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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
Circuit Court Judge

APPELLATE CASE NO. 2022-001565
TRIAL CASE NO. 2018-CP-22-00199

The Gulfstream Café, Inc. ..... Petitioner,

v.

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

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Any Special and Important Reasons Exist to Justify Granting Certiorari.

II. Whether The Court Of Appeals Correctly Held That South Carolina Precedent Governed The Warranty Provision In The Easement And Correctly Concluded That The Facts Did Not Support A Finding that Respondent Owed A Duty To Warrant And Defend Petitioner.

III. Whether The Court Of Appeals Correctly Held That Only Successful Claims Justify An Award Of Attorneys' Fees.

IV. Whether The Court of Appeals Correctly Held that The Footnote in *Black v. Patel* Did Not Apply As No Third Parties Were Involved In The First Lawsuit.

INTRODUCTION

This case does not present any novel questions of law. This Court has explicitly held that indemnification obligations asserted under general warranty provisions, typically found in deeds, do not give rise to the recovery of attorneys' fees unless (1) a claim is made against the validity of "title" and (2) the claim is "lawful" – i.e., the claim was successful. *See*, *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162, (2004). The Court of Appeals correctly found the plain language of the general warranty provision in Petitioner's Easement is not applicable as Respondent (1) did not make a claim against the validity of Petitioner's Easement and (2), even if Respondent had made a claim, the claim was not successful as a jury found in favor of Petitioner in the first lawsuit. In addition, the Court of Appeals properly held that the exception addressed in footnote 4 of *Black* is not applicable because a third-party, which is required by the exception, was not involved in the underlying case. Accordingly, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Two restaurants in Garden City share a parking lot.

Respondent owns the Marlin Quay Marina (the "Marina") in Garden City. (R. p. 30.) The Marina property includes a ship's store and restaurant, along with boat slips. (R. pp. 28, 39.) Respondent also owns the parking lot (the "Parking Lot"). (R. p. 30.) On the other side of the Parking Lot is Petitioner's restaurant. (R. p. 28.) When the Marina was developed in the 1980s, the original owner of the Marina property granted Petitioner three substantially similar easements to use the Parking Lot, which in sum gave Petitioner a nonexclusive right to use the Parking Lot for ingress, egress, and parking and for maintaining and improving its building. (R. pp. 127–43.) A similar easement was granted in 1990. (R. pp. 145–54.)

All four easements (collectively, the "Easement") each contain the identical warranty provisions:

> Marlin Quay Marina Corporation does hereby bind itself and its Successor and Assigns, to warrant and forever defend, all and singular, the said premises unto the said Gulfstream Cafe, its Successor and Assigns, against itself and its Successors and Assigns and all other whomever lawfully claiming, or to claim the same or any part thereof.

(R. pp. 128, 135–36, 141–42, 149.)

B. A dispute arises over Respondent's new building and the parking lot.

After Respondent purchased the Marina in 2014, (R. pp. 155–61), it developed plans to replace the old store and restaurant with a new one. This spawned a long-running lawsuit pitting Petitioner against Respondent and its member, Mark Lawhon. The first lawsuit between Petitioner and Respondent was filed in November 2016. *See* Compl., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Nov. 16, 2016) (the "First Lawsuit").

As a (very) brief overview, Petitioner alleged that Respondent and Lawhon intentionally interfered with Petitioner's Easement, Respondent trespassed, and that Petitioner was entitled to relief under S.C. Code § 15-67-410. (R. pp. 201–29.) Respondent and Lawhon denied any liability to Petitioner and counterclaimed for forcible entry, trespass, declaratory relief, promissory estoppel, and breach of the Easement. (R. pp. 230–41.) In the First Lawsuit, Respondent neither denied Petitioner's Easement nor did it attack the validity of the Easement.

