THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
Circuit Court Judge

Opinion No. 5935 (S.C. Ct. App. filed August 10, 2022)
Appellate Case No. 2019-000885

The Gulfstream Café, Inc., Petitioner,

v.

Palmetto Industrial Development, LLC, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Petitioner certifies that a petition for rehearing was made on August 25, 2022, and finally ruled on by the Court of Appeals on October 5, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by overlooking the warranty language of the Petitioner's easement and instead relying on warranty of title case law to conclude that Respondent did not have a duty to warrant and defend Petitioner?
2. Did the Court of Appeals err by finding that the general rule in warranty of title cases that only successful claims to title justify an award of attorneys' fees barred Petitioner's claim for fees, even where the grantor itself attacked the easement?
3. Did the Court of Appeals err by finding that the exception set forth in *Black v. Patel*, 357 S.C. 466, 471 n.4, 594 S.E.2d 162, 165 n.4 (2004) did not apply to Petitioner's claim for attorneys' fees, even though Respondent's wrongful acts interfered with Petitioner's easement rights and caused Petitioner to file the litigation?

INTRODUCTION

This case presents novel questions of law regarding the interpretation of an easement containing a warranty obligation from the easement grantor (Respondent) to defend the easement grantee (Petitioner): must the easement grantor defend the easement grantee where the grantor is found to have interfered with the easement? The answer is yes, because the plain language of the easement's warranty requires it and because a warranty in a deed should be treated differently from a warranty in an easement. Moreover, even if the cases interpreting title warranties guide the way, the exception in *Black v. Patel*, 357 S.C. 466, 471 n.4, 594 S.E.2d 162, 164 n.4 (2004), requires the duty to defend where the grantor's wrongful conduct caused the grantee to sue the grantor, even if no third-party is involved. There is no South Carolina precedent addressing these issues of first impression, and the Court should grant this Petition for Writ of Certiorari to clarify South Carolina law and reverse the Court of Appeals.

STATEMENT OF THE CASE

Since 1986, Petitioner has owned and operated the "Gulfstream Cafe," located in the Marlin Quay Marina in Garden City, South Carolina. (R. p. 124 ¶ 3.) When Petitioner purchased the restaurant, the Marlin Quay Marina Corporation owned the adjacent lot, which included a small building, the "Marina Club & Snack Bar" (the "Snack Bar"), and a parking lot (the "Parking Lot") that served both the restaurant and the snack bar. (R. p. 124 ¶ 4.) Marlin Quay Marina Corporation expressly granted Petitioner a perpetual, appurtenant easement to utilize the Parking Lot. The easement was recorded in the Georgetown County Deed Book 234 at Pages 790, 797, and 803 (the "1986 Easement") (R. pp. 127-143.) Specifically, the 1986 Easement grants Petitioner, including its successors and assigns:

> a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the

following described property of the Grantor, together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property.

(*Id.*) Except for the portion of the property that was occupied by the Snack Bar and an unrelated sign easement, the 1986 Easement by its terms encumbers all of the Parking Lot, which is on Lots 3, 4, and 5 of Tract 3, as shown on the Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point (the "Plat"). (*Id.*); (R. p. 144.)

The 1986 Easement expressly recognizes that "Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening." (R. pp. 127-143.) The 1986 Easement also includes a warranty provision requiring that Grantor warrant and forever defend Petitioner's right to the easement. (*Id.*) Petitioner depended upon the easement rights to the Parking Lot for parking and otherwise to run the restaurant. (R. p.124 ¶ 7.)

In 1990, the Marlin Quay Marina Corporation again expressly granted a perpetual easement for the use of the Parking Lot to Petitioner, its successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement") (collectively with the 1986 Easement, the "Gulfstream Easement" or the "Easement") recorded with Georgetown County in Deed Book 382, Pages 217 to 226 (R. pp. 145-154). The 1990 Easement includes a substantially similar warranty provision to the 1986 Easement, requiring that Respondent warrant and defend Petitioner. This warranty states:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(*Id.*)

For many years the Gulfstream Cafe and Marlin Quay Marina Corporation operated harmoniously. However, in 2014, Respondent purchased the Marlin Quay Marina Property subject to the Gulfstream Easement, including the provisions requiring Respondent to warrant and forever defend the Easement. (R. pp. 155-161). Thereafter, Respondent demolished the Snack Bar in order to build a new structure. (R. p. 167, line 20 - p. 168, line 3). Since that time, Respondent's hostile actions have repudiated the Easement by:

