THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-00885

Case No. 2018-CP-22-00199

The Gulfstream Café, Inc.,.....Appellant,

v.

Palmetto Industrial Development, LLC, ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the circuit court correctly granted summary judgment for Palmetto Industrial, when the warranty provisions at issue use centuries' old language for documents conveying interests in real property that has never been interpreted to require indemnification in litigation between the grantor and the grantee.

INTRODUCTION

This lawsuit is the second in a long-running dispute between The Gulfstream Café and Palmetto Industrial over a parking lot in Garden City. Unlike the large record and multiple legal questions raised in the first lawsuit, this second lawsuit asks a single, narrow question: whether identical warranty provisions in four easement agreements require Palmetto Industrial to pay Gulfstream's legal fees and costs in the disputes between the parties.

For multiple reasons, those provisions do not. *First*, those provisions—which use language dating back to the 1700s for expressing certain warranties related to the transfer of an interest in real property—have never been interpreted as requiring a grantor to indemnify a grantee in litigation between those parties. Moreover, common sense cuts against Gulfstream's interpretation of these provisions. If Gulfstream were correct, Palmetto Industrial could control both sides of this litigation, which is not possible under our adversarial judicial system.

Second, even if Gulfstream's interpretation of the warranty provisions were correct, Gulfstream's inexcusable delay in invoking those provisions precludes it from benefiting from them now. Gulfstream waited over a year after it filed the first lawsuit

to demand indemnification from Palmetto Industrial. During that time, the parties litigated myriad motions, including ones for a preliminary injunction, to compel, and for contempt. This delay prejudiced any ability Palmetto Industrial would have had to control that litigation, as the warranty provisions allow (at least under Gulfstream's interpretation of them).

Third, the only evidence that Gulfstream offered in support of its interpretation is an inadmissible affidavit, in which the old president of Gulfstream purports to know what someone else was thinking thirty years ago.

The circuit court therefore correctly granted summary judgment for Palmetto Industrial. This Court should affirm.

STATEMENT OF THE CASE

Two restaurants in Garden City share a parking lot.

Palmetto Industrial owns the Marlin Quay Marina in Garden City. (R. p. 30.) The marina property includes a ship's store and restaurant, along with boat slips. (R. pp. 28, 39.) Palmetto Industrial also owns the parking lot. (R. p. 30.)

On the far side of the parking lot is The Gulfstream Café. (R. p. 28.) When the marina property was developed in the 1980s, the original owner of the marina granted Gulfstream three easements to use the parking lot, which in sum gave Gulfstream a nonexclusive right to use the parking lot for ingress, egress, and parking and for maintaining and improving its building. (R. pp. 127–43.) A similar easement was granted in 1990. (R. pp. 145–54.)

All four easements contained identical warranty provisions:

> Marlin Quay Marina Corporation does hereby bind itself and its Successor and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Café, Inc., its Successor and Assigns, against itself and its Successors and Assigns and all other whomever lawfully claiming, or to claim the same or any part thereof.

(R. pp. 128, 135–36, 141–42, 149.)

A dispute arises over Palmetto Industrial's new building and the parking lot.

After Palmetto Industrial purchased the marina property in 2014, (R. pp. 155–61), it developed plans to replace the old shop and restaurant with a new one. That has spawned a long-running lawsuit pitting Gulfstream against Palmetto Industrial and its member, Mark Lawhon. This first lawsuit between Gulfstream and Palmetto Industrial was filed in November 2016. *See* Compl., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Nov. 16, 2016).

As a (very) brief overview, Gulfstream alleged that Palmetto Industrial and Lawhon intentionally interfered with Gulfstream's easements and trespassed and that Gulfstream was entitled to relief under S.C. Code § 15-67-410. (R. pp. 201–29.) Palmetto Industrial and Lawhon denied any liability to Gulfstream and counterclaimed for forcible entry, trespass, declaratory relief, promissory estoppel, and breach of the easements. (R. pp. 230–41.)

