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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the 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' INITIAL REPLY BRIEF

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Appellants

/s George W. Redman, III
George W. Redman, III SCB#72365
GRedman@BellamyLaw.com
Robert S. Shelton SCB#68543
RShelton@BellamyLaw.com

November 13, 2023.

Other Counsel of Record:

Gene M. Connell, Jr.
S.C. Bar No. 1358
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Surfside Beach, SC 29587
(843) 238-5648
gconnell@classactlaw.net
Attorney for Scott Barry Gutovitz and Caron Dawn Gutovitz

L. Morgan Martin
S.C. Bar No. 3667
Law Offices of L. Morgan Martin, P.A.
1121 Third Avenue
Conway, SC 29526
(843) 248-3177
mmartin@lmorganmartin.com
Attorney for Scott Barry Gutovitz and Caron Dawn Gutovitz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF REPLY ISSUES

1. THIS ACTION INVOLVES THE ENFORCEMENT OF RESTRICTIVE COVENANTS CONCERNING REAL PROPERTY, NOT A STANDARD BREACH OF CONTRACT

2. A DECLARATORY JUDGMENT CAUSE OF ACTION DOES NOT ALLOW FOR JURY TRIAL WHEN THE UNDERLYING NATURE OF THE ACTION IS EQUITABLE

3. EVEN IF IT WAS NOT FRIVOLOUS, A MALICIOUS PROSECUTION CAUSE OF ACTION DOES NOT CHANGE THE UNDERLYING NATURE OF AN ACTION FROM EQUITABLE TO LEGAL

4. GUTOVITZS ARGUE THE LOWER COURT'S ORDER GRANTING CONSOLIDATION IS SPECIFIC, WHILE THE SPECIFIC DENIAL OF A MOTION TO STRIKE A JURY TRIAL IS NOT

5. GUTOVITZS ARGUE THE LOWER COURT'S ORDER GRANTING CONSOLIDATION IS SPECIFIC, WHILE THE SPECIFIC DENIAL OF A MOTION TO STRIKE A JURY TRIAL IS NOT

REPLY ARGUMENTS

1. THIS ACTION INVOLVES THE ENFORCEMENT OF RESTRICTIVE COVENANTS CONCERNING REAL PROPERTY, NOT A STANDARD BREACH OF CONTRACT

Respondents argument that they are entitled to a jury trial due in part to a breach of contract cause of action is misplaced. This action involves restrictive covenants upon real property. While restrictive covenants are contractual in nature, they are not enforced by the Courts as a typical breach of contract cause of action. *Hanold v. Watson's Orchard Prop. Owners Ass'n*, 412 S.C. 387, 395, 772 S.E.2d 528, 533 (Ct. App. 2015), aff'd, 419 S.C. 162, 797 S.E.2d 47 (2017) (*citing Hardy v. Aiken,* 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)). An action to enforce restrictive covenants by means of injunctive relief is an action in equity. *Id.* (*citing Cedar Cove Homeowners Ass'n v. DiPietro,* 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct.App.2006)).

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); *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). Nowhere in their responsive briefing to this honorable court did the Gutovitzs provide any case law or authority from any jurisdiction for the proposition that the nature of this case has been altered from that of being an action to enforce the restrictive covenants to an action to be reviewed as a breach of contract.

2. A DECLARATORY JUDGMENT CAUSE OF ACTION DOES NOT ALLOW FOR JURY TRIAL WHEN THE UNDERLYING NATURE OF THE ACTION IS EQUITABLE

Respondents argument that they are entitled to a jury trial under a declaratory judgment cause of action is also misplaced. "Declaratory judgments in and of themselves are neither legal

nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.,* 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App.2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc*., 412 S.C. 387, 395, 772 S.E.2d 528, 533 (Ct. App. 2015), aff'd, 419 S.C. 162, 797 S.E.2d 47 (2017). As set forth above, there is no question this action involves the alleged breach of restrictive covenants concerning real property.