Various claims were disposed of before trial, and after a six-day trial in June 2018, a jury found for Petitioner on its intentional interference with easement claim but initially awarded no damages. The trial judge directed the jury that damages had to be awarded, at which point the jury awarded $1,000 but no punitive damages. (R. pp. 242–43.) The court entered an injunction prohibiting Respondent and Lawhon from interfering with Petitioner's Easement and limiting the

footprint of any new marina store and restaurant building to the footprint of the old building. (R. pp. 244–46.)

Petitioner, in its description of the First Lawsuit, tries to paint Respondent as the wrongdoer, but Petitioner has been anything but a good neighbor. By way of one example, Petitioner argued to the trial court that Respondent could not serve dinner, which it had done for years, because the Easement "anticipated" (a nonbinding word) that Petitioner would "primarily" use the Parking Lot at night and the Respondent "primarily" during the day. However, Petitioner failed to tell the Court that it has for years served brunch (a daytime meal) on Sundays. (R. p. 146); *see* Opp'n to Mot. for Contempt 17, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Sept. 4, 2019). In another example, Petitioner sought to have Respondent and Lawhon held in contempt for their use of cranes to build the new marina shop and restaurant. Again, Petitioner failed to tell the Court that it had cranes of its own in the Parking Lot to work on its building. *See* Opp'n to Mot. for Contempt 16–17, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Sept. 4, 2019). (Petitioner eventually withdrew this motion the day before the hearing. *See* Withdrawal of Mot. for Contempt, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Oct. 16, 2019).)

C. Petitioner demands Respondent pay its attorneys' fees.

More than a year after the First Lawsuit was filed, Petitioner made a demand that Respondent pay Petitioner's attorneys' fees incurred in the First Lawsuit. (R. pp. 80–82.) Petitioner based its indemnification claim on four factors. First, Petitioner pointed to the filing of the First Lawsuit. (No. 2016-CP-22-961). (R. p. 81.) Second, Petitioner cited the redevelopment plans that Respondent submitted to Georgetown County for a larger building and a challenge to those plans that Petitioner lodged with the zoning commission. (R. p. 81.) Third, Petitioner referred to the lawsuit filed by Marlin Quay Marina Bar & Grill, LLC in May 2017 (No. 2017-CP-22-446). (R.

p. 81.) Fourth, Petitioner noted that Respondent obtained a building permit for a larger building on the north end of the Parking Lot in September 2017. (R. p. 81.)

Respondent denied that it had any duty to indemnify Petitioner or pay its attorneys' fees. (R. p. 84.)

D. Petitioner files this second lawsuit.

When Respondent denied that Respondent had any rights for Petitioner's indemnification due to the claims in the First Lawsuit, Petitioner tried to amend its complaint in the First Lawsuit to assert two new causes of action based on indemnification. Petitioner's motion was denied. *See* Order, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Feb. 8, 2018). Petitioner filed this second lawsuit against Respondent. (R. pp. 27–37.) In this second lawsuit, Petitioner sought a declaratory judgment that Respondent breached its duty to defend Petitioner's rights under the Easement. (R. pp. 34–35.) Petitioner also asserted a breach of warranty claim. (R. pp. 35–36.)

After Respondent answered the complaint, (R. pp. 109–11), both parties moved for summary judgment. (R. pp. 112–23, 262.) The circuit court granted Respondent's motion for summary judgment and denied Petitioner's. (R. pp. 6–10.) The circuit court held *Black v. Patel* governed the case and Respondent was not required to warrant and defend the Easement from the claims made in the First Lawsuit. (R. p. 9.). The Court of Appeals affirmed.

ARGUMENT

I. No Special and Important Reasons Exist for Granting Certiorari.

There are no "special and important" reasons to grant certiorari. A writ of certiorari "is not a matter of right," and it "will be granted ***only*** where there are ***special and important reasons***." Rule 242(b), SCACR (emphasis added). While the Rule does not attempt to list all of the "special and important reasons" that might exist to justify granting certiorari, the Rule

identifies five examples to illustrate the "character of reasons" "which will be considered" when determining whether to grant certiorari. *Id.* Those five reasons are:

1. Where there are novel questions of law.

2. Where there is a dissent in the decision of the Court of Appeals.

3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

4. Where substantial constitutional issues are directly involved.

5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id. None of these five reasons are present here.

