

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. 2022-001565

The Gulfstream Café, Inc.,

Petitioner,

v.

Palmetto Industrial Development, LLC,

Respondent.

**REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF
CERTIORARI**

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INTRODUCTION

This case falls squarely into the criteria for granting a writ of certiorari, as it presents novel questions of law. Respondent in its Return does not point to a single case in South Carolina interpreting the warranty language at issue here in the easement context. There is not a single South Carolina case on point addressing the question presented here: must the easement grantor defend the easement grantee where the grantor is found to have interfered with the easement? Both Respondent and the Court of Appeals fall back on warranty of title case law interpreting similar language in warranty deeds, but both fail to address adequately the critical differences between a warranty in a deed and a warranty in an easement. The Court should grant certiorari to clear up the confusion and decide this issue of first impression. Moreover, 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. Respondent calls the language from *Black* dicta and contends that a third-party is required for the exception to apply. The Court should grant certiorari to definitively recognize the exception from the general rule in *Black* and determine its parameters. For these reasons, Petitioner's Petition for Writ of Certiorari should be granted.

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") (R. pp. 145-154.)

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. (R. p. 169, line 3 -p. 170, line 19; R. p. 171, line 7 - p. 173, line 18; R. p. 192, line 4 - p. 197, line 20; R. p. 183, line 15 - p. 191, line 15; R. p. 163, lines 16-21; R. p. 164, line 23 -p. 165, line 19; R. p. 166, lines 6-17; R. p. 174, line 13 - p. 175, line 6; R. p. 199, lines 6-9; R. p. 179, line 25 - p. 180, line 2; R. p. 11, lines 15-19; 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. (R. pp. 201-229.) After a week-long trial, the jury returned a verdict largely for Petitioner.¹ 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.)

The Easement provides the following:

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

¹ The jury and Judge refused use interference.

and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(R. pp. 145-154.)

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 Court should analyze the Easement language on its face. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language. *Schulmeyer v. State Farm First and Cas. Co.*, 353 S.C. 491, 495, 570 S.E.2d 132, 134 (2003). Based on the plain language, 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.)

Under this provision, 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 all claims or interference, including those instigated by Respondent's own conduct. 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, regardless of the "success" of the claim.

Respondent relies on the "success doctrine" found in warranty of title claims to escape the plain meaning of those words. This Court should not fall down that same doctrinal mineshaft. There is no South Carolina case that applies this doctrine to easements and there is no reason to disregard the plain language of the contract in favor of an inapplicable line of cases.

Respondent then relies on *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 231, 797 S.E.2d 387, 391 (2016) to argue that the term "lawfully" in the Easement applies to both the "claiming" and "or to claim" language. But *Simmons* is far from on point. In that case, the Court considered whether a prior court decision articulating the third element of a prescriptive easement as "adverse or under a claim of right" meant that a claimant could establish a prescriptive easement through: (1) adverse use, or (2) under a claim of right. *Id.* at 229-31, 797 S.E.2d at 390-91. The Court looked to another prior decision, which articulated the element as "adverse, or under a claim of right," and concluded that the comma after adverse showed "under a claim of right" was intended to modify the term adverse, not establish another method of establishing a claim. *Id.* at 231, 797 S.E.2d at 391.

Simmons is clearly distinguishable from this case, as it construed prior case law instead of the plain language of an easement, and the language is far different from the “lawfully claiming, or to claim” language here. In addition, in *Simmons*, the Court reasoned that the terms adverse use and claim of right were essentially the same and interchangeable. *Id.* at 232, 797 S.E.2d at 391-92. That is not the case here. In warranty of title cases, a lawful claim means a successful claim, while “to claim” means any claim, regardless of its success. These are far from the same or interchangeable terms. Finally, to read the Easement so that “lawfully” modifies “claiming” and “to claim” renders the Easement redundant. Respondent essentially asks the Court to read the Easement as saying “lawfully claiming,” or “lawfully to claim.” The Court should reject this repetitive reading.

Instead of evaluating the language of the Easement from a clean slate, Respondent tries to force a square peg into a round hole by relying on warranty of title case law to interpret the Easement. 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). But application of that rule is nonsensical here. Respondent’s position ignores the actual language of the Easement, blindly applying muddled case law from a totally different property rights context because it is beneficial to Respondent. The unreasoned application of the warranty of title cases ignores the primary rule of contract construction to construe the intent of the parties, borrows a line of cases applying deeds instead of easements, and causes nothing but dissonance as a result. The concepts that apply for deeds simply do not make sense in the easement context.

To begin, it is undisputed that an easement does not convey title. What is disputed is whether a claim to “title” is required for a defense obligation to arise in the easement context. It

is Petitioner's position that a claim to "title" cannot be required for a duty to defend to arise in the easement context because there can never be a claim to title of an easement. Respondent does not directly address this position, instead arguing that what is required is a challenge to the "validity" of the Easement. But nowhere in the Court of Appeal's opinion is there a requirement that the challenge be to "validity" of an easement. Instead, the Court of Appeals required that "title" be challenged. (Court of Appeals Order at 5, 7.) Similarly, the language in *Black* cited by Respondent regarding validity states that "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). The rule for the warranty deed cases is about title, not a challenge to "validity." The Court should reject Respondent's "validity" test, created in an attempt to make sense of the general rule's application to an easement.

Similarly, it makes no sense to interpret "success" the same way in an easement dispute as compared to a deed dispute. Under the Court of Appeals' rationale, the grantor is only taxed with paying the grantee's attorneys' fees when the grantor is found to be innocent of interference or its claim fails, *i.e.*, 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. Respondent fails to address this argument at all, and it is not hard to see why. This reading adopted by the Court of Appeals and Respondent turns the intent of the parties and plain language on its head.