Various claims were disposed of before trial, and after a six-day trial in June 2018, a jury found for Gulfstream on its intentional interference with easement claim but initially awarded no damages. The trial judge directed the jury that damages had to be awarded, at which point the jury awarded $1,000 but no punitive damages.

(R. pp. 242–43.) The court entered an injunction prohibiting Palmetto Industrial and Lawhon from interfering with Gulfstream's easements and limiting the footprint of any new building to the footprint of the old building. (R. pp. 244–46.)

Gulfstream, throughout its description of the first lawsuit, tries to paint Palmetto Industrial as the wrongdoer in this dispute, but Gulfstream itself has been anything but a good neighbor. For instance, despite Gulfstream's objection to a new marina restaurant serving dinner because the easements "anticipated" (a nonbinding word) that Gulfstream would "primarily" use the parking lot at night and the marina "primarily" during the day, Gulfstream fails to tell the Court that it has for years been serving brunch (a daytime meal) on Sundays. (R. p. 146); *see* Opp'n to Mot. for Contempt 17, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Sept. 4, 2019). Nor, as another example, did Gulfstream acknowledge that it had sought to have Palmetto Industrial and Lawhon held in contempt for its use of cranes to build the new marina shop and restaurant, despite the fact that Gulfstream has had cranes of its own in the parking lot to work on its building. *See* Opp'n to Mot. for Contempt 16–17, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Sept. 4, 2019). (Gulfstream eventually withdrew this motion the day before the hearing. *See* Withdrawal of Mot. for Contempt, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Oct. 16, 2019).)

Gulfstream demands Palmetto Industrial pay its attorney's fees.

More than a year after the first lawsuit was filed, Gulfstream sent Palmetto Industrial a demand to indemnify Gulfstream for Gulfstream's defense of the easements. (R. pp. 80–82.) Gulfstream pointed to four things it claimed triggered

Palmetto Industrial's duty to indemnify it. First, it pointed to the lawsuit that Gulfstream filed in November 2016 (No. 2016-CP-22-961). (R. p. 81.) Second, it cited the redevelopment plans that Palmetto Industrial submitted to Georgetown County for a larger building and a challenge to those plans that Gulfstream lodged with the zoning commission. (R. p. 81.) Third, it referred to the lawsuit filed by Marlin Quay Marina Bar & Grill, LLC in May 2017 (No. 2017-CP-22-446). (R. p. 81.) Fourth, it noted Palmetto Industrial's obtaining a building permit for a larger building on the north end of the parking lot in September 2017. (R. p. 81.)

Palmetto Industrial denied that it had any duty to indemnify Gulfstream or pay its attorney's fees. (R. p. 84.)

Gulfstream files this second lawsuit.

Several weeks later, Gulfstream moved to amend its complaint in the first lawsuit to assert two new claims on indemnification, but that motion was denied. *See* Order, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961 (Feb. 8, 2018). So Gulfstream filed this second lawsuit against Palmetto Industrial. (R. pp. 27–37.) In this second lawsuit, Gulfstream sought a declaratory judgment that Palmetto Industrial breached its duty to defend Gulfstream's rights under the easements. (R. pp. 34–35.) Gulfstream also asserted a breach of warranty claim. (R. pp. 35–36.)

After Palmetto Industrial answered the complaint, (R. pp. 109–11), both parties moved for summary judgment. (R. pp. 112–23, 262.) Gulfstream relied on an affidavit from Edward Cribb, Jr. in its motion. (R. pp. 124–26.) Cribb was president of Gulfstream in 1986 and 1990. (R. pp. 124–25.) He claimed that he would not have

signed the easements if they did not include the warranty provisions. (R. p. 125.) He also said (without any further detail or explanation) that the grantor "intended the warranty provision to mean that Grantor would pay for Gulfstream's attorney's fees and costs incurred in defending or bringing litigation to protect Gulfstream's use of the Parking Lot or its easements rights if those rights were challenged by anyone, including Grantor itself." (R. pp. 125–26.) And Cribb testified (again, without any further detail or explanation) that "it was clear that Grantor understood this warranty provision to mean the exact same thing as" he did. (R. pp. 125–26.)