- Placing construction containers in parking spaces during its demolition of the Snack Bar (R. p. 169, line 3 -p. 170, line 19.)
- Erecting a construction fence around the Parking Lot, blocking 2/3 of the parking spaces (R. p. 171, line 7 - p. 173, line 18.)
- Blocking a U.S. Foods delivery driver's ability to deliver food to Gulfstream (R. p. 192, line 4 - p. 197, line 20.)
- Calling the sheriff on two separate occasions on workers performing work on the Gulfstream Cafe, once on window washers and once on painters. The trial court held Respondent in criminal contempt for interfering with Petitioner's easement rights (R. p. 183, line 15 - p. 191, line 15.)
- Respondent tried to construct part of a new building directly in the Easement. (R. p. 163, lines 16-21, R. p. 164, line 23 -p. 165, line 19, R. p. 166, lines 6-17.)
- Respondent later changed the plans for its building (hereinafter "Building 2.0") (R. p. 174, line 13 - p. 175, line 6) and then tried to build Building 2.0 on yet another part of the Gulfstream Easement. (R. p. 199, lines 6-9.)
- Respondent attempted to substantially increase the parking burden placed on the Easement. For instance, Respondent planned to serve a full-scale dinner at night at the

new restaurant. (R. p. 179, line 25 - p. 180, line 2.) Respondent's owner, Mr. Lawhon, wanted the new restaurant to include nightlife as well. (R. p. 11, lines 15-19.) The plans for Building 2.0 had an occupancy limit of 359 people, and Building 2.0 would include 8500 square feet, compared to 4500 square feet for the original Snack Bar. (R. p. 181, lines 10-14, R. p. 182, lines 3-12.)

In response to this hostility to Petitioner's easement rights, Petitioner sued Respondent and Mr. Lawhon on November 16, 2016 for: (1) intentional interference with easement rights, (2) trespass and nuisance, and (3) forcible entry and detainer. (R. pp. 201-229.) Petitioner sought both injunctive relief and damages.

After a week-long trial, the jury returned a verdict for Petitioner. On the issue of Respondent's interference with the Gulfstream Easement, the jury found that "[w]e, the jury, by unanimous decision find for the Plaintiff on its claim of interference with its easement." (R. pp. 242-243.) The jury awarded Gulfstream damages. (*Id.*)

After the jury's verdict, the trial court entered a permanent injunction against Respondent. (R. pp. 244-246.) Thereafter the trial court entered an amended permanent injunction prohibiting Respondent from denying Petitioner the rights contained in the Easement and from constructing a building outside the boundaries of the demolished Snack Bar. (R. pp. 247-249.)

Petitioner tendered a "Notice and Demand for Defense and Indemnification" to Respondent, demanding that Respondent fulfill its warranty and defense obligations by paying Petitioner's costs, including attorney's fees, incurred in having to vindicate its Easement. (R. pp. 250-252.) Respondent refused, (R. p. 253), so Petitioner brought this action, to recover its attorney's fees pursuant to the warranty in the easement. The trial court granted Respondent's

Motion for Summary Judgment, finding, as a matter of law, Petitioner could not recover fees. The Court of Appeals affirmed.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY OVERLOOKING THE PLAIN WARRANTY LANGUAGE OF THE EASEMENT AND INSTEAD RELYING ON WARRANTY OF TITLE CASE LAW TO CONCLUDE THAT RESPONDENT DID NOT HAVE A DUTY TO WARRANT AND DEFEND PETITIONER.

The plain language of the Easement requires Respondent to warrant and defend Petitioner. The warranty provision of the Easement says:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(R. pp. 127-143, pp. 145-153.)

Respondent must warrant and defend Petitioner against: (1) itself and its successors and assigns and (2) all others. Thus, the express language requires Respondent to warrant and forever defend Petitioner against Respondent. Moreover, the obligation arises for those "whomever lawfully claiming, *or to claim* the same or any part thereof." (*Id.*) (emphasis added). The intent of the provision includes lawful claims *and* other claims. Based on this plain language, there is an obligation for Respondent to warrant and defend Petitioner against any claim by Respondent, whether "successful" or not. The Easement says nothing about title, and there is no reason to read that word into the Easement either. The Court should not read words into the Easement that are not there or engraft requirements onto the Easement that do not fit this situation.

Instead of simply following the plain language agreed to by the parties, the trial court and Court of Appeals looked to title warranty case law to interpret the language. The general rule in warranty of title cases is that a grantor is only required to defend the grantee for "successful" claims against "title." *Black v. Patel*, 357 S.C. 466, 471, 594 S.E.2d 162, 164 (2004). There are several reasons why this rule should not be applied in the easement context, and therefore, the rule should not foreclose Petitioner's claims for attorneys' fees. The Court should take up this novel question of law in South Carolina and grant the Petition for Writ of Certiorari.

