also notable for establishing defenses to slander of title claims. In *Pennyman v. Rabanks*[16] the court of common pleas commented: "[I]f a man claim estates [in his own name], although they be false he shall not be punished. This was agreed by all the Court, that no action lay against one for saying, that he himself had title or estate in lands, . . . although it were false."[17] In perhaps one of the most widely cited slander of title cases, both for the court's in-depth analysis and for the jury's award of $10 million in punitive damages, the court in *TXO Production Corp. v. Alliance Resources Corp.*[18] explained the rationale and development of the defense of making a claim in one's own name:

> A distinction between claiming title in oneself and claiming title in another arises for a logical reason. Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own. . . . Although the courts of the 16th and 17th centuries had not yet clearly enunciated this distinction, they did follow it. The courts circumvented the general rule whenever the defendant had not acted in good faith. . . . When,

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14. RESTATEMENT (SECOND) OF TORTS § 623A (1977); *cf. Gerrard*, 78 Eng. Rep. at 453 (focusing on the publication, its truth, and the defendant's knowledge of its falsity).

15. RESTATEMENT (SECOND) OF TORTS § 624 (1977). The court of appeals followed West Virginia's lead in *TXO* by applying these two sections of the Restatement (Second) of Torts to discern the six elements for slander of title. *Huff*, ___ S.C. at ___, 459 S.E.2d at 891.

16. 78 Eng. Rep. 668 (c. 1596).

17. *Id.* at 668.

18. 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

> therefore, a defendant knows that his claim is false, he cannot rely on the defense of claiming title in himself.[19]

Though the court of appeals in *Huff* did not specifically hold that a good faith claim in oneself constitutes a valid defense in South Carolina, it did attempt to discourage Jennings's use of the defense by finding that Jennings's lien "clearly raises substantial ethical and constitutional questions."[20]

Just as in any other civil action, a plaintiff must prove all of the elements of slander of title to establish a prima facie case. The court of appeals in *Huff* indicated that the most common way for a plaintiff to satisfy the requirement of false publication is by demonstrating that the defendant wrongfully recorded an unfounded claim.[21] The naked simplicity of this should give pause to many property lawyers, who routinely file documents affecting other people's property. In particular, real estate attorneys should be wary of filing a lis pendens against property when a client is merely contemplating suit.[22]

In *Edwards v. Bridgetown Community Ass'n*[23] the defendant homeowners association filed a lis pendens because the plaintiffs had purportedly failed to pay their association maintenance assessments resulting in a $140.00 lien. When six months passed and the homeowners association still had not filed suit, the Mississippi Supreme Court held that the lis pendens was improperly filed and that the plaintiffs' action for slander of title was proper.[24] *Edwards*, therefore, supports the proposition that even a good faith filing of a lis pendens for a contemplated suit can result in slander of title if the suit is never commenced.

Other states have sought to limit a plaintiff's claim for slander of title stemming from an improperly filed lis pendens. The basic premise is that the filing of a lis pendens constitutes a judicially privileged action. There is a split, however, among the states as to the extent of the privilege.[25] Texas courts, for example, follow a policy recognizing the filing of a lis pendens as an absolutely privileged action, which can never form the basis of a cause of

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19. *Id.* at 879; see Shipley, *supra* note 3, at 846-55 (discussing the good faith defense).

20. *Huff*, ___ S.C. at ___, 459 S.E.2d at 890.

21. *Id.* at ___, 459 S.E.2d at 891; *see also* Shipley, *supra* note 3, at 843.

22. South Carolina briefly dealt with a similar issue in *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (1991) (dismissing the slander of title action in favor of an abuse of process claim).

23. 486 So. 2d 1235, 1240 (Miss. 1986) ("[T]here can be no lis pendens because of the fact that an action or suit is contemplated." (quoting 54 C.J.S. Lis Pendens § 17 (1948))); *see also* Ann Gifford, *Homeowner Association Assessment Inferior to Mortgage Lien*, 15 REAL EST. L.J. 269 (1987).

