NO. 326PA19 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, Plaintiff-Appellee, v. RESCO PRODUCTS, INC. AND PIEDMONT MINERALS COMPANY, INC., Defendants-Appellants.	)	From Orange County 17 CVS 1399 No. COA 19-76

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PLAINTIFF-APPELLEE'S RESPONSE BRIEF

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PLAINTIFF-APPELLEES' RESPONSE BRIEF

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STATEMENT OF THE CASE

Plaintiff-Appellee Cheryl Lloyd Humphrey Land Investment Company, LLC ("Plaintiff") commenced this action by filing a Complaint on 27 October 2017 against Defendant-Appellant Resco Products, Inc. ("Resco") and Piedmont Minerals Company, Inc. ("Piedmont") for tortious interference with prospective economic advantage as a result of the malicious, intentional and wholly unjustified misrepresentations made during a Town Council hearing which impacted Plaintiff's contract to sale real property. Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) on 10 August 2018. Following a hearing, the Order granting Defendant's

Motion to Dismiss as to all Plaintiff's Claims was entered on 1 October 2018 Order by the Honorable Michael J. O'Foghludha, judge presiding. Plaintiff filed and served Notice of Appeal on 29 October 2018. The proposed record was settled by stipulation on 7 January 2019, filed with the Court of Appeals on 22 January 2019 and docketed 23 January 2019. On 16 July 2019, the Court of Appeals reversed the decision of Judge O'Foghludha in a 25-page opinion, finding that Plaintiff had stated sufficient claims upon which relief could be granted. Specifically, the Court of Appeals found that the *Noerr-Pennington* doctrine (a First Amendment doctrine which protects businesses when they engage in certain petitioning activities, but recognizing an exception to this protection where the conduct at issue is a "mere sham" and is "nothing more than an attempt to interfere directly with the business relationship of a competitor") does not apply in this case. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods.*, ___ N.C. App. ___, 831 S.E.2d 395, 399 (2019). The Court of Appeals also found that the alleged misrepresentations "are actionable under North Carolina law even though their content relates to activity regarded by the law as ultrahazardous" and Plaintiff's complaint was "properly pleaded."

On 20 August 2019, Defendants filed a Notice of Appeal Based Upon a Substantial Constitutional Question and Alternative Petition for Discretionary Review. The Court dismissed Defendants Notice of Appeal pursuant to N.C. Gen. Stat. §7A-30 regarding the Substantial Constitutional Question and allowed Defendants Petition for Discretionary Review pursuant to N.C. Gen. Stat. §7A-31 on 26 February 2020.

STATEMENT OF THE FACTS

In the summer of 2013, Plaintiff began negotiations with Braddock Park Homes, Inc. (a third-party buyer) ["Braddock Park"] to sell approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road in Hillsborough, NC [the "Property"]. [R p 13 (Compl. ¶17)]. As part of the Purchase and Sale Agreement, Braddock Park planned to construct a 118-unit townhome subdivision on the Property. [R p 13 (Compl. ¶18)]. Braddock Park's planned townhome subdivision required the Property to be annexed into the Town of Hillsborough and be rezoned as "Multi-Family Special Use" by the Town in order to complete the planned development. [R p 13 (Compl. ¶19)]. A particular parcel of the Property, consisting of 5.5 acres on the north side of Enoe Mountain Road was located adjacent to Defendants' Pyrophyllite/Andalusite/Sericite mine located at 231 Piedmont Drive, Hillsborough, NC ["Hillsborough Mine"]. [R pp 9, 13 (Compl. ¶ 1, 20)].

In the fall of 2013, the Town of Hillsborough, through its planning board, began conducting a series of meetings to consider whether the property to be purchased by Braddock Park could be rezoned and annexed into the Town. [R p 13 (Compl. ¶21)]. During the approval process required by the Town of Hillsborough, Defendants requested that the Town deny the approval of Braddock Park's proposed subdivision adjacent to their Hillsborough Mine due to the threat of damage to the health, safety, and welfare of future residents of the proposed subdivision due to fly rock and structural damage that would result from the blasting operations at Defendants' Hillsborough Mine. [R p 13 (Compl. ¶22)].

However, during the ten year period of time following June 7, 2002 (the date that the Department of Environment and Natural Resources issued its initial permit to Defendants to operate the Hillsborough Mine), Defendants did not report to the Department of Environmental Quality any violations of the ground vibrations limits, did not report any violations of the air blast limits, and did not report any fly rock had occurred beyond the permitted and guarded areas, even though the June 7, 2002 permit requires such disclosures. [R pp 11-12 (Compl. ¶¶5, 9-11)].