Respondents erroneously cite to *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 155 S.E.2d 618 (1967) and *Legette v. Smith,* 226 S.C. 403, 85 S.E.2d 576 (S.C. 1955), for the proposition that factual issues that must be decided by a jury in a declaratory judgment action. (Br. Resp. p. 6). Guimarin did not involve restrictive covenants involving real property; instead, it involved claims for money damages under the related construction contracts. *Guimarin & Doan, Inc.*, 249 S.C. at 564-65. Likewise, *Legette* did not involve restrictive covenants involving real property; as it instead involved a declaratory judgment by a husband seeking to inherit from a wife "accidentally killed while shooting at rival for wife's affections." *Legette,* 226 S.C. at 417.

The sole question as to whether a party is entitled to a non-jury trial in this Action is by looking to the nature of the underlying action, i.e., this is an action to enforce restrictive covenants involving real property.

3. THE EXISTENCE OF QUESTIONS OF FACT OR AN ALLEGATION OF AMBIGUITY DOES NOT CHANGE THE NATURE OF AN ACTION FROM EQUITABLE TO LEGAL

Without any relevant citation to any statute or jurisprudence, Respondents erroneously argue that a list of questions of fact and an allegation of ambiguity change the nature of this Action from equitable to legal. (Br. Resp. p. 6). This argument intuitively misses the mark and would create a rule that the enforcement of a restrictive covenant is an action in equity, except when there

are any facts being questioned. For example, in *Hanold v. Watson's Orchard POA* referenced above, this Honorable Court sought to construe the meaning of the term "'developed' in the context of restrictive covenants pertaining to landholdings." *Hanold*, 412 S.C. at 399. Likewise, in *Buffington v. T.O.E. Enterprises*, the Supreme Court agreed that a restrictive covenant had been violated and affirmed the lower court's enforcement of the restriction by injunction, holding: "the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 394, 680 S.E.2d 289, 292 (2009). (Court, and not a jury, is empowered to construe the restrictive covenant and to consider and address the numerous factual issues which may be asserted as defenses); *See also Circle Square vs. Atlantic Dev. Co.*, 267 S.C. 618, 621, 230 S.E.2d 704, 705 (1976) (Court reviews facts related to laches, waiver, or estoppel)).

4. EVEN IF IT WAS NOT FRIVOLOUS, A MALICIOUS PROSECUTION CAUSE OF ACTION DOES NOT CHANGE THE UNDERLYING NATURE OF AN ACTION FROM EQUITABLE TO LEGAL

Respondents do not forward any authority from any jurisdiction which would indicate that a malicious prosecution cause of action changes the nature of the underlying case from equitable to legal, or vice versa. Furthermore, Respondents do not forward any authority from any jurisdiction which states that a malicious prosecution cause of action is legal (or equitable). In fact, the only authority before this Honorable Court as to this cause of action indicates that the underlying lawsuit must be tried first, before any action for malicious prosecution will lie. (*See* Br. of App., p14)(*citing Gecy v. Somerset Point at Lady's Island Homeowners Ass'n, Inc.*, 426 S.C. 540, 548, 828 S.E.2d 73, 77–78 (Ct. App. 2019).

If the opposite were true, i.e., a malicious prosecution cause of action could be used to change the nature of any underlying action (or original judicial proceedings), and thereby create a right to a jury trial where one has never existed.

