IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, III, Master-in-Equity

Case No. 2012-CP-46-02286

Charles Sonnenberg, Festival Corp., Phillip Pulley
and Robert Foster,. . . . . Plaintiffs,

Of whom Phillip Pulley and Robert Foster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,
d/b/a Area 51 Fireworks, and York County,
a political subdivision of the State of South Carolina, ...Defendants,

Of which D&T Imports South Carolina, Inc., a Nevada Corporation,
d/b/a Area 51 Fireworks, is the Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

Appellants which sell fireworks at Carowinds commenced this action on the eve of July 4, 2012 against Respondent to prevent the opening of a nearby competing fireworks store. Appellants obtained an *ex parte* temporary restraining order against Respondent, which was then dissolved. Respondent moved under Rule 12, SCRCP, for dismissal of it from the case, which was granted. Respondent made a claim against the injunction bond. The claim was upheld. Damages were awarded in favor of Respondent.

On June 21, 2012, Appellants sought and were awarded without any bond an *ex parte* temporary restraining order preventing Respondent from renovating, building, upfitting or constructing its property for the purpose of selling fireworks.

When Appellants went to the trial court for a temporary restraining order, they represented to the court that Respondent was not registered to do business in South Carolina based solely on checking the online website of the Secretary of State. (R. p. 28.) Appellants later were forced to retract this assertion because it was irrefutable that Respondent had registered on June 4, 2012. (R. p. 367.) Appellants would have ascertained this fact if they had telephoned the Secretary of State.

Appellants averred to the trial court that they had a private right of action under S.C. Code Ann. § 6-29-1145 (1976) to immobilize Respondent's construction crews which were actively working on the property, even though the Statute expressly states that it does not apply to building permits. (R. pp. 33-34.) At the hearing on its Motion to Dissolve *Ex Parte* TRO, Respondent pointed out to the trial court that S.C. Code Ann. § 6-29-1145(C)(2) does not limit issuance of construction permits regardless of any deed restriction. (R. p. 78, lines

10-13.) Appellants conceded that they had no basis for prohibiting the construction work. (R. pp. 112-113, lines 25 and 1.) Upon ruling for Respondent on its motion to dismiss, the trial court determined that Appellants had no private right of action under the Statute. Their remedy "at best" under S.C. Code Ann. § 6-29-1145(B)(3) was limited to compelling the local agency to withhold a certificate of occupancy. York County did not object to an injunction prohibiting it from issuing Respondent a certificate of occupancy. Thus, the injunction against the County was uncontested.

Appellants told the trial court in seeking the temporary restraining order that they could enforce a deed restriction against a fireworks store on the property of Respondent.[1] (R. p. 359.) The trial court later found that Appellants had no common law right to enforce the deed restriction. Appellants and Respondent do not have property from a common tract of land, and their respective properties are not part of a common scheme or plan of development.

Appellants also yielded on the bond requirement. While no bond was posted when the temporary restraining order was issued, Appellants conceded they had to post a bond in effect from the date of issuance of any injunctive relief. (R. p. 129, lines 9-13.) Appellants did subsequently file a bond as required by the trial court.

Neither the Order Modifying Temporary Restraining Order, nor the Order Granting Motion to Dismiss were appealed. Both are now final orders. The Order (Wrongful T.R.O.) (hereafter referred to as the "Wrongful TRO Order") and the Order (Damages and Attorneys'

[1]The deed from Crescent Resources to Randazzo Properties, the predecessor in title to Respondent, prohibited the sale of fireworks on the property. The deed did not say the fireworks restriction was a covenant running with the land, binding upon the grantee, its successors and assigns such as Respondent. (R. pp. 45-47.)

Fees) (hereafter referred to as the "Damages Order") awarding Respondent $16,258.68 are before this Court on appeal.

ARGUMENT

Standard of Review

Appellants have raised a legal issue, i.e., whether a finding of bad faith is required to conclude an injunction was wrongful. They are questioning the Wrongful TRO Order. They are not challenging the evidentiary findings in the Damages Order.