In December 2012, Defendants submitted a Mining Permit Application for their Hillsborough Mine where they described the precautions they would use to prevent physical hazard from their blasting to persons or neighboring properties from fly rock or excessive air blasts and/or ground vibrations. [R p. 12 (Compl. ¶12)]. On September 11, 2013, the Department of Environment and Natural Resources issued another permit for Defendants' Hillsborough Mine. [R p 12 (Compl. ¶13)]. The September 11, 2013 permit mandated strict blasting conditions to prevent fly rock, excessive air blasts, and/or ground vibrations as well as requiring that Defendants monitor each blast with a seismograph and maintain records of peek particle velocity, air pressure, and vibration frequency levels. [R p 12 (Compl. ¶¶14-15)]. Defendants have not reported any violations of the ground vibration limits, air blast limits, or fly rock permitted areas to the Department of Environment and Natural Resources. [R p 14 (Compl. ¶26)].

Furthermore, during the course of the meetings with the Town of Hillsborough, Defendants admitted that they could, in fact, conduct their mining excavations

without endangering the residents of the proposed Braddock Park subdivision. [R p 14 (Compl. ¶27)]. Despite those assurances, during the course of the meetings with the Town of Hillsborough, Defendants "maliciously, intentionally and without justification" misrepresented that the residents of the Braddock Park subdivision would be endangered from fly rock, excessive air blasts, and/or excessive ground vibrations from the blasting operations at the Hillsborough Mine. [R p 14 (Compl. ¶23-25)].

Despite Defendants' objections, the Town of Hillsborough approved Braddock Park's request that the subdivision project be annexed by the Town and issued a "special use" permit. [R p 15 (Compl. ¶28)]. However, on October 9, 2014, citing dangers of foundation damage to homes, fly rock from blasting, and nitrogen dangers to future inhabitants of their project based on the egregious misrepresentations Defendants made to the Town during the meetings, Braddock Park exercised its right to modify the Purchase and Sale Agreement with Plaintiff and terminated its contract to purchase the 5.5 acres closest to Defendants' Hillsborough Mine. [R pp 15-16 (Compl. ¶33)]. Defendants' interference with Plaintiff's contract with Braddock Park was without justification as they had no evidence that the blasting operations from the Hillsborough Mine had or would have endangered persons or neighboring properties from fly rock and/or excessive air blasts/ground vibrations. [R p. 16 (Compl. ¶36)]. Defendants made the malicious misrepresentations in an underhanded attempt to diminish the value so Defendants could purchase the 5.5 acres from Plaintiffs at a severely discounted price. [R pp 16-17 (Compl. ¶39-40)]. Furthermore,

Defendants' interference with Plaintiff's pending contract with Braddock Park was without justification because Defendants' motives were not reasonably related to the protection of a legitimate business interest, not to redress a legitimate grievance. [R p 16 (Compl. ¶37-38)].

STANDARD OF REVIEW

The standard of review for the dismissal of a complaint pursuant to Rule 12(b)(6) is *de novo* as to whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Farrell v. Transylvania Cty. Bd. of Educ.,* 175 N.C. App. 689, 695, 625 S.E.2d 128, 133 (2006). In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. *Arroyo v. Scottie's Professional Window Cleaning,* 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed,* 343 N.C. 118, 468 S.E.2d 58 (1996).

ARGUMENT

North Carolina courts have held that the only purpose of a motion under Rule 12(b)(6) is to test the legal sufficiency of the pleading, and the trial court must treat all factual allegations of the Complaint as true and deemed admitted, and in the light most favorable to plaintiff. *See, e.g., Isenhour v. Hutto,* 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999)(all factual allegations treated as true); *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 218, 367 S.E.2d 647, 648 (1988)(allegations in the

complaint viewed as admitted). In the face of a 12(b)(6) motion, a complaint should not be dismissed unless there is no set of facts supporting plaintiff's claim which would entitle it to relief. *See, e.g., Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). In order to defeat a motion to dismiss, Plaintiff need only demonstrate that its claim alleges facts sufficient to support a legal claim. *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 402, 653 S.E.2d 181, 184 (2007). Furthermore, as demonstrated in more detail below, the allegations in Plaintiff's Complaint relating to Defendants' actions and alleged misrepresentations are more than sufficient to meet the "liberal construction" on a 12(b)(6) motion that is applied even under claims for dismissal pursuant to Rule 9(b). *See, Id.* at 406, 653 S.E.2d at 186.