Petitioner concedes that the general warranty language presented in the Easements is "virtually identical" to that in a general warranty deed but argues that the language in the Easement should be read differently as deeds and easements grant different rights. This is incorrect and is a settled area of the law. *See, Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004) ("the language in the general warranty deed is based upon state statute" and "the general rule for cases in this context is that only 'lawful' – that is, successful – claims asserted against title justify an award attorneys' fees where the covenantor has failed to defend") (citing S.C. Code Ann. § 27-7-10). Thus, contrary to the assertions by Petitioner, the difference between "deeds" and "easements" does not demand a different result and the Court of Appeals' opinion fits neatly with established precedent about warranty provisions.

None of the other reasons identified in Rule 242 are present either: no dissent in the Court of Appeals' decision, no constitutional issues, and no federal questions. Therefore, this

Petition does not raise any "special and important reasons" necessary to grant certiorari. Accordingly, this Court should deny the petition.

II. The Court Of Appeals Correctly Held That South Carolina Precedent Governed The Warranty Provision In The Easement And Correctly Concluded That The Facts Did Not Support Any Finding That Respondent Owed A Duty To Warrant And Defend Petitioner.

Petitioner mistakenly contends that "Respondent must warrant and defend Petitioner against: (1) itself and its successors and assigns and (2) all others" whether the claim is "'successful' or not." (Pet. for Writ of Cert., p. 7). In particular, Petitioner argues that the obligation arises when "whomever lawfully claiming, *or to claim* the same or any part thereof." *Id.* Petitioner emphasizes "or to claim", arguing that "lawfully" is a not a requirement of "or to claim." Petitioner misreads and mischaracterizes the language of the Easements.

The word "lawfully" applies to both "claiming" and "or to claim". *See Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 231, 797 S.E.2d 387, 391 (2016) ("By placing a 'comma' after the term 'adverse', this Court intended to modify the term 'adverse', not create another method to establish a claim."). Accordingly, as similarly held in *Simmons*, the comma after "lawfully claiming" modifies the term "lawfully claiming" to include future lawful claims, not to create another method to establish a claim. Thus, the plain language of the Easement applies "lawfully" to both "claiming" and "or to claim." Accordingly, the Court of Appeals properly looked to *Black* to determine the meaning of "lawfully". *Black*, 357 S.C. at 471, 594 S.E.2d at 164.

In defining "lawfully", *Black* held that "[t]he general rule for cases in this context is that only 'lawful' – that is, successful – claims asserted against title justify an award of attorneys' fees where the covenant has failed to defend." *Id.* Here, the Court of Appeals correctly found that Respondent had not (1) made a claim against the validity of Petitioner's Easement and, (2)

even if Respondent had made a claim, the claim could not have been lawful as the jury found in favor of Petitioner at the 2018 trial. Accordingly, Petitioner's argument that it is entitled to an award of attorneys' fees fails because no claim against the validity of Petitioner's Easement was "lawfully" made.

Petitioner also argues that this "general rule" should not apply because deeds and easements grant different rights. Petitioner relies on *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) in support of its argument contending 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." Thus, Petitioner contends that because an easement does not give "title", the holding in *Black* limits Petitioner's ability to establish that Respondent brought a "lawful claim" against Petitioner. Petitioner rhetorically asks "if attorney's fees are only triggered where the grantor does not interfere with easement, what is the point of the warranty?" (Pet. Writ of Cert., p. 9). Simply, the point of the warranty is to protect and defend the validity of the Easement, not to protect against any and all claims that may "interfere" with the Easement. *Outcalt v. Wardlaw*, 750 N.E.2d 859, 863 (Ind. Ct. App. 2001), as cited in *Black,* confirms this reasoning and held that "because the covenant of warranty does not protect against **every adverse claim**, 'the covenantee is not entitled to demand of his covenantor expenses incurred in the defense of a suit which sustains the conveyed title as **valid**". *Black*, 357 S.C. at 471, 594 S.E.2d at 164-65 (emphasis added); *see also*, 21 C.J.S. *Covenants § 22* (1990) ("A covenant of warranty in a deed has been defined as . . . an obligation to defend and protect the covenantee against any rightful claims and demands."). Thus, the covenant of warranty solely warrants and protects the **validity** of what is conveyed.