24. 486 So. 2d at 1240.

25. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 114, 115, 128, at 815, 824, 962 (5th ed. 1984).

action for libel or slander.[26] Wisconsin, on the other hand, allows the party filing a lis pendens to enjoy only a conditional privilege.[27] In general, South Carolina recognizes the defenses of conditional or qualified privilege (which a plaintiff can overcome by proving malice).[28] In forming a rule to govern in slander of title actions, the essential issue that South Carolina courts will have to decide is whether the filing of a lis pendens is far enough removed from the related judicial proceeding to be outside the protection of absolute privilege.

Like any slander claim, the fourth element of slander of title requires that the publication have a derogatory impact on the plaintiff. The court of appeals defined a derogatory publication as disparaging or diminishing the "quality, condition, or value of the property."[29] In *Huff*, Jennings's lien was shown to have disparaged the property because it caused the bank to refuse refinancing the debt on Huff's home.[30] Thus, a plaintiff need not demonstrate that the slander of title permanently affected the property, only that a third party viewed the property in a dimmer light, even if for a short time.

Proving the element of malice is often a plaintiff's greatest obstacle. Claims falter at this stage because defendants commonly assert the good faith defense. The court of appeals in *Huff* held that a plaintiff may prove malice by demonstrating that "the publication was made in reckless or wanton disregard to the rights of another, or without legal justification."[31] A defendant can, therefore, negate an allegation of malice by establishing good faith. As a Florida District Court of Appeals held in overruling a plaintiff's motion for summary judgment in a slander of title suit: "The affirmative defense of good faith raises a privilege and creates a factual issue as to the existence of malice."[32] The existence of the good faith defense implies that an attorney who researches and investigates both the underlying facts and legal theories before filing a document or making a publication should not fear a slander of

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26. Manders v. Manders, 897 F. Supp. 972, 976 (S.D. Tex. 1995).

27. For the conditional privilege to apply to a lis pendens, the filer must (1) have a reasonable ground for believing in the information in the lis pendens and (2) use the lis pendens only to protect reasonably calculated rights. Larson v. Zilz, 445 N.W.2d 699, 702 (Wis. Ct. App. 1989). This conditional privilege should not be confused as applicable to statements made before a court concerning a property dispute. *See* Louis v. Blalock, 543 S.W.2d 715 (Tex. Civ. App. 1976) (holding that defendant's suit claiming an easement by prescription was not actionable under a slander of title claim).

28. Wright v. Sparrow, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989) (citing Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979)). *Wright* was a personal defamation action, *id.* at 470, but the principles of privilege announced should apply across factual barriers.

29. *Huff*, ___ S.C. at ___, 459 S.E.2d at 891.

30. *Id.* at ___, 459 S.E.2d at 891.

31. *Id.* at ___, 459 S.E.2d at 891.

32. Allington Towers Condominium N. v. Allington Towers N., 415 So. 2d 118, 119 (Fla. Dist. Ct. App. 1982).

title claim because he will not possess the requisite malice.[33] As to non-attorney defendants, issues such as the level of sophistication and the pure or impure motives of the defendant may play a large part in a court's analysis of whether the malice requirement is met.[34]

Once malice is established, punitive damages become an issue.[35] In South Carolina, punitive damages are recoverable under two theories. First, a jury may award punitive damages when a defendant acts willfully and wantonly or is so grossly negligent as to imply willfulness or wantonness.[36] Second, a plaintiff is entitled to a jury verdict on punitive damages when there is a *malicious* invasion of plaintiff's rights.[37] Given the similarities of the elements necessary to prove malice and punitive damages, a court is likely to submit a slander of title claim and any request for punitive damages to the jury for contemporaneous consideration.