Plaintiff has alleged that Defendants "maliciously, intentionally, and without justification misrepresented" facts and calculations regarding fly rock debris, air blasts, and ground vibrations in order to negatively impact Plaintiff's pending sale to Braddock Park, so that Defendants could attempt to and purchase the adjacent tract at a substantially discounted price. [R pp 13-14, 16-17 (Comp. ¶¶ 22-26, 38-39)]. Plaintiff has alleged sufficient facts and circumstances to show Defendants' malicious, intentional and unjustified actions in misrepresenting the "dangers" of the mining operation for the purpose of scaring away Plaintiff's buyer in order to allow Defendants the opportunity to swoop in with a low-ball offer to purchase the property following Plaintiff's buyer's termination of the contract.

The Court of Appeals, in a 25-page opinion, found that the *Noerr-Pennington* Doctrine does not apply and that Plaintiff had sufficiently pled facts to state a claim

for relief. Defendants now attempt to claim that certain First Amendment Protections for Freedom of Speech and Freedom to Petition are being egregiously violated, and, in essence requesting "absolute" protection from any and all liability, even for (as specifically alleged in the Complaint), malicious, intentional misrepresentations, that were made without justification. This is simply not the law.

For the following reasons, the Court of Appeals was correct in overturning the Motion to Dismiss: First, the Defendants' Reliance on the Immunity Granted by the Noerr-Pennington doctrine is misplaced; second, Plaintiff has appropriately alleged a claim for tortious interference with prospective economic advantage; third, Defendants' plea for protection under the First Amendment is not "absolute"; and, finally, Defendants' argument that their claims to the Town of Hillsborough were objectively reasonable and justified stand in direct contrast to the specific allegations in the Complaint, which should be the basis of any review on a Motion to Dismiss.

I. Defendants' Reliance on the Immunity Granted by the Noerr-Pennington Doctrine is Misplaced

The Noerr-Pennington doctrine protects a private party that uses *proper* means in an attempt to influence a public official from antitrust liability, even if the private party has a selfish motive, purpose, or intent. *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 398 (1991); *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127, 140 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965). The First Amendment provides the basis for

immunity from antitrust laws, even if the request of the government or private entity is anticompetitive in nature.

However, the Noerr-Pennington doctrine does not grant immunity to individuals or entities for all statements made in an attempt to influence a public official. *McDonald v. Smith*, 472 U.S. 479, 483 (1985); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1986). The Court in *State ex rel. Cooper v. McClure*, a significant decision by the North Carolina Business Court, discussed which behaviors by private persons constitute petitioning and, specifically, dealt with whether protected petitioning, as defined under Noerr-Pennington, occurs when an entity submits false data to a public agency. 2004 NCBC 8, ¶¶22-25, 2004 NCBC LEXIS 7, *12-14 (03-CVS-005617, Wake Super. Ct. Dec. 14, 2004). The Court in *McClure* looked at whether the Noerr-Pennington doctrine classifies the allegedly falsified bids and rates surveys submitted by defendants as "protected petitioning" and therefore immune from antitrust liability, or constituted something other than "protected petitioning" and therefore would be subject to liability. Ultimately, the Court in *McClure* found that the petitioning activities did not qualify for immunity because the anticompetitive restraint flows from the private actions of the defendants, the submissions of inflated surveys and bids were not the action of a governmental agency, but that of a private group seeking an economic gain, and the context of the petitioning activity was undertaken only for financial gain. *Id.* at *21.

In the present case, Plaintiffs have alleged that the activities and information submitted to the Town of Hillsborough were false, and, per *McClure*, these activities

fall outside of the protections afforded by the Noerr-Pennington Doctrine. Furthermore, just as in *McClure*, Defendants' activities were not as a result of some grievance filed against it or as a result of some action of a governmental entity, but rather that of a private group seeking an economic gain (the purchase of Plaintiff's land at a discounted price) [R p 16 (Compl. ¶39)] and undertaken only for financial gain. Defendants in this case do not represent any community interest group, or collection of individuals, but rather was a for-profit company, appearing on its own behalf to request a denial of a rezoning petition filed by Plaintiff. The actions on the part of Defendants were to further its own economic interests, as they have specifically admitted, and not a political exercise. [R pp 14, 16 (Compl. ¶¶ 27, 39)].

