THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

Case No. 2018-CP-22-00199
Appellate Case No. 2019-000885

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC, Respondent.

FINAL REPLY BRIEF OF APPELLANT

Robert P. Wood (SC Bar No. 6206)
Joshua R. Hinson (SC Bar No. 102270)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
Robert.Wood@rogerstownsend.com
Joshua.Hinson@rogerstownsend.com
Counsel for Appellant The Gulfstream Café, Inc.

Wm. Grayson Lambert
BURR & FORMAN LLP
P.O. Box 11390
Columbia, SC 29211
(803) 799-9800
glambert@burr.com
Henrietta U. Golding
BURR & FORMAN LLP
2411 Oak Street, Ste. 206
Myrtle Beach, SC 29577
(843) 444-1107
hgolding@burr.com
Counsel for Respondent Palmetto Industrial Development, LLC

Simon Bloom (admitted Pro Hac Vice)
Adamn Nugent (admitted Pro Hac Vice)
Andrea Pearson (admitted Pro Hac Vice)
Bloom Parham, LLP
977 Ponce de Leon Ave., NE
Atlanta, GA 30306
(404) 577-7710
Counsel for Appellant The Gulfstream Café, Inc.

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CERTIFICATE OF COUNSEL

I hereby certify that the Final Reply Brief has been served on all parties and complies with Rule 211(b) SCACR.

Respectfully submitted,

Robert P. Wood (SC Bar No. 6206)
Joshua R. Hinson (SC Bar No. 102270)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
Robert.Wood@rogerstownsend.com
Joshua.Hinson@rogerstownsend.com

Counsel for Appellant The Gulfstream Café, Inc.

November 27, 2019

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PROOF OF SERVICE

I hereby certify I have served the Final Reply Brief of Appellant on November 27, 2019, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following party of record:

Henrietta Golding, Esq.
Burr & Forman LLP
P.O. Box 336
Myrtle Beach, SC 29578

Grayson Lambert, Esq.
Burr & Forman LLP
P.O. Box 11390
Columbia, SC 29211

Jennifer L. Tucker
Paralegal
ROGERS TOWNSEND & THOMAS, PC

TABLE OF CONTENTS AND CASES

Cases:

INTRODUCTION

Both parties agree this case hinges on a question of law—specifically, whether the warranty language in a perpetual easement requires the grantor of the easement to pay attorney's fees where the grantor itself challenges the rights granted in the easement. Put another way, can a grantor seek to undermine the easement rights it granted without bearing responsibility for the attorney's fees it forces the grantee to incur. The court below declined to find this requirement in the easement granted from Respondent to Appellant and granted Respondent's motion for summary judgment. Based on our Supreme Court's own words from *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004), this case should be reversed and returned to the trial court to consider any additional arguments of counsel on the imposition and appropriateness of fees.

ARGUMENT

Every day parties negotiate agreements where one party agrees to indemnify and defend the other from claims relating to that contract. Thereafter, when a claim arises, the indemnitee demands the indemnitor pay attorney's fees for the action. In many cases, the indemnitee brings a lawsuit against the indemnitor regarding the contract and also requires the indemnitor to pay the attorney's fees incurred by the indemnitee in bringing suit. What Respondent asserts "contradicts common sense" happens on a regular basis, which makes it unsurprising that traditional warranty deed language captures this obligation. With that understanding, Appellant respectfully submits this reply to Respondent's Initial Brief to raise several points of fact and law that have been misconstrued.

I. The Court's Rule from *Black v. Patel* Makes Sense and Requires Respondent to Pay Appellant's Attorney's Fees.

The Court in *Black v. Patel* expressly recognized an exception to the general rule that the grantor of a warranty deed is only responsible for the payment of attorney's fees if a successful

claim is made against the title conveyed through the deed.[1] *Black v. Patel*, 357 S.C. 466 at 471 n. 4, 594 S.E.2d 162 at 164, n. 4 (2004). That exception requires the grantor to pay attorney's fees regardless of whether the claim is successful where the grantor's own wrongful conduct gives rise to the claim. *Id.* In its Initial Brief, Respondent acknowledges that this exception exists, but Respondent attempts to narrow the exception in order to avoid its effect. Respondent claims that the exception from *Black v. Patel* applies only where the Grantor's wrongful conduct results in litigation involving a third party. Respondent's reading of the exception does not make sense. There is no logical reason why a Grantor who acts wrongfully should be required to indemnify the Grantee in litigation with a third party but not in litigation between the Grantor and Grantee. While it is true that the Court in *Black v. Patel* referenced litigation involving third parties, that is because the case involved litigation between the Grantee and a third party. As such, the Court was merely responding to the issue presented before it.

A reading of the Court's opinion in *Black* makes clear that the underlying rationale for the rule and the exception is fairness. *Id.* at 472, 594 S.E.2d at 165. The key question is simple: "when is it fair to require the Grantor to warrant, defend, or indemnify the Grantee in litigation?" This fairness consideration is identical whether the litigation in question involves the Grantor or a third party. In the present case, it is unquestionably fair to force Respondent to warrant, defend, and indemnify Appellant. Respondent's predecessor in interest warranted to Appellant it would defend the easement. Respondent, through its actions, sought to take away the rights granted in the easement. Respondent physically restricted the easement by attempting to construct a new building on the real property subject to the easement, and Respondent sought (and still seeks) to undermine the capacity of the easement by operating a full service restaurant

[1] All parties agree that the applicable language contained in the easements is identical to that contained in warranty deeds.

at night, in plain contravention of the balance of uses contemplated in the easement. Respondent's actions claimed the very heart of the rights granted in easement and compelled Appellant to take legal action to protect its easement.