Other jurisdictions and legal commentators support the close identities of punitive damages and malice in a slander of title claim. In *Peckham v. Hirschfeld*[38] the Supreme Court of Rhode Island admitted that the degree of "harassment" typically found in those slander of title cases that had resulted in punitive damages was not present in *Peckham*. The court, however, allowed a jury verdict for punitive damages to stand. The *Peckham* holding prompted the following observation: "Although the Rhode Island court professes to the contrary, we think this case stands for the proposition that any conduct that rises to the level of slander of title will *ipso facto* trigger punitive damages liability."[39] In addition, another writer has commented that "[f]or the most part, [upon] finding . . . that there was actual malice on the part of the one found liable for slander of title, the courts reviewing actions for slander of title have held that punitive damages were recoverable, in various circumstances . . . ."[40] The heightened threat of punitive damages should cause defendants and

33. *See* Shipley, *supra* note 3, at 846-55.

34. Peckham v. Hirschfeld, 570 A.2d 663, 667 (R.I. 1990) (establishing malice by defendant's knowledge that he had not made payments and was put on notice by plaintiff); TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 880 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993) (looking to TXO's experience in real estate and "real intent" in filing quitclaim deed to find malice).

35. *See* Ross Lloyd, *Vendor-Purchaser: Punitive Damages for Slander of Title*, 20 REAL EST. L. REP. 7 (1990).

36. Tant v. Dan River, Inc., 286 S.C. 140, 144, 332 S.E.2d 534, 536 (Ct. App. 1985) (citing Sample v. Gulf Ref. Co., 183 S.C. 399, 191 S.E. 209 (1937)), *rev'd per curiam*, 289 S.C. 325, 345 S.E.2d 495 (1986) (reinstating jury's verdict for punitive damages).

37. Fennell v. Littlejohn, 240 S.C. 189, 199, 125 S.E.2d 408, 413-14 (1962) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958)).

38. 570 A.2d 663, 669 (R.I. 1990).

39. Lloyd, *supra* note 35, at 9.

40. Marvel, *supra* note 5, at 1221.

their attorneys to exercise extreme caution when faced with a slander of title action.[41]

The fifth element that a plaintiff must prove to establish a claim of slander of title is special damages. The *Huff* Court defined special damages as "the pecuniary losses that result 'directly and immediately from the effect of the conduct of the third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation.'"[42] The court then classified the money Huff paid to extinguish Jennings's lien as special damages;[43] thus the court implied that reasonable mitigation costs will usually be recoverable as special damages.

Attorneys' fees incurred in removing an unwarranted cloud on title can also qualify as special damages.[44] Slander of title represents a unique area of the law in which attorneys' fees are recoverable without a specific statutory provision. Dean Prosser wrote, in support of the majority rule allowing attorneys' fees as damages in slander of title cases, "It would also appear obvious that special damages include the expenses of legal proceedings necessary to remove a cloud on the plaintiff's title caused by the falsehood . . . ."[45] At least one state supreme court, however, has declared that

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41. For example, the United States Supreme Court in *TXO* upheld a $10 million punitive damages verdict in a slander of title case (total punitives amounted to more than 526 times the amount of compensatory damages). TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453 (1993). TXO tried to combat the punitive damages award on substantive and procedural due process grounds, but the Supreme Court rejected these contentions, resisting the temptation to declare a bright-line rule requiring proportionality between compensatory and punitive damages. *Id.* at 457-64. In sum, a successful slander of title action has the potential for enormous financial consequences to the defendant.

42. *Huff*, ___ S.C. at ___, 459 S.E.2d at 892 (citing 50 AM. JUR. 2D *Libel & Slander* § 560 (1977)). The court also referred to section 633 of the RESTATEMENT (SECOND) OF TORTS, which provides:

> (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to
>
> (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third person, including impairment of vendibility or value caused by disparagement, and
>
> (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.
>
> (2) This pecuniary loss may be established by
>
> (a) proof of the conduct of specific persons, or
>
> (b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify.