While the simple act of petitioning the government and asking for restrictive results is not actionable, if improper means are used, then that can create a cause of action which is not subject to the Noerr-Pennington protections (or First Amendment protections in general). The right to petition is not an absolute right and "it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolutely immunity" from civil liability. *McDonald v. Smith*, 472 U.S. 479, 483 (1985). Indeed, even *Noerr* itself recognized the right to petition must also give way to a government's regulatory authority. 365 U.S. at 144.

The Court of Appeals agreed with such limitations. The Court of Appeals found that where the conduct at issue is a "mere sham," such as where an anti-competitive policy campaign, while 'ostensibly directed toward influencing governmental action, is … actually nothing more than an attempt to interfere directly with the business

relationships of a competitor'", then there was no such protection. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods.*, ___ N.C. App. ___, 831 S.E.2d 395, 399 (2019)(citing *Noerr*, 365 U.S. at 144, 81 S. Ct. at 533). This is especially applicable here as Plaintiff has alleged specific actions on the part of Defendants that would illustrate that Defendants' activities (regardless of whether they are deemed to be Petitioning under the Petition Clause or merely addressing a Town Council on an unrelated matter), can be actionable. Specifically, Plaintiff alleges that:

> 22. During the approval process required by the Town of Hillsborough to approve the Braddock Park project, The Defendants requested that the Town deny the approval of "Enoe Mountain Village," which was proposed on the parcel of land adjacent to their Hillsborough Mine, *due to the potential threat of damage to the health safety and welfare of future residents* of Enoe Mountain Village due to fly rock and structural damages from the operations of the Defendants Mine.
>
> 23. During the course of the meetings before the Town of Hillsborough the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from fly rock from the blasting operations at the Defendants' Hillsborough Mine.
>
> 24. During the course of the meetings before the Town of Hillsborough, the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from excessive air blasts from the blasting operations at the Defendants' Hillsborough Mine.
>
> 25. During the course of the meetings before the Town of Hillsborough, the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from excessive ground vibrations from the blasting operations at the Defendants' Hillsborough Mine.

[R p 14 (Compl. ¶¶22-25)]. Therefore, the Court of Appeals found that Plaintiff had stated a claim upon which relief can be granted.

It is also worth noting that, while Defendants constantly cite to the fact that the Court of Appeals used the term "overstated", it is the specific allegations of the Complaint that should be tested. *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005). As quoted above, Plaintiff alleged that Defendants did not just "overstate" their position, but rather maliciously, and without justification inflated the dangers associated with its mining operation, specifically in order to deflate the value of the Property, which it eventually sought to purchase. I tis those allegations that must be viewed as admitted in deciding a motion to dismiss for failure to state a claim upon which relief can be granted.

In the first case to address the Noerr-Pennington doctrine in North Carolina, the Court of Appeals found that the counterclaims raised "did not interfere with the plaintiff's First Amendment rights to seek redress from the government for the harms it allegedly suffered as a result of its competitors conduct" and that "even if plaintiff's suit against [its competitor] was objectively reasonable, plaintiff could still be liable for tortious interference" to the defendant. *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001). The Court of Appeals also goes through a detailed analysis of all *Noerr-Pennington* case law in North Carolina, with specific regard to the allegations made in the Complaint sub judice. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods.*, __ N.C. App. ___, 831 S.E.2d 395, 399-401 (2019).

Rather, in this case, Defendants seek to have the Noerr-Pennington doctrine expanded without limitation. Defendants believe they should be immune to any claim for relief based on statements made by it, for its own self-interest, to any governing body, regardless of the truthfulness of the statements. Rather than as a protection for petitioning activity in an anti-trust matter, Defendants seek to have all their activity protected. If such were the case, there would be no need for the Noerr-Pennington doctrine in the first place, as all petitioning activity would be protected activity. As discussed below, such is not the case.

For that reason, as well as others stated above and in the well-reasoned Court of Appeals' decision, the Supreme Court should affirm the Court of Appeals decisions, and reverse the Trial Court Order, and remand the case back to the Trial Court requiring Defendants to Answer.

II. Plaintiff Has Adequately Pled Sufficient Facts to Support a Claim of Tortious Interference

To establish a tortious interference with contract claim, a plaintiff must show the following: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. *White v. Cross Sales & Eng'g Co.*, 177 N.C. App. 765, 768–69, 629 S.E.2d 898, 901 (2006). The Court of Appeals agreed and found that Plaintiff

had alleged each of these essential elements, and a motion to dismiss is therefore improper.

