

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas
Fifteenth Judicial Circuit

The Honorable Daniel Coble,
Circuit Court Judge

APPELLATE CASE NO. 2023-000295

Gary L. Park and Cynthia Park..... Appellants,

vs.

Scott Barry Gutovitz and Caron Dawn Gutovitz..... Respondents,

**APPELLANTS’ REPLY IN OPPOSITION TO
RESPONDENTS’ MOTION TO STRIKE**

On August 17, 2023, the Respondents Gutovitz filed a Motion to Strike requesting that the Court strike 14 items that Appellants had designated as matters to be included in the Record on Appeal. Those items, as numbered in Appellants initial designation, include the following:

1. Order of the Honorable Benjamin H. Culbertson, Form 4, Granting Temporary Injunction December 17, 2019.
2. Order of the Honorable Benjamin H. Culbertson, form 4, Denying Defendants’ Motion for Partial Summary Judgment, December 17, 2019.
3. Order of the Honorable Benjamin H. Culbertson, Granting Temporary Injunction, February 10, 2020.
5. Order of the Honorable William H. Seals, Jr., Form 4, Denying Motion for Summary Judgment, January 26, 2021.
6. Order of the Honorable William H. Seals, Jr., Form 4, Granting Motion to Dissolve Injunction and Bond Money to be Released, January 26, 2021 .

7. Order of the Honorable William H. Seals, Jr., Dissolving Temporary Injunction, February 9, 2021.
22. Parks' Motion for Injunction & Memorandum in Support, October 28, 2019.
23. Gutovitzs' Motion to Amend Complaint; January 24, 2020.
24. Gutovitzs' Motion to Dissolve Injunction, October 10, 2020.
25. Parks' Opposition to Ending Injunction, November 6, 2020.
26. Parks' Motion in Opposition, November 9, 2020.
28. Parks' Offer of Judgement, November 4, 2022.
29. Parks' Motion for Sanctions Against Gutovitz, November 18, 2022.
31. Motion to Exclude Expert Testimony of Alan Campbell, P.E., November 18, 2022.

Respondents did not consult with Counsel for Appellants regarding the matters set forth herein prior to the filing of their Motion.

At the outset, Appellants concur with the removal of items numbered 28, 29, and 31, from the designation of matter, however, for the reasons stated below, the Court should deny the remainder of Respondents' Motion to Strike.

BRIEF RESPONSE

Rules 209 and 210 of the *South Carolina Appellate Court Rules* provide the following rules as to the Content of matter to be designated for this Appeal:

(b) Content. The Designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall not include any matter in his Designation which is not relevant to the appeal. S.C.A.C.R., R. 210.

(c) Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents,

and a certificate by appellant. ... When a portion of an order, judgment, decision or pleading is to be included in the Record on Appeal, the entire order, judgment, decision or pleading shall be included in the Record, to include the caption and signature(s). S.C.A.C.R., R. 210.

In their Initial Brief, Appellants set forth the following statement as to the issue on appeal:

THE LOWER COURT ERRED IN DENYING THE PARKS' RIGHT TO HAVE THIS CASE TRIED BY THE COURT, AND NOT A JURY; AN ACTION TO ENFORCE AN RESTRICTIVE COVENANT OR EASEMENT IN REAL PROPERTY IS AN ACTION IN EQUITY

Appellants also set forth the following brief introduction to this appeal:

The Appeal at bar involves an action to enforce restrictive covenants by way of injunction. South Carolina law is clear: an action to enforce restrictive covenants by injunction is an action in equity. *Buffington v. T.O.E. Ent.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009); *S.C. Dep't of Nat. Res. v. McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001); *Holling v. Margiotta*, 231 S.C. 676, 680, 100 S.E.2d 397, 399 (1957); *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct.App.1993). The lower court erred in striking Respondents' jury trial demand because the Parks have a substantial right to have this matter tried by the Court.