Gulfstream argued that it was entitled to summary judgment on the declaratory judgment claim based on Cribb's affidavit, which Gulfstream said required Palmetto Industrial to defend "any and all claims made to the easement." (R. p. 121.) As for its breach of warranty claim, Gulfstream observed that it prevailed on its interference claim in the first lawsuit and was awarded $1,000 and an injunction. (R. p. 122.) Gulfstream claimed that it tendered the defense of its easement rights to Palmetto Industrial but that tender was denied. (R. p. 122.)

Palmetto Industrial argued that the plain language of the easements' warranty provisions made clear that the warranties did not apply here. It pointed to *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004), in which the Supreme Court analyzed nearly identical language to the warranty provisions in Gulfstream's easements, (R. pp. 332–33); *see also* Gulfstream's Br. 9 (calling the warranty provisions here "virtually identical" to the one in *Black*). Palmetto Industrial also argued that common sense precluded applying the warranty provisions in a suit between grantor

and grantee without more explicit language that the provisions apply in such an instance. (R. pp. 335–36.) Finally, Palmetto Industrial pointed out that the Cribb affidavit was not admissible evidence on which Gulfstream could rely. (R. pp. 336–37.)

The circuit court grants summary judgment for Palmetto Industrial.

The circuit court granted Palmetto Industrial's motion and denied Gulfstream's. (R. pp. 6–10.) The circuit court relied on *Black* in reaching its decision. (R. p. 9.)

Gulfstream timely appealed. (R. p. 18.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). An appellate court reviews a grant of summary judgment under "the same standard applied by the trial court pursuant to Rule 56(c)." *Id.* Under that rule, summary judgment must be granted whenever "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Rule 56(c), SCRCP.

ARGUMENT

I. The warranty provisions do not apply here, so the circuit court properly granted summary judgment for Palmetto Industrial.

At its simplest, Gulfstream's argument is that Palmetto Industrial must pay Gulfstream's fees in any litigation involving the easements it was granted by Palmetto

Industrial's predecessor—including in litigation between Gulfstream and Palmetto Industrial. As the circuit court commented, this result "seems idiotic." (R. p. 346, line 14.) Albeit harsh, the circuit court correctly recognized that Gulfstream is incorrect and granted summary judgment for Palmetto Industrial.

A. Warranty provisions like the ones here have never been understood to apply in litigation between the grantor and the grantee.

Gulfstream treats the warranty provisions as attorney's fee provisions that are implicated by any litigation between Gulfstream and Palmetto Industrial that touches on the easements. They are, in reality, something much different. When put in their proper context, these provisions do not require Palmetto Industrial to indemnify any lawsuit involving Gulfstream, Palmetto Industrial, and the easements. Instead, they require only that Palmetto Industrial indemnify successful claims against the easements.

The language of the warranty provisions in the four easements mirrors the statutory language for a general warranty deed. *See* S.C. Code § 27-7-10. That Code section "include[s] the common law covenants of title," which are "(1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances." *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 592, 635 S.E.2d 649, 656 (Ct. App. 2006). This language has been "used since the earliest days of our nation" to give these warranties. 17 S.C. Jur. Covenants § 30; *see also Jeter v. Glenn*, 43 S.C.L. 374, 376 (S.C. App. L. 1856) (noting that this same language was used

in a deed from 1848 and observing that this language was "according to the form contained in our Act of 1795 . . . and is what we usually call the general warranty"); Act to Facilitate the Conveyance of Real Estates, 1795 S.C. Acts Dec. Session, pp. 11–12. This long-held understanding thus indicates the grantor's intent in using this language, and that intent, of course, is what must be given effect. *See Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009).