The appellate court reviews questions of law *de novo*. *Regions Bank v. Strawn*, 399 S.C. 530, 732 S.E.2d 230 (Ct. App. 2012). *See also Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." *Id.* at 573, 730 S.E.2d 357, 363.

I. The Order Modifying Temporary Restraining Order and the Order Granting Motion to Dismiss constitute findings that the TRO was a wrongful enjoinder.

Bad faith or lack of good faith is not required to conclude an injunction was wrongful. Even if it were required, Respondent would still be entitled to an award of damages. Appellants intentionally shutdown construction to prevent Respondent from competing with Appellants over July 4th fireworks sales, *ex parte* (when they should have given notice), without bond (when this is a mandatory requirement), and devoid of any legal basis. Appellants apparently did not read S.C. Code Ann. § 6-29-1145 (1976) which on its face does not proscribe building permits regardless of any deed restriction. Appellants knew they were not a party to the deed restriction or in privity with anyone who was a party to it. They must have known that they had no common law or other right to enforce the deed restriction, as

found by the trial court. In other words, it appears they filed the complaint without probable cause under statutory and common law and with "malice." "Malice is defined as the 'deliberate intentional doing of an act without just cause or excuse.'" *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006). This is also bad faith. *See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011) (Upholding Rule 11, SCRCP, sanctions for bad faith when removal pleadings were filed solely for delay and not based on good grounds.).

However, Appellants' bad faith is not the issue. Rather, an injunction was wrongful if it is subsequently dissolved or the enjoined party thereafter prevails on the merits. Both occurred in this case.

The position of Appellants ignores Rule 65(c), SCRCP, and this Court's decision in *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 451 S.E.2d 410 (Ct. App. 1994). Rule 65(c) plainly says an enjoined party is entitled to the resulting damages from being wrongfully enjoined. The *per curiam* decision in *Chambron* just as plainly as the Rule displaces the common law requirement of bad faith. "At common law, there was no liability, absent malicious prosecution, for a wrongfully issued injunction. However, statutes in many states create the right to damages for wrongful injunction. In South Carolina, Rule 65, SCRCP, deals with injunctions." *Chambron*, 317 S.C. at 44, 451 S.E.2d at 411. The "possibility of damages during the duration of a temporary injunction is provided for by security because the party which is the object of the injunctive relief has not had an opportunity to fully adjudicate his rights." *Chambron*, 317 S.C. at 45, 451 S.E.2d at 411.

Both cases cited by Appellants, *Coosaw Min. Co. v. Carolina Min. Co.*, 75 F. 860 (D.S.C. 1896), and *Garlington v. Copeland*, 43 S.C. 389, 21 S.E. 317 (1895), predate the South Carolina Rules of Civil Procedure by one hundred years.[2] As stated in *Chambron*, these common law rulings were superseded by the enactment of the South Carolina Rules of Civil Procedure.[3] If the injunction is dissolved or if, after litigating to a final decision, the trial court rules in favor of the enjoined party, either constitutes a determination that the injunction or restraining order should not have been issued and was wrongful. Unlike the common law, Rule 65(c), SCRCP, does not require a showing of malice in order to recover damages. Instead, the focus is on whether the party seeking injunctive relief was not entitled to the issuance of the injunction.

The Notes to Rule 65 say, "This Rule 65, . . . , is substantially the Federal Rule . . ." The federal decisions uniformly hold that dissolution of an injunction or a final ruling in favor of the enjoined party is a final determination of wrongful enjoinder. *See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2nd Cir. 1990) ("The focus of the 'wrongfulness' inquiry is whether, in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have issued in the first instance."); *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir. 1994) (Defendant

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[2] Appellants' attempt to reconcile *Coosaw* with the South Carolina Rules of Civil Procedure is misguided. While dissolution of an injunction does not automatically entitle the enjoined party to damages, that just means damages must still be proven to result from the issuance of the injunction. If it is shown that the person enjoined was "put to any disadvantage", then damages should be awarded against the bond. South Carolina Rules of Court: Key Rules, Vol. 1A - State, p. 163 (West 2013).