5. GUTOVITZS ARGUE THE LOWER COURT'S ORDER GRANTING CONSOLIDATION IS SPECIFIC, WHILE THE SPECIFIC DENIAL OF A MOTION TO STRIKE A JURY TRIAL IS NOT

The lower court granted the Gutovitzs' motion to consolidate based upon Rule 42 of the *South Carolina Rules of Civil Procedure*. Rule 42 does not control the nature of the underlying action, nor the mode of trial. As a result, Appellants moved to strike the Gutovitzs' jury trial demand on November 18, 2022. The motion to strike was heard by the Honorable Daniel Coble on February 7, 2023, and trial was set to take place at the end of February. Moreover, in their briefing and argument to the Court, Appellants clearly set forth the argument that the enforcement of a restrictive covenant is an action in equity. In response, the lower court specifically (and erroneously) held that Appellants motion to strike the Gutovitzs' jury trial demand was denied. In other words, the sole issue at bar in this appeal was specifically raised by Appellants and directly ruled upon by the trial judge, rendering a motion for reconsideration under Rule 59 of the *South Carolina Rules of Civil Procedure* unnecessary.

CONCLUSION / PRAYER FOR RELIEF

The Appellants respectfully pray this Honorable Court will remand this equitable action to the lower court for a prompt resolution by and through a non-jury trial.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Appellants

/s George W. Redman, III
George W. Redman, III, Esq., SCB # 72365
GRedman@BellamyLaw.com

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PROOF OF SERVICE

Pursuant to SCACR Rules 262(a)(3) and (c)(3), 613, 614, and Orders 2022-05-06-03 and 2022-05-06-04 of the Supreme Court of South Carolina, I certify that Appellants' Appellants' Initial Reply Brief to be included in the Record on Appeal was electronically served upon Counsel for Respondents, Scott Barry Gutovitz and Caron Dawn Gutovitz, by way of the attached email sent on November 13, 2023, to the primary e-mail address listed for each attorney in the Attorney Information System.

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Appellants

/s George W. Redman, III
George W. Redman, III SCB#72365
GRedman@BellamyLaw.com
Robert S. Shelton SCB#68543
RShelton@BellamyLaw.com

November 13, 2023

Other Counsel of Record:

Gene M. Connell, Jr.
S.C. Bar No. 1358
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Surfside Beach, SC 29587
(843) 238-5648
gconnell@classactlaw.net
Attorney for Scott Barry Gutovitz and Caron Dawn Gutovitz

L. Morgan Martin
S.C. Bar No. 3667
Law Offices of L. Morgan Martin, P.A.
1121 Third Avenue
Conway, SC 29526
(843) 248-3177
mmartin@lmorganmartin.com
Attorney for Scott Barry Gutovitz and Caron Dawn Gutovitz

Redman, George W

From:	Redman, George W
Sent:	Monday, November 13, 2023 8:25 PM
To:	'gconnell@classactlaw.net'; 'mmartin@lmorganmartin.com'; 'basmith@classactlaw.net'; 'lmoore@lmorganmartin.com'
Cc:	'RShelton@BellamyLaw.com'; Richardson, Nicole M.; Meier, Len
Subject:	RE: Park and Park v. Gutovitz and Gutovitz; Appellate Case No. 2023-000295
Attachments:	2023-11-13 Appellants' Initial Reply Brief vgs.pdf

Gene and Morgan,

Attached please find Appellants' Initial Reply Brief which we are serving upon you via this email, and which we will be filing with the Court momentarily.

With kindest regards,

George.

George W. Redman III
Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.

Office: (843) 448-2400
Direct Dial: (843) 916-7160
Mobile: (843) 446-7906

From: Redman, George W
Sent: Monday, November 13, 2023 5:48 PM
To: gconnell@classactlaw.net; mmartin@lmorganmartin.com; basmith@classactlaw.net; lmoore@lmorganmartin.com
Cc: RShelton@BellamyLaw.com; Richardson, Nicole M. <NRichardson@bellamylaw.com>; Meier, Len <LMeier@bellamylaw.com>
Subject: Park and Park v. Gutovitz and Gutovitz; Appellate Case No. 2023-000295

Gene and Morgan,

Attached please find Appellants' Amended Designation of Matter which we are serving upon you via this email, and which we will be filing with the Court momentarily.

With kindest regards,

George.