RESTATEMENT (SECOND) OF TORTS § 633 (1977).

43. *Huff*, ___ S.C. at ___, 459 S.E.2d at 892.

44. *See, e.g.*, Michelsen v. Harvey, 866 P.2d 1141, 1142 (Nev. 1994); Pearson, *supra* note 4, at 560-63.

45. KEETON, ET AL., *supra* note 25, § 128, at 972; *see also* TXO Prod. Corp. v. Alliance

attorneys' fees, although an element of damages under slander of title, are within the discretion of the trial court and that the trial court should not grant them unless the plaintiff successfully removes the cloud on title.[46]

A final type of special damages are those sustained as a result of a postponed or lost sale of the slandered property.[47] The traditional rule was that in order to collect special damages for a lost sale, the plaintiff must identify a prospective purchaser who refrained from dealing with the plaintiff because of the slander.[48] The modern trend, however, is to require the plaintiff to identify a purchaser only when it is reasonable for the plaintiff to do so. As Dean Prosser wrote, "[i]t is probably still the law everywhere that [the plaintiff] must either offer the names of those who have failed to purchase or explain why it is impossible for [the plaintiff] to do so; but where [the plaintiff] cannot, the matter is dealt with by analogy to the proof of lost profits resulting from breach of contract."[49] South Carolina will have to decide whether, in the absence of other special damages, a plaintiff must specifically identify a lost sale or whether the plaintiff can satisfy the special damages element by generally describing the circumstances in which the slander of title impeded the property's marketability.

The final element of the cause of action, diminished value in the eyes of a third party, adds to the plaintiff's burden of proof -- the requirement that the publication be heard and believed by a third party. The *Huff* court gave only cursory guidance with respect to this element,[50] but other South Carolina cases reveal some interesting nuances. Obviously, the testimony of a witness about the publication constitutes the easiest way to satisfy the element. In South Carolina, however, all that a plaintiff must demonstrate to raise a jury question on this issue is that a third person was present and could have heard the slanderous publication—even if the third person denies actually hearing the publication.[51] Conversely, if the publication was made between only the two parties or the publication was of an incredulous nature, then the plaintiff likely

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Resources Corp., 419 S.E.2d 870, 881 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993) (citing cases that support the majority rule that attorney's fees constitute special damages in slander of title cases).

46. *Michelsen*, 866 P.2d at 1142.

47. Pearson, *supra* note 4, at 560.

48. *Id.* at 542-47. Still following this very narrow and restrictive view, Texas courts hold that the only way a plaintiff can recover for slander of title is to prove the loss of a specific sale or lease. Karen McConnell, Comment, *Slander of Title: Onward through the Fog*, 24 S. TEX. L.J. 171 (1983).

49. KEETON, ET AL. *supra* note 25, at 972-73 (citations omitted).

50. *Huff*, ___ S.C. at ___, 459 S.E.2d at 891.

51. Duckworth v. First Nat'l Bank of S.C., 254 S.C. 563, 570, 176 S.E.2d 297, 301 (1970). *Duckworth* was a personal action for slander in which plaintiff was falsely and publicly accused of passing bad checks. *Id.* at 567, 176 S.E.2d at 299.

will not have satisfied the derogatory element, and the court should dismiss the slander of title action.

The decision by the court of appeals to recognize slander of title as a valid action in South Carolina adds another arrow to the property owner's quiver. Few can argue that a person maliciously interfering with the property of another should not be civilly liable for the damage caused. Fears that slander of title actions will discourage the adjudication of valid property disputes are unfounded. This is especially so when one considers that courts have, for over 400 years, recognized the defense of a good faith claim in oneself. Further, given that good faith belief in the claim is always a defense, concerns that slander of title actions target property lawyers are also without sound basis. What slander of title does wield is the heavy-handed threat of punitive damages, encouraging everyone to conduct reasonable research and make good faith inquiries before interfering with the property rights of others.

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