THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Benjamin H. Culbertson
Circuit Court Judge

Case No. 2018-CP-22-00199
Appellate Case No. 2019-000885

The Gulfstream Café, Inc.....Appellant,

v.

Palmetto Industrial Development, LLC.....Respondent.

APPELLANT'S PETITION FOR REHEARING

Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND LLC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
sean.foerster@rogerstownsend.com

Simon H. Bloom (admitted Pro Hac Vice)
Andrea J. Pearson (admitted Pro Hac Vice)
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue, NE
Atlanta, GA 30306
(404) 577-7710
sbloom@bloom-law.com
apearson@bloom-law.com

Attorneys for Appellant The Gulfstream Café, Inc.

PETITION FOR REHEARING & MEMORANDUM IN SUPPORT

I. Standard of Review

Per Rule 221(a), Appellant respectfully asks the Court for a rehearing. Rule 221(a), SCACR. A Petition for Rehearing shall be in accordance with Rule 240. Id. Therefore, a Petition for Rehearing shall be written, state the grounds for the petition, and comply with Rule 267. See Rule 240(c), SCACR. The purpose of a Petition for Rehearing is to state with particularity the points that have been overlooked or misapprehended by the Court. Rule 221(a), SCACR.

II. The Court Overlooked and Misapprehended Several of Appellant's Critical Positions.

The Court's opinion overlooked and misapprehended the fundamental issue that this case is not a warranty deed case about defending title. This is a case about defending an easement. The Court's opinion essentially says that since the language in Appellant's easement is like the language in a warranty deed, the Court should rely on all of the warranty of title cases and hornbooks to interpret the easement language. But at the same time the Court confirms that deeds and easements are very different. The Court said at footnote 3 that "[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." (Opinion at 8, n. 3, quoting *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970)). Appellant agrees. Applying the warranty of title language and the cases and handbooks from around the county to this easement case is a mistake.

Once the Court forced the square peg of the title cases into this case the result was inevitable. Applying those warranty of title rules, the Court found that Appellant is not entitled to attorneys' fees because: (1) Respondent did not make a claim to Appellant's title, (2) Appellant was successful in defending the claim, and (3) there was no third-party claim involved.

But easements convey different rights than warranty deeds, and the case law relied on by the Court is inapposite. The Court's reliance on the warranty of title rules reads all meaning out of the easement provision at issue.

Instead of relying on warranty of title cases, the Court should turn to the rules of construction and the language of the easement itself to determine if Appellant is entitled to attorneys' fees. The easement provides:

> 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).

The plain language of the easement imposes the obligation on Respondent to warrant and defend Appellant. Respondent must warrant and defend Appellant against: (1) itself and its successors and assigns and (2) all others. Thus, the express language requires Respondent to warrant and forever defend Appellant against Respondent. Moreover, the obligation arises for those "whomever lawfully claiming, *or to claim* the same or any part thereof." (Id.) 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 Appellant against any claim by Respondent, whether lawful 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.

Even if the general rule applies, the Court overlooked several of Appellant's arguments, which if given due consideration, Appellant should prevail. Specifically, the Court found that Appellant did not satisfy the general rule because "title" is not at issue here, and Respondent has

not disputed that Appellant has an easement. Instead, "at worst," the Court found that Respondent has been infringing upon Appellant's easement rights. The Court's interpretation misapprehends 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. Basically, the Court 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 Appellant has an easement. (R. p. 171, line 7 – p. 173, line 18). That is also what happened in Black v. Patel, 357 S.C. 466, 468, 594 S.E.2d, 162, 163 (2004) when the defendants encroached upon the plaintiffs' property by erecting a building on it. Id.

In addition, the Court's footnote 3 essentially implies that there can never be a claim to "title" in the context of an easement because an easement does not give title to the land at all. Appellant urges that this strict reading of "title" is not warranted in the easement context due to the nature of the rights conveyed by an easement. The Court's interpretation of the general rule eviscerates the defense and indemnity obligations in the easement here, and Appellant requests the Court reconsider.