The fact remains that no South Carolina court has construed a warranty provision in an easement, and the Court should grant the Petition for Writ of Certiorari to determine that the right analysis is to look to the plain language of the Easement and intent of the parties. Under

that inquiry, it is clear that the parties intended to hold the grantor responsible for attorneys' fees if the grantor interfered with the rights conferred in the easement.

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.

If the Court determines that the general rule applies, it still should not be applied to bar Petitioner's claim for fees. There can be no more of a fundamental challenge to an easement than interference with it. Whether the attack is called a challenge to "title," "validity," or "interference" is a distinction without a difference. In this case, Respondent tried to take away the essential right granted by the Easement: use. If a claim to "title" is required, the circumstances here meet that test.

Respondent's "validity" argument essentially contends that if Respondent blocked off 59 of the 60 parking spaces in the Parking Lot that would not trigger the warranty obligation in the Easement, but if Respondent sent a letter to Petitioner stating that Petitioner did not have the Easement at all, that would trigger it? That cannot be the right result. Respondent's argument also overlooks that the dispute to title in *Black* arose as a result of physical interference, as the plaintiffs filed suit claiming that the defendant's building encroached on a portion of their land. *Black*, 357 S.C. 466, 468, 594 S.E.2d 162, 163. Accordingly, even in warranty deed cases, the Court has recognized that interference can result in a challenge to "title."

Moreover, the cases cited by Respondent allegedly establishing that there are different causes of action for interference, trespass, and quiet title merely recognize those causes of action. The cases do not come close to addressing the question of whether a claim of interference is a claim to title for an easement. In fact, *Kunkle v. South Carolina Elec. & Gas Co.*, 251 S.C. 138,

161 S.E.2d 163 (1968), highlights why a claim to title should not be required for an easement. In *Kunkle*, the plaintiff brought a quiet title action and the question before the court was whether the defendant obtained an easement or fee simple title. *Id.* at 145, 161 S.E.2d at 165. The Court found the defendant had an easement, not fee simple title, which highlights the critical distinctions between the rights granted for title and the rights granted for an easement.

As explained above, “success” in this context should not be interpreted to mean that Petitioner is not entitled to an award of its attorneys’ fees because the jury found the Respondent did interfere with Petitioner’s Easement. The Court should not accept this illogical result.

Finally, 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.) Respondent contends that this argument asks the Court of Appeals to re-write the Easement. Regardless, Petitioner lost on this issue and Respondent won. Under Respondent’s interpretation of the general rule, that equals “success.”

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*, 357 S.C. at 471 n.4, 594 S.E.2d at 165 n.4, did not apply to Petitioner’s claims. The exception from *Black* recognizes that “[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.* Respondent’s interference caused Petitioner to file the litigation, so the exception set forth in *Black* should apply to this case. Respondent calls the exception in *Black* dicta. The Court should grant certiorari for this reason alone and confirm this exception exists under South Carolina law.

Both Respondent and the Court of Appeals rely on language in *Black* relating to a third-party to say that third-party involvement is required for the exception to apply. But 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 the easement context, requiring a third-party fails to recognize that the continued interaction between the grantor and grantee of an easement creates a likelihood that any dispute over the easement will be between grantor and grantee, not some unrelated third-party. The Court should not engraft a third-party requirement to the rule under these circumstances.

Respondent contends that Petitioner’s argument defies common sense, because a party would rarely ever agree to pay the other side’s attorneys’ fees in a lawsuit. Respondent overlooks, however, that this happens on a daily basis in the insurance defense context. Everyday parties tender to the opposing party and its insurer demands for the defense of a claim. To contend that this is somehow a novel concept ignores the realities of indemnity and defense obligations.

Finally, the Easement itself demonstrates that the parties were concerned with prospective litigation between themselves. The Easement says grantor will “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

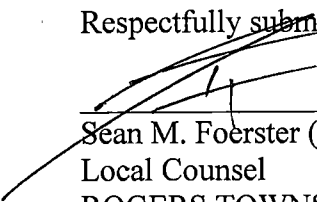
added.) Respondent's argument that a third-party is required again asks the Court to ignore the plain language of the Easement, which expressly contemplates a defense obligation in litigation between the grantor and grantee.

For these reasons, the Court should grant the Petition for Writ of Certiorari to affirm that the exception in *Black* is the law of the state of South Carolina and clarify that a third-party is not required for the *Black* exception to apply in an easement dispute.

CONCLUSION

Quite simply, as is evident by both parties' briefing, this case involves novel questions of law. The Court should grant the Petition for Writ of Certiorari to determine the context and contours of the defense obligation when a grantor is found to have unlawfully interfered with the grantee's easement. Ultimately, under the plain language of the Easement and the exception in *Black*, the Court should find that the Court of Appeals' decision must be reversed.

Respectfully submitted,



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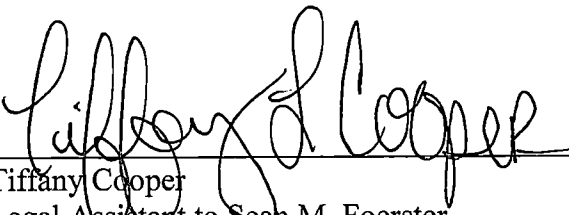
Respondent.

PROOF OF SERVICE

I hereby certify I have served a copy of *Reply to Respondent's Return to Petition for Writ of Certiorari* upon Respondent on January 9, 2023, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following counsel of record:

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