Appellant's request that Respondent warrant and defend Appellant fits easily within the bounds of the court's holding in *Black*. Appellant asserts there are two instances in which a grantor is responsible for the costs of defending a warranty: (1) when the claim is successful; (2) when the grantor acts wrongfully, resulting in litigation. This protection from challenges to a grantee's ownership is the hallmark of a warranty deed or an easement. The trial court erred in refusing to enforce that warranty.

II. Respondent's Claim Against the Easement Was Successful, Thereby Triggering the Warranty Obligation.

Although not addressed by the trial court in its brief ruling based on its interpretation of the warranty, Respondent was successful in having the parties' long-time understanding of the easement limited. Appellant expressly asked the lower court to prohibit Respondent from operating a restaurant that serves dinner in the evening. (R. pp. 274-279). Appellant made this request because its easements expressly contemplate that Respondent would use the parking lot during the daytime and Appellant would use it during the evening. (R. pp. 127-143, pp. 145-154.) The trial court denied this request and declined to enter the injunctive relief requested by Appellant. (R. pp. 247-249.) Respondent's operation of such a restaurant will overburden the parking lot and greatly limit the scope of Appellant's easement rights. Accordingly, even if the court declines to apply exception identified in *Black*, the general rule still requires Respondent to warrant and defend Appellant because Respondent's claim to the easement *was* successful, requiring reversal of the lower court's ruling.

III. Respondent's Actions Unquestionably Constituted Claims to the Easement.

Respondent asserts "neither Palmetto Industrial nor anyone else has ever claimed that Gulfstream did not have any easements, had a more limited easement than what appears in the written documents, or, to use Gulfstream's word, 'repudiate[d]' the easements," thus no claim was made. (Resp. Br. at 10). This narrow conception of a "claim" does not make sense. Unlike a warranty deed, which conveys title, an easement conveys the right to use a particular parcel of real property for a specified purpose. In this case, the easement executed by Respondent's predecessor granted Appellant the full and free right of ingress and egress upon the easement area, as well as use of that area for parking. When Respondent attempted to take away these easement rights, it necessarily claimed that Appellant's easement contained fewer rights than originally conveyed. Respondent's attempts to undermine the easement are equivalent to a claim to title conveyed by a warranty deed.

IV. Respondent's Brief Promotes a Fundamentally Inequitable Position.

Respondent's brief seeks to limit its warranty obligation in a manner that would create absurd and unjust results. Were Respondent's argument to prevail, a grantor could interfere and fundamentally undermine an easement, knowing that if its improper conduct resulted in litigation, it would bear no responsibility for the grantee's legal fees unless the effort to undermine the easement succeeded. Such a holding would encourage grantors to repudiate easements when convenient rather than abide by their contractual duties. Respondent's own conduct demonstrates the flaw in this logic. Respondent's clear disregard for Appellant's easements put Appellant in an untenable position: Appellant could either allow Respondent to construct its building and lose the benefit of its easement, or Appellant could spend attorney's fees to defeat Respondent's repeated challenges. Respondent tried to steal back Appellant's easement and in doing so set off a multi-year legal battle involving numerous lawsuits. In the

face of this wrongful conduct, Respondent's obligation to warrant and defend should not depend on its theft succeeding.

V. This Court Should Not Rely on Alternative Sustaining Grounds Which the Trial Court Refused to Include in its Order Granting Summary Judgment.

"The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). "An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case." *Id.* "It is within the court's discretion whether to address any additional sustaining grounds." *Id.*

In its brief, Respondent asserts two factual issues as alternative sustaining grounds. Specifically, Respondent asserts that Appellant failed to timely invoke its rights under the warranty. Respondent also asserts the Cribb affidavit is not competent evidence. However, these factual and evidentiary questions were raised to the trial court, which specifically refused to include these alternative grounds in its order. (*Compare* R. pp. 346-369 Palmetto's Proposed Order *with* R. pp. 9-10 Court's Order dated April 26, 2019.) If this court agrees with Appellant that the plain language of the warranty is a basis for the award of attorney's fees in this case, this court should remand to the lower court to make specific findings of fact with respect to Respondent's defenses and Appellant's requested fees. *See Simmons v. State*, 416 S.C. 584, 593 788 S.E.2d 220, 225 (2016) ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting."). There is no need to consider any of Respondent's alternative arguments, particularly since the trial court expressly declined to adopt those positions.

CONCLUSION

Based on the foregoing and the arguments made in Appellant's Brief, this court should reverse and remand for a determination of appropriate attorney's fees.

Respectfully submitted,

Robert P. Wood (SC Bar No. 6206)
Joshua R. Hinson (SC Bar No. 102270)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
Robert.Wood@rogerstownsend.com
Joshua.Hinson@rogerstownsend.com

Counsel for Appellant The Gulfstream Café, Inc.

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