Similarly, while the Court states that the jury found in favor of Appellant, the Court does not address the issue that *Respondent* was successful in convincing the trial court to deny Appellant's request to restrict Respondent's business to daytime operations. Appellant 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 Appellant. (R. pp. 247–249). Appellant failed to defeat this part of Respondent's claim on the easement. The success doctrine does not apply. Appellant believes that the Court overlooked these arguments, and the Court should grant the Petition for Rehearing.

With respect to the issue of the exception set forth in Black, 357 S.C. at 471 n.4, 594 S.E.2d at 164 n.4, to the general rule, the Court appears to acknowledge the exception exists, but the Court distinguishes this action from Black because this case does not involve a third-party. Nothing in the Black rule and exception require that a third-party be involved for the principles to apply. Black just happened to be a case that included a third-party claim. The Court's application of Black also ignores the language in the easement that Respondent "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*[.]" (R. pp. 127–143, pp. 145—153). The Court overlooked the easement's own language, which demonstrates that the exception in Black should apply (if jurisprudence around warranty of title is to be a guide).

The Court also failed to address Appellant's argument regarding fairness, which further supports Appellant's reading of the easement language and the application of the exception in Black to this case. Respondent forced Appellant's hand in filing the litigation in this case, as it made claims to the easement by interfering with it. It is only fair to require Appellant to pay for the legal fees Appellant necessarily incurred, regardless of whether there is a third-party in this case.

CONCLUSION

Appellant respectfully petitions the Court to rehear the argument.

Respectfully submitted,

Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND LLC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
sean.foerster@rogerstownsend.com

Simon H. Bloom (admitted Pro Hac Vice)
Andrea J. Pearson (admitted Pro Hac Vice)
BLOOM PARHAM, LLP
977 Ponce de Leon Avenue, NE
Atlanta, GA 30306
(404) 577-7710
sbloom@bloom-law.com
apearson@bloom-law.com

Attorneys for Appellant The Gulfstream Café, Inc.

August 25, 2022

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The Gulfstream Café, Inc.....Appellant,

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Palmetto Industrial Development, LLC.....Respondent.

PROOF OF SERVICE

I hereby certify I have served a copy of Appellant's Petition for Rehearing upon Respondent on August 25, 2022, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following counsel of record:

Henrietta Golding, Esquire
Burr & Forman LLP
P.O. Box 336
Myrtle Beach, SC 29578

Tiffany Cooper
Legal Assistant to Sean M. Foerster
ROGERS TOWNSEND LLC

ROGERS TOWNSEND LLC
POST OFFICE BOX 100200 (29202)
1221 Main Street, 14th Floor
COLUMBIA, SOUTH CAROLINA 29201
P 803.771.7900 F 803.343.7017
W ROGERSTOWNSEND.COM

SEAN M. FOERSTER, ESQUIRE
MEMBER
SEAN.FOERSTER@ROGERSTOWNSEND.COM
D 803.744-1855
F 803.343.7017

LICENSED IN SOUTH CAROLINA

ROGERS TOWNSEND
ATTORNEYS AT LAW

August 25, 2022

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court for the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *The Gulfstream Café, Inc. v. Palmetto Industrial Development, LLC*
Appellate Case No.: 2019-000885
Our File No.: 023499-00002

Dear Ms. Kitchings:

Enclosed are the original and seven copies of Appellant's Petition for Rehearing and Proof of Service in reference to the above-listed matter.

By copy of this letter, I am serving copies of these documents all counsel of record.

Please have your staff return a clocked copy of these documents to me via the courier. Thank you for your assistance in this matter.

Very truly yours,

Sean M. Foerster

/SMF
Enclosures

cc via regular mail:
Henrietta Golding, Esquire
Burr & Forman LLP
P.O. Box 336
Myrtle Beach, SC 29578