Respondent did not attack the validity of Petitioner's Easement. Thus, the covenant of warranty does not apply. In fact, and importantly, Petitioner maintains the exact same rights provided by the Easement today as it did when it was granted those rights in 1986 and 1990. Accordingly, the Court of Appeals correctly found that *Black v. Patel* governed the general warranty provisions and Respondent does not owe a duty to warrant or defend Petitioner from the claims made in the First Lawsuit.

III. The Court of Appeals Correctly Held That Only "Successful" Claims Justify An Award Of Attorneys' Fees.

Petitioner contends that "interference" to an Easement is equivalent to an "attack[ ] [on] the validity of title" arguing that Respondent's actions were, in effect, a "claim" on Petitioner's Easements. (Pet. for Writ of Cert., p. 9). Petitioner argues that "[b]asically 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." (*Id.*, p. 10).

Petitioner's argument lacks any merit and is exactly why South Carolina common law has established causes of action for "trespass" and "interference", in addition to a separate cause of action for "quiet title" against title and easements. *See*, *Ravan v. Greenville Cnty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993) (A trespass is any interference with one's right to the exclusive, peaceable possession of his property."); *Brown v. Gaskins*, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1984) ("[t]he general rule is that the owner of the servient estate may erect gates across an easement if they (1) are so located, constructed and maintained as not to unreasonably interfere with the right of passage of the dominant estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for the use of the servient estate.") (citing *Watson v. Hoke*, 73 S.C. 361, 53 S.E. 537 (1906)); *Marion County Lumber Co. v.*

Tilghman Lumber Co., 75 S.C. 220, 55 S.E. 337 (1906) (Owner of the dominant estate cannot materially interfere with use and enjoyment of servient estate's easement); *Walker v. Guignard*, 293 S.C. 247, 359 S.E.2d 528, 528-29 (Ct. App. 1987) (A quiet title action to property which held an easement over the property); *Kunkle v. South Carolina Electric & Gas Co.,* 251 S.C. 138, 161 S.E.2d 163 (1978) ("The fact that plaintiff's possession was subject to the defendant's easement would not preclude plaintiff from maintaining the action to quiet title. 74 C.J.S. Quieting Title, § 32c"). Thus, the Court of Appeals correctly held that "Respondent has not disputed that Petitioner has easements over Respondent's property; rather, Respondent, at worst, has been infringing upon Petitioner's rights." Accordingly, the Court of Appeals correctly found that Respondent neither sought to attack the validity of the Easement nor did it contend that the grant from Marlin Quay Marina Corporation was ineffective in any manner.

In arguing that Respondent had, in fact, made a "successful" claim against the Easement, Petitioner contends that "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." (Pet. for Writ of Cert., p. 10-11). Notably, the language within the Easement does not grant or restrict Respondent's business to daytime operations. In particular, the Easement sets forth, in relevant part:

> "It is anticipated by the parties that while they will each have joint and non-exclusive use **at all times** of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular hours of Grantee.

(R. pp. 62) (emphasis added). Accordingly, the Easement granted both parties use of the Parking Lot at all times. Thus, had the trial court restricted Respondent's use of the Easement to just

daytime regular business hours, the trial court would have re-written the Easement. Accordingly, the Court of Appeals correctly found that Respondent was not "successful" when the lower court declined to limit Respondent's business to daytime operations as this was never a restriction set forth in the Easement.

IV. The Court of Appeals Correctly Held that The Footnote in *Black v. Patel* Did Not Apply As No Third Parties Were Involved In The First Lawsuit.