The Supreme Court's discussion of this language in *Black v. Patel* shows that Gulfstream's argument here is misguided. There, the Supreme Court recognized that attorney's fees are recoverable only if "authorized by contract or statute" and that the contract at issue was the deed. 357 S.C. at 471, 594 S.E.2d at 164. In the deed there (which uses essentially identical language to the easements here), the provision applied only when someone "lawfully claim[ed]" against the grant. *Id.* at 468, 594 S.E.2d at 163; *see also N. Am. Rescue Prod., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015) ("If a contract's language is unambiguous, the plain language will determine the contract's force and effect."). A "lawful claim" was a successful one, which resulted in the grantee not having the property rights that the grantee was supposed to have.[1] *Black*, 357 S.C. at 471–72, 594 S.E.2d at 164–65.

[1] Cases from other jurisdiction interpret similar language the same way that our Supreme Court did in *Black*, demonstrating the well-established meaning of this language. *See, e.g., Omega Chem. Co. v. Rogers*, 524 N.W.2d 330, 336 (Neb. 1994); *Outcalt v. Wardlaw*, 750 N.E.2d 859, 864 (Ind. Ct. App. 2001); *Chaney v. Haeder*, 752 P.2d 854, 856–57 (Or. Ct. App. 1988); *Nunes v. Meadowbrook Dev. Co.*, 24 A.3d 539, 543 (R.I. 2011); *Stumhoffer v. Perales*, 459 S.W.3d 158, 165–66. (Tex. App. 2015).

No lawful claim has been made here. First, no *claim* was made against the easement. In other words, neither Palmetto Industrial nor anyone else 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. Gulfstream's Br. 8. Rather, the dispute was over whether Palmetto Industrial or its member, Mark Lawhon, had interfered with those easements or whether Gulfstream had exceeded them. (*See* R. pp. 201–41.)

Second, no *successful* claim was made against the easements. Gulfstream came out of the first lawsuit and the other proceedings cited in its demand letter, (*see* R. p. 80–82), with the exact same rights it had on the days that the easements were signed. Indeed, Gulfstream has admitted that it prevailed in the first lawsuit. (R. p. 117.) Thus, it has no claim against Palmetto Industrial under the warranty provisions. *See Black*, 357 S.C. at 471, 594 S.E.2d at 164–65 ("Because the covenant of warranty does not protect against every adverse claim, 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." (quoting *Outcalt v. Wardlaw*, 750 N.E.2d 859, 863 (Ind. Ct. App. 2001))).

B. Gulfstream ignores the plain language of *Black*.

Seemingly recognizing that this well-established interpretation of the warranty provisions does not help it, Gulfstream hangs its entire argument on footnote 4 in *Black*. Yet strangely, Gulfstream does not quote that footnote when first articulating what that footnote says. Instead, it paraphrases it (in bold font, no less). *See*

Gulfstream's Br. 8. In doing so, however, Gulfstream stretches the exception beyond Supreme Court's express language.

The footnote reads, in its entirety:

> There are exceptions to this rule, for example, where it is the wrongful act of the covenantor which causes the covenantee to be *in litigation with the third party*, then the covenantor would be liable for costs despite the fact that the covenantee prevailed.

Black, 357 S.C. at 471 n.4, 594 S.E.2d at 165 n.4 (emphasis added).

Immediately obvious is that Gulfstream's paraphrase ignores "in litigation with the third party." In other words, the exception (assuming our Supreme Court even adopted it in *Black*, *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (observing that dicta is not binding)) is one that involves litigation between the grantee and a third party, not between the grantee and the grantor. It therefore cannot apply here. And the circuit court was correct not to rely upon it. *Cf. Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013) (recognizing that effect must be given the plain language of court orders).

Instead, what Gulfstream has done is implicitly ask this Court to *expand* that exception to include lawsuits between the grantor and grantee. *See* Gulfstream's Br. 10. But doing so would shift attorney's fees without a contract in which the parties agreed to that. *See Black*, 357 S.C. at 471, 594 S.E.2d at 164.