Plaintiff has specifically pled that Plaintiff's buyer terminated the contract citing "dangers of foundation damage to homes, fly rock from blasting and nitrogen dangers to future inhabitants of their project based on Defendants misrepresentation to the Town of Hillsborough." [R pp 15-16 (Compl. ¶33)]. Plaintiff even pleads specifics of Defendants' misrepresentations because the comments made to the Town of Hillsborough stand in direct contrast to measures they were required to make pursuant to their September 11, 2013 Permit. [R pp 12-13, 14, 16 (Compl. ¶¶13-16, 26-27, 34)]. Furthermore, Plaintiff alleges that Defendants' actions were "not in the legitimate exercise of Defendants' own rights, but with design to injure the Plaintiff or to obtain some advantage at their expense." [R p 16 (Compl. 38)]. Indeed, that advantage was so that Defendants could attempt to "purchase the 5.5 acre tract adjacent to their property at a substantially discounted price." [R p 16 (Compl. ¶39)].

Defendants' claim that the complaint on its face alleges facts that show their actions were justified is without merit. Defendants rely on *Peoples Security Life Insurance Co. v. Hooks*, which states that competition can justify interference with a competitor's business relations. 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). However, *Hooks* "also emphasized that '[t]he privilege [to interfere] is conditional or qualified; that is it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bonafide* attempt to protect the interests of the defendant which is involved.'" *United Labs., Inc. v.*

Kuykendall, 322 N.C. 643, 662, 370 S.E.2d 375, 387 (1988) (alteration in original) (quoting *Hooks*, 322 N.C. at 220, 367 S.E.2d at 650).

Although competition may justify particular actions, competitors must use "lawful means to pursue their ends." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 2003 NCBC 4, ¶ 278, Mecklenburg Co. No. 00–CVS–10358 (N.C. Super. Ct. May 2, 2003). If the defendant's motive "is to maliciously injure the plaintiff, his actions are not justified." *HSG, LLC v. Edge-Works Mfg. Co.*, 2015 NCBC 87, ¶ 26, No. 15–CVS–309 (Onslow Super. Ct. Oct. 5, 2015) (citing *Hooks*); *see also Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 318, 498 S.E.2d 841, 851 (1998) ("A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties.").

The Court of Appeals properly found that Plaintiff's Complaint "(1) the existence of a valid business relationship; (2) interference with that business relationship by an outsider; (3) the absence of a legitimate justification for the alleged interference by the outsider; (4) malice by the outsider in engaging in the alleged interference; (5) causation from the alleged interference resulting in damages to Plaintiff; and (6) damages suffered", all "adequate to make out a cause of action for tortious interference with prospective economic advantage." *Lloyd*, ___ N.C. App. at ___, 831 S.E.2d at 404. The Court of Appeals further found that the inducement "to terminate or fail to renew" a contract is sufficient grounds for a tortious interference

with prospective economic advantage claim. [*Id.* (citing *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 317, 498 S.E. 2d 841, 850 (1998)].

Therefore, Plaintiff has pled sufficient facts to support its tortious interference claim.

III. Defendants' citation to the First Amendment and Petitioning Activities are not Absolute and Not Without Limitation

The First Amendment to the United States Constitution reads in part that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. Similarly, the North Carolina Constitution states: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14. On its face, and without context, these provisions appear to be clear, bright-line rules. However, "history, necessity, and judicial precedent have proven otherwise: 'Freedom of speech is not an unlimited, unqualified right.'" *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012)(citing *State v. Leigh,* 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (citation omitted)).

Not all speech is protected speech. There exist "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, (1942); *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297-98, 749 S.E.2d 429, 435 (2012). The United States Supreme Court, endorsed by the North Carolina Supreme Court, has outlined particular categories of speech that receive no First Amendment protection; these categories include

"obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010)(internal citations omitted); *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297-98, 749 S.E.2d 429, 435 (2012).