For this Court to conduct an analysis of the issue of whether this action is equitable or legal, this Honorable Court will need to understand the pending causes of action in each of the consolidated actions, as well as the equitable injunctive relief sought when the action was commenced, thereafter when construction suddenly started, and as the matter is currently pending at this time. It is important to note that each action initially involved claims and counterclaims. Additionally, Respondents amended their initial complaint to add a malicious prosecution cause of action, and Appellants thereafter amended their responsive counterclaims. Accordingly, the following Matters were forwarded simply to inform the lower court, as well as this Honorable Court, as to the equitable nature of the action and the relief sought, granted, and thereafter dissolved in this action:

1. Order of the Honorable Benjamin H. Culbertson, Form 4, Granting Temporary Injunction December 17, 2019 (3 pages);
2. Order of the Honorable Benjamin H. Culbertson, form 4, Denying Defendants' Motion for Partial Summary Judgment, December 17, 2019 (3 pages);

3. Order of the Honorable Benjamin H. Culbertson, Granting Temporary Injunction, February 10, 2020 (12 pages);
5. Order of the Honorable William H. Seals, Jr., Form 4, Denying Motion for Summary Judgment, January 26, 2021 (3 pages);
6. Order of the Honorable William H. Seals, Jr., Form 4, Granting Motion to Dissolve Injunction and Bond Money to be Released, January 26, 2021 (3 pages); and,
7. Order of the Honorable William H. Seals, Jr., Dissolving Temporary Injunction, February 9, 2021 (5 pages).

The underlying orders issued to date in this case amount to a grand total of twenty-nine (29) pages, and are critical to this Court understanding the procedural posture of the case.

During the hearing held by the lower court on February 7, 2023, several motions were presented to the Court. As noted in Appellants' Initial Brief at footnote 1, Appellants did not include a vast majority of the testimony presented:

While the Deposition Testimony of the Gutovitzs' and all of their contractors and witnesses was introduced and relied upon during the February 7, 2023 hearing on Appellants' Motion to Strike Jury Trial Demand and Motion for Summary Judgment, that testimony is not directly relevant in this appeal. While the Defendants and each of their witnesses confirmed the violation of the restrictive covenants, none of these facts change the nature of the underlying Action, that being an action in equity to enforce a restrictive covenant upon real property. Therefore, other than the initial obvious violation of the Easement Amendment set forth and pictured in the Complaint, testimony regarding the continued and subsequent violations are intentionally excluded in this Appeal.

Nevertheless, during the underlying hearing, opposing counsel repeatedly argued that the Appellants sale of their property and the subsequent dissolution of the pending injunction somehow changed the equitable nature of this Action (Transcript of Rec. pp. 29-30, 33). More specifically, Counsel stated:

Again, Judge, this is a little complicated, especially for you and you're just hearing it. And let me say this: They filed motions, and we filed responses to those motions yesterday, I believe, it was, and I would ask you, if there's any question about my arguments, to please refer back to those because they're, I think, well thought-out and informative to the Court on why our position is correct. (Morgan Martin, Trans. p. 30).

The underlying reasons for the injunctive relief initially granted and later dissolved are relevant to this Appeal because they demonstrate that the nature of this action began and remains 100% equitable. As a result, Appellants believe the following matters are relevant and should be included in the designation of matter for this Court:

22. Parks' Motion for Injunction & Memorandum in Support, October 28, 2019 (19 pages).
23. Gutovitzs' Motion to Amend Complaint; January 24 2020 (10 pages).
24. Gutovitzs' Motion to Dissolve Injunction, October 10, 2020 (3 pages).
25. Parks' Opposition to Ending Injunction, November 6, 2020 (10 pages); and,
26. Parks' Motion in Opposition, November 9, 2020 (6 pages).

South Carolina law is clear: an action to enforce restrictive covenants by injunction is an action in equity. The items designated above assist the Court in demonstrating the nature of the claims in this action and the relief sought always have been and currently are 100% equitable.

CONCLUSION

Appellants respectfully request that this Honorable Court deny Respondents' Motion to Strike as set forth above.

Respectfully submitted,

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