The first reason why the general rule should not apply is that deeds and easements grant different rights. As acknowledged by the Court of Appeals, "[a]n easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land." *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970). As an easement does not convey title, it does not make sense to require a claim to "title" for a defense obligation to arise in the easement context.

Similarly, it does not make sense to interpret "success" in the same way in an easement dispute as compared to a title dispute. For cases regarding a deed, the grantor has represented that he conveyed good title to the grantee. The grantee relies on this promise for good title and the promise to defend it. If a later attack on the validity of title (whether launched by a third-party or the grantor himself) prevails, the grantee receives nothing for his money. This is a successful claim against title. The warranty obligation makes perfect sense in this context. It serves to punish the grantor for breaching his promise. The fact that the grantor did not convey good title justifies his payment of attorneys' fees to the grantee for failing to defend the action.

In contrast, for an easement, the grantor has conveyed a right to use the grantor's land for a specific purpose and set timeframe. *Morris*, 253 S.C. at 635, 172 S.E.2d at 822. Under the

Court of Appeals' application of the general rule, for the claimant's (grantor) claim against an easement to be "successful," the grantor must win, such that a determination is made that the grantor did not interfere with the easement. This means that grantor pays attorneys' fees if the grantor did not interfere with the easement, but the grantor does not pay attorneys' fees if the grantor did interfere with the easement. This scenario flips the "success" rule on its head, demonstrating the absurdity of its application in the easement context. It also creates perverse incentives for the grantor, as the grantor is permitted to interfere with the easement without fear of paying attorneys' fees if the grantee sues.

This success doctrine simply does not fit this context. If attorneys' fees are only triggered where the grantor does not interfere with the easement, what is the point of the warranty? The goal of the warranty is to protect the grantee from the grantor's interference, yet the success rule fails to punish the grantor for doing just that.

Because the application of the general rule does not make sense here, the express language of the Easement should prevail. The Court should take up this issue of first impression regarding the application of the general rule from warranty of title cases to an easement dispute and determine that Petitioner's Easement requires Respondent to pay Petitioner's attorneys' fees.

II. THE COURT OF APPEALS ERRED BY FINDING THAT THE GENERAL RULE IN WARRANTY OF TITLE CASES THAT ONLY SUCCESSFUL CLAIMS TO TITLE JUSTIFY AN AWARD OF ATTORNEYS' FEES BARRED PETITIONER'S CLAIM FOR FEES, WHERE THE GRANTOR ITSELF ATTACKED THE EASEMENT.

Even if the general rule interpreting warranty deeds applies, the Court of Appeals drew an unfounded distinction between a challenge to title and interference with use of an easement. For purposes of warranty and defense, they are the same. Blocking off access to an easement is the same as attacking the validity of title. The Court of Appeals misapplied the general rule in

the easement context, and the Court should grant this Petition for Writ of Certiorari to clarify how the rule works for easements. Specifically, the Court of Appeals found that Petitioner did not satisfy the general rule because "title" is not at issue here, and Respondent has not disputed that Petitioner has an easement. Instead, "at worst," the Court of Appeals found that Respondent has been infringing upon Petitioner's easement rights. The Court of Appeals' interpretation misconstrues the difference between warranty deeds that convey title and easements that convey the right to use property for a specific purpose. There can be no more fundamental "claim" to an easement than interference with it, as there can be no more fundamental "claim" to a warranty deed as a challenge to title. In fact, many title challenges emerge as adjoining property owners erecting fences on property they contend they own. Basically, the Court of Appeals is saying that if you have an easement to use a road on your neighbor's property, and he tells you he does not think you have an easement, then he is making a claim against title, but if he closes and locks a gate to his fence and blocks the road, he is not. Closing the gate and blocking the road is without question a claim to "title" for an easement. In fact, that is exactly what happened here with Respondent when it erected a construction fence around the parking lot to which Petitioner has an easement. (R. p. 171, line 7 – p. 173, line 18.) For an easement, a claim to "title" should certainly be interpreted to include interference with an easement, and the Court should grant this Petition for Writ of Certiorari to provide definitive guidance on the issue.