Petitioner contends the exception in *Black* is applicable as "Petitioner was forced to sue Respondent because Respondent interfered with Petitioner's Easement". Petitioner relies on footnote 4 within *Black* contending that "[t]he 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." (Pet. of Writ of Cert., p. 11). Petitioner contends that "[w]hile 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." (*Id.*, p. 12). Petitioner's argument is without merit and support.

Assuming our Supreme Court even adopted the "exception" in *Black*, *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (observing that dicta is not binding)), the Supreme Court does not identify that the "involvement of a third-party was not critical to the Court's holding." Nowhere in the opinion does the Court opine that the third-party is not critical. In fact, the opposite must be true, as the Court specifically identified that the covenantee be in litigation with a third party. And the Court of Appeals was correct not to rely upon it. *Cf. Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013) (recognizing that effect must be given the plain language of court orders). Accordingly, because a third-party was not involved in this litigation, the exception in *Black* does not apply to Petitioner's argument.

Petitioner further argues that "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." (Pet. Writ of Cert., p. 12). As addressed above, Petitioner again fails to accept that "interference" is a separate and distinct cause of action from attacking the validity of title. *See*, *Brown v. Gaskins*, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). As the Court of Appeals correctly set forth, "we again emphasize [Petitioner's] actual "title" has not been challenged and there is not a third party involved as contemplated in *Black*. *See Black*, 357 S.C. at 471, n.4, 594 S.E.2d at 165, n.4 ("[W]here it is the wrongful act of the covenantor which causes the covenantee to be in litigation with the third party, then the covenantor would be liable for costs despite the fact that the covenantee prevailed.").

Petitioner also contends that "requiring a third-party to 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[.]" (Pet. Writ of Cert., p. 12). Petitioner's argument defies common sense. A party would rarely, if ever, agree to pay the other side's costs and fees in a lawsuit, regardless of the outcome. Doing so would effectively prevent that party from ever litigating any dispute with the other side. Thus, "courts have generally declined to infer indemnification obligations from an indemnitee/indemnitor suit if the contractual language does not suggest that the contracting parties were *specifically concerned with prospective litigation between themselves*." *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012) (emphasis added).

The warranty provisions here are the typical ones that have a long history in real estate documents. This language has never been construed as requiring the grantor to indemnify the grantee in any dispute between them that relates to the real estate interest that was granted.

Petitioner therefore infers, without support, that this centuries' old language requires Respondent to indemnify Petitioner in litigation between themselves. But inferring such a requirement is exactly what courts around the country have refused to do.

The plain language of the warranty provisions reinforces this common-sense conclusion. Those provisions require Respondent "to warrant and forever defend" a lawful claim against the easements. (R. pp. 128, 135–36, 141–42, 149). As one court has observed, "defend" is a key word in a provision like the ones here. *See Canopy Corp. v. Symantec Corp.*, 395 F. Supp. 2d 1103, 1115 (D. Utah 2005). That court reasoned:

> [T]he parties' use of the term "defend" necessarily narrows the sweep of the indemnifying language. The use of the word "defend" indicates that the parties intended the provision to apply only to third-party claims because the word would have no effect in a direct action between the parties. Obviously, in a direct action between the parties, neither party would be interested in tendering its defense or being defended by the other party.

Id. In other words, if Petitioner's interpretation of the easement were correct, Respondent could control both sides of the litigation. Such a result makes no sense and is antithetical to our adversarial system.

Finally, requiring an explicit agreement to pay for both sides of a lawsuit comports with the traditional American rule that parties usually pay their own attorney's fees. Without a clear agreement for the unusual situation (to put it mildly) in which one side would fund both sides of a lawsuit regardless of the outcome, each party should bear its own fees, as has long been the custom in our courts. *See, e.g.*, *S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 9, 766 S.E.2d 700, 704 (2014) (describing the American rule that parties must bear their own attorney's fees, unless a contract or statute provides otherwise). Accordingly, this Court should deny the Petition for Writ of Certiorari

as it is a well settled area of law that *Black v. Patel* controls whether Petitioner is entitled to recovery of attorneys' fees under the general warranty provision.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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