[3] Appellants' citation to *Transcontinental Gas Pipe Line Corporation v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969), is also misplaced. *Transcontinental* addresses whether a TRO or preliminary injunction should issue "pending the litigation". *Id.* at 483, 167 S.E.2d at 316. The holding in *Transcontinental* protects the rights of parties during the litigation. It does not address what happens once final orders have been entered that determine the injunction should not have issued in the first place.

who prevailed in underlying litigation was wrongfully enjoined by the issuance of a preliminary injunction and was entitled to recover damages against the bond.); *Division No. 1, Detroit, Broth. of Locomotive Engineers v. Consolidated Rail Corp.*, 844 F.2d 1218, 1225 (6th Cir. 1988) ("The federal courts of appeals have consistently held that the reversal on appeal of an injunction is tantamount to finding that the enjoined party was "wrongfully enjoined or restrained," and that such reversal triggers the wrongfully enjoined party's right to pursue recovery on the security bond."); *U.S. D.I.D. Corp. v. Windstream Communications, Inc.*, 2013 WL 67257 (S.D.N.Y. 2013) (Voluntary dismissal with prejudice constitutes a final adjudication on the merits that the injunction should not have issued and party had been wrongfully enjoined.)

State courts in other jurisdictions are in accord with federal law. *Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 777-78, 914 N.E.2d 1251, 1256 (2009) ("[P]rior opinion ordering the trial court to dissolve the preliminary injunction constituted a legal determination that the preliminary injunction was wrongfully issued."); *South Central Tennessee Railroad Authority v. Harakas*, 44 S.W.3d 912 (Ct. App. Tn. 2001) (Determination that the facts did not warrant the issuance of the injunction; therefore, the injunction was wrongfully issued.)

The Order Modifying Temporary Restraining Order dissolved the TRO against Respondent. This alone made the TRO against Respondent a wrongful enjoinder. Two months later, Appellants' entire case against Respondent was dismissed with prejudice under Rule 12, SCRCP. This too made the TRO against Respondent a wrongful enjoinder. Each

of these decisions constitutes a final finding that the TRO was a wrongful enjoinder within the meaning of Rule 65(c), SCRCP.

II. Because the TRO was found to be a wrongful enjoinder, D&T is entitled to the payment of costs and damages as ordered by the trial court.

Rule 65(c), SCRCP, states the security or bond is "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Once the injunctive relief is found to be a wrongful enjoinder, the next inquiry under the language in the Rule is just whether the costs and damages resulted from the wrongful enjoinder. The trial court conducted that inquiry mindful of *Chambron* and concluded there were costs and damages resulting from the wrongful enjoinder in the amount of $16,258.68. Appellants have not suggested that the trial court's conclusion was incorrect on the evidentiary record. The Wrongful TRO Order and the Damages Order awarding Respondent $16,258.68 should be affirmed.

CONCLUSION

The position taken by Appellant glossing a bad faith requirement onto Rule 65(c), SCRCP, is without merit. The position is contrary to the Rule. The position is contradictory to *Chambron*. The position is at odds with federal law which the Notes to the Rule say is substantially the same as South Carolina law. The position is not in accord with law in other states. Whether or not a plaintiff acts in good faith in pursuing injunctive relief has no bearing on whether a party has been "wrongfully enjoined" "Wrongfully" describes "enjoined" in the Rule. The Rule does not say costs and damages are available if the motion was wrongful under Rule 11. Once Respondent received a final order that the TRO against it was dissolved or the claims against it were dismissed with prejudice, the TRO was a wrongful enjoinder.

It really is that simple. The decisions of the trial Court in the Wrongful TRO Order and the Damages Order should be affirmed.

Respectfully submitted,

Date: 10/17/13

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellants with a copy of the *Final Brief of Respondent* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR.

Date: 10/17/13

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