Defendants now appear to be arguing that certain First Amendment Protections for Freedom of Speech and Freedom to Petition are being egregiously violated by the Court of Appeals decision, and, in essence appear to be seeking the North Carolina Supreme Court grant them "absolute" protection from any and all liability, even for (as specifically alleged in the Complaint), malicious, intentional misrepresentations. This is simply not the law. Indeed, the U.S. Supreme Court has rejected absolute immunity claims, even under *Noerr-Pennington*. *McDonald v. Smith*, 472 U.S. 479, 483 (1985); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1986). This rejection is for good reasons as private parties should not be entitled to absolutely immunity for intentional misrepresentations or sham requests made to the government. Policing the marketplace to ensure that it is free of anticompetitive or abusive behavior is critical to "the preservation of our democratic political and social institutions." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); N.C. Const. art. I, §34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.").

Furthermore, Defendants were not necessarily seeking any action on the part of the Town of Hillsborough but were rather attempting to block action on the part of Plaintiff. Indeed, this was specifically for Defendants own economic self-interest. [R pp 14, 16 (Compl. ¶27, 39)]. Plaintiff had requested the Property to be annexed into

the Town of Hillsborough and be rezoned as "Multi-Family Special Use" by the Town in order to complete the planned development. Defendants opposed this rezoning due to the alleged threat of damage to the health, safety, and welfare of future residents of the proposed subdivision due to fly rock and structural damage from the blasting operations at Defendants' Hillsborough Mine. However, as alleged in the Complaint, Defendants had no justification for such statements. Indeed, when questioned, Defendants admitted that they could, in fact, conduct their mining excavations without endangering the residents of the proposed Braddock Park subdivision. The real reason Defendants opposed the rezoning is because it *might* be more costly to them. Also, Defendants thereafter made a "low-ball" offer to Plaintiff for the purchase of the re-zoned land. Defendants actions were not for some "greater good" or higher purpose, but rather was specifically for their own economic benefit.

As such, Defendants statements and misrepresentations are "not immunized when used in the adjudicatory process." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). "Administrative bodies and courts…rely on the information presented by the parties," and "supplying of fraudulent information thus threatens the fair and impartial function" of these bodies. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261-62 (9th Cir. 1982)(footnote omitted).

Plaintiff has specifically alleged elements of intentional misrepresentation on the part of Defendants, for the purpose of purchasing the Property at a discount and to avoid any higher costs associated with increased safety measures as the actual

motivations for the statements made by Defendants [R pp 14, 16 (Compl. ¶¶27, 39)].

IV. Defendants' claims that their reasoning was Objectively Reasonable and Justified Stand in Direct Contrast to Allegations of the Complaint

Defendants argue in the alternative that, if the court must assess their statements subject to the "mere sham" exception, their petitioning activity should still be protected as it was objectively reasonable and justified. However, such statements are directly contrasted by the allegations in the Complaint.

The Petition Clause requires that any petition to a governing agency be both objectively and subjectively baseless in the sense that it attempts to use a government process as proposed to the outcome of that process as a weapon against another party. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993). However, petitions based on misrepresentations fall outside the scope of Noerr-Pennington immunity. *Balt. Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 616-17 (D. Md. 2000)(citing *Lake Investments Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993)(*Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995)(finding a fraudulently obtained patent nullifies antitrust immunity); *Whelan v. Abell*, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (giving of deliberately false statements to state securities officials not protected by Noerr immunity). A misrepresentation that was intentionally made, with knowledge of its falsity, was material, and altered the outcome is still actionable. *See Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60-61 (1993). In this case, the specific allegations of the

Complaint state that the misrepresentations were intentionally made, caused the interference, and resulted in the failed sale while Defendants made a low-ball offer for the newly re-zoned property.

Furthermore, the Court of Appeals specifically found (with appropriate NC authority), that the absence of allegations in Plaintiff's complaint pleading the cause of action for tortious interference with prospective economic advantage into the "sham" exception to the Noerr-Pennington doctrine is not a defect of the complaint, much less one warranting dismissal of the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods.*, ___ N.C. App. ___, 831 S.E.2d 395, 401 (2019).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Supreme Court affirm the Court of Appeals' Order reversing reverse the trial court's Order granting Defendants' Motion to Dismiss and remand for an Order requiring Defendants to file an answer to Plaintiff's Complaint within 10 days of the entry of the Order denying the motion.

This the 27th day of July, 2020.

/s/ J. Whitfield Gibson
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Plaintiff-Appellee's Response Brief conforms to the limitations as set forth in the North Carolina Rules of Appellate Procedure, Rule 28(j).

This the 27th day of July, 2020.

/s/ J. Whitfield Gibson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Plaintiff-Appellee's Response Brief** was duly served upon the following by first class mail, postage prepaid, addressed as follows:

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This the 27th day of July, 2020.

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