Plus, other courts have rejected this argument. *See Nunes v. Meadowbrook Dev. Co.*, 24 A.3d 539, 543 (R.I. 2011). The Rhode Island Supreme Court in *Nunes* recognized

that courts already possess inherent power to punish "contumacious conduct" but that they should not prohibit parties from pursuing "a legitimate dispute." *Id.* at 543 n.6. As the *Nunes* court recognized, a grantor may have a legitimate dispute, even if the grantor does not prevail in that dispute.

C. Gulfstream's argument contradicts common sense.

As the circuit court recognized, a party would rarely, if ever, agree to pay the other side's costs and fees in a lawsuit, regardless of the outcome. Doing so would effectively prevent that party from ever litigating any dispute with the other side. Thus, "courts have generally declined to infer indemnification obligations from an indemnitee/indemnitor suit if the contractual language does not suggest that the contracting parties were *specifically concerned with prospective litigation between themselves.*" *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012) (emphasis added).

The warranty provisions here are the typical ones that have a long history in real estate documents. This language has never been construed as requiring the grantor to indemnify the grantee in any dispute between them that relates to the real estate interest that was granted. Gulfstream is thus left having to imply that this centuries' old language requires Palmetto Industrial to indemnify Gulfstream in litigation between them. But implying such a requirement is exactly what courts around the country have refused to do.

The plain language of the warranty provisions reinforces this common-sense conclusion. Those provisions require Palmetto Industrial "to warrant and forever

defend" a lawful claim against the easements. (R. pp. 128, 135–36, 141–42, 149.) As one court has observed, "defend" is a key word in a provision like the ones here. *See Canopy Corp. v. Symantec Corp.*, 395 F. Supp. 2d 1103, 1115 (D. Utah 2005). That court reasoned:

> [T]he parties' use of the term "defend" necessarily narrows the sweep of the indemnifying language. The use of the word "defend" indicates that the parties intended the provision to apply only to third-party claims because the word would have no effect in a direct action between the parties. Obviously, in a direct action between the parties, neither party would be interested in tendering its defense or being defended by the other party.

Id. In other words, if Gulfstream's interpretation of the easement were correct, Palmetto Industrial could control both sides of the litigation. Such a result makes no sense and is antithetical to our adversarial system.

Finally, requiring an explicit agreement to pay for both sides of a lawsuit comports with the traditional American rule that parties usually pay their own attorney's fees. Without a clear agreement for the unusual situation (to put it mildly) in which one side would fund both sides of a lawsuit regardless of the outcome, each party should bear its own fees, as has long been the custom in our courts. *See, e.g., S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 9, 766 S.E.2d 700, 704 (2014) (describing the American rule that parties must bear their own attorney's fees, unless a contract or statute provides otherwise).

II. Gulfstream's delay in invoking the warranty provisions defeats its claims now.

Even if Gulfstream were right about what the warranty provisions meant, it still could not prevail here.[2] Its delay in invoking those provisions prejudiced Palmetto Industrial's ability to defend any action.

To benefit from a warranty provision, a party must notify the grantor of the claims against the grantee's interest. *See Black*, 357 S.C. at 471, 594 S.E.2d at 165. South Carolina has long required a party invoking a warranty to give the warrantor sufficient notice such that the warrantor has time to defend the case meaningfully. *See, e.g., Greer v. McFadden*, 295 S.C. 14, 19, 366 S.E.2d 263, 266 (Ct. App. 1988); *Davis v. Wilbourne*, 19 S.C.L. 27, 28–29 (S.C. App. L. & Eq. 1833). This rule makes sense, as it ensures that the warrantor has the opportunity to defend the case fully, rather than being brought in only after proceedings are so far along that the warrantor's options had, for all practical purposes, been limited by the warrantee's actions up to that point in the litigation. *See Davis*, 19 S.C.L. at 28–29 (reasoning that a warrantor "ought therefore to have a reasonable time to prepare for" a defense); *cf. Vt. Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994) ("The purpose of a notification requirement is to allow for investigation of the facts and to assist the insurer in preparing a defense.").