Moreover, as explained above, "success" in this context should not be interpreted to mean that Petitioner is <u>not</u> entitled to an award of its attorneys' fees because the jury found the Respondent <u>did</u> interfere with Petitioner's Easement. The Court should not accept this illogical result. Further, even if the rule is to be interpreted that way, Respondent was successful in convincing the trial court to deny Petitioner's request to restrict Respondent's business to

daytime operations. Petitioner expressly asked the lower court to prohibit Respondent from operating a restaurant that serves dinner in the evening. (R. pp. 274–279.) The trial court denied this request and declined to enter injunctive relief requested by Petitioner. (R. pp. 247–249.) Petitioner failed to defeat this part of Respondent's claim on the Easement, so the Court of Appeals erred in finding that Respondent was not "successful."

III. THE COURT OF APPEALS ERRED BY FINDING THAT THE EXCEPTION SET FORTH IN *BLACK V. PATEL*, DID NOT APPLY TO PETITIONER'S CLAIMS, EVEN THOUGH IT WAS RESPONDENT'S WRONGFUL ACTS THAT INTERFERED WITH PETITIONER'S EASEMENT RIGHTS AND CAUSED PETITIONER TO FILE THE LITIGATION.

Petitioner was forced to sue Respondent because Respondent interfered with Petitioner's Easement, and the Court of Appeals erred by holding that the exception to the general rule set forth in *Black v. Patel*, 357 S.C. 466, 471 n.4, 594 S.E.2D 162, 165 n.4 (2004), did not apply to Petitioner's claims. The exception from *Black* recognizes that the general rule does not apply where it is the wrongful act of the covenantor which causes the covenantee to be in litigation. Id. Petitioner respectfully requests that this Court accept this Petition to clarify the meaning and parameters of the exception announced in *Black*. The entire basis for the exception announced in Footnote 4 is to punish the wrongdoer. Where the grantor of an easement later interferes with that easement and a trier of fact finds him liable, the only just interpretation of the warranty provision is to punish the grantor. Why else include the language, "[t]here are exceptions to this rule, for example, where it is the wrongful act of the covenantor which causes the covenantee to be in litigation"? *Id.*

That is exactly what happened here. The grantor warranted protection from interference, including its own interference, and then was found liable for interference. But instead of applying the exception, and punishing the grantor, the Court of Appeals distinguished this case

from *Black* because this case does not involve a dispute with a third-party. While the Court in *Black* did note that the litigation involved a third-party, that just happened to be the circumstance in *Black*, and the involvement of a third-party was not critical to the Court's holding. There is no reason to impose a requirement that a third-party be involved before enforcing a defense obligation under a warranty in an easement.

In fact, imposing a third-party requirement overlooks another key distinction with respect to easement disputes. Instead of being a one-time transaction like a title transfer, for an easement, the grantor still owns the property subject to the easement. As such, there is potential for continued interaction (and interference) between the parties. Requiring that a third-party make the claim against the easement for the exception to apply overlooks that it is more likely to be the grantor who makes the claim to the easement by trying to use his or her own property in violation of the easement.

Finding that the exception does not apply if a third-party is not involved also violates the fairness principles recognized in *Black*. See id. at 472, 165 (noting "the covenantor has not conveyed bad title in any way, so it seems unfair to shift the burden of the costs of defense on him."). Respondent forced Petitioner to file the litigation by interfering with the Easement, so finding that Petitioner is not entitled to attorneys' fees simply because the dispute involved Respondent and Petitioner and not anyone else is an unjust result.

Finally, requiring that a third-party be involved is contrary to the language of the Easement requiring that Respondent "warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, its successors and assigns, *against itself* and its successors and assign[.]" (R. pp. 127-143, pp. 145-153) (emphasis added.) Respondent expressly pledged to defend the Easement unto Petitioner against itself, Respondent. The Court

of Appeals' interpretation of the exception from *Black* to require involvement of a third-party reads this language right out of the Easement and is reversible error.

The Court should grant the Petition for Writ of Certiorari to clarify that a third-party is not required for the *Black* exception to apply in an easement dispute and for the Easement to impose an obligation for Respondent to warrant and defend Petitioner.

CONCLUSION

This case presents an opportunity for the Court to address novel issues of law regarding the construction and application of warranty language in an easement which have never been addressed in South Carolina. The Court should take this opportunity to clarify its precedent establishing that an easement grantor must honor its obligations to warrant and defend the grantee, especially when it is the grantor that interferes with the easement and causes the grantee to file litigation against it. That is the only logical and fair outcome and is the only interpretation of the Easement which gives full meaning to the terms contained in the Easement itself. Accordingly, the Court should grant this Petition for Writ of Certiorari and ultimately reverse the Court of Appeals.

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PROOF OF SERVICE

I hereby certify I have served a copy of *Petition for a Writ of Certiorari* upon Respondent on November 4, 2022, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following party of record:

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