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[2] This Court may affirm for any reason in the record. *See* Rule 220(c), SCACR. Palmetto Industrial invoked the long delay in Gulfstream's assertion of the warranty provisions as a defense below. (R. pp. 110–11.)

Gulfstream failed to invoke the warranty provisions timely. Take the first lawsuit between Gulfstream and Palmetto Industrial, which is the biggest of the four things cited in Gulfstream's demand for indemnification. That lawsuit was filed on November 16, 2016—384 days before Gulfstream's December 5, 2017 demand. (*See* R. p. 80.) Of course, even before November 2016, Gulfstream knew about the warranty provisions and its dispute with Palmetto Industrial. Its delay is therefore inexplicable.

Whatever the reason for the delay, by the time of Gulfstream's belated demand, that lawsuit filed in November 2016 had seen the parties litigate a motion for a temporary restraining order, a motion for a preliminary injunction, multiple motions to compel, a motion to disqualify an attorney, a motion to amend the pleadings, and a motion for contempt. *See* Docket, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-961. Even if Palmetto Industrial ever could have been controlling both sides of this litigation, too much had happened by the time Gulfstream demanded that Palmetto Industrial indemnify it for Palmetto Industrial not to have been prejudiced.

Gulfstream's indemnification demand was similarly late on the other three bases for indemnification. (Of course, none of these three things actually involved a claim against the easement, which makes the provisions inapplicable. But Palmetto Industrial puts that issue aside for purposes of this argument.) Marlin Quay Marina Bar & Grill, LLC filed its lawsuit in May 2017, more than six months before Gulfstream's indemnification demand and while the lawsuit between Gulfstream and Palmetto Industrial was already pending. (*See* R. p. 81.) And the later of the two submissions to Georgetown County was in the summer of 2017, with a permit issued

in September 2017, still months before any demand was made. (*See* R. p. 81.) Given how much time elapsed and the events that transpired before Gulfstream's demand, any ability Palmetto Industrial had to defend these actions was hampered. Gulfstream's demand was therefore too late, so its claims here fail.

III. The Cribb affidavit is not competent evidence.

Gulfstream's factual argument was that both it and Palmetto Industrial's predecessor understood the warranty provisions to mean that Palmetto Industrial had to pay Gulfstream's legal fees in a case between those parties. (R. pp. 120–21.) Its position is based solely on the affidavit from Edward Cribb. (R. pp. 124–26.)

When moving for summary judgment, a party may rely only on admissible evidence. *See* Rule 56(e), SCRCP. But the Cribb affidavit is not admissible. It therefore is of no help to Gulfstream in either supporting its own motion for summary judgment or opposing Palmetto Industrial's.

The crux of Cribb's affidavit is in Paragraphs 10, 11, 16, and 17. In these paragraphs, Cribb discusses the easement agreements and their similar warranty provisions. Cribb says that both the "Grantor and [Cribb] intended" that the warranty provisions require the grantor to pay Gulfstream's attorney's fees "incurred in defending or bringing litigation" related to the easement, including litigation against "the Grantor itself." (R. pp. 125–26.) Cribb continues that "it was clear" from the "negotiation and execution" of these agreements that "the Grantor understood the warranty provision to mean the exact same thing as" he did. (R. pp. 125–26.)

A witness, of course, may testify only about matters of which he has personal knowledge. *See* Rule 602, SCRE. Simply saying that someone has personal knowledge, however, is not enough. A party must offer evidence "sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE.

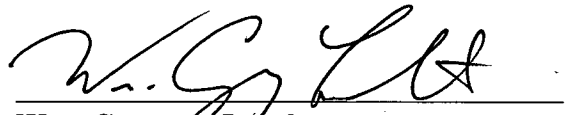
Cribb claimed to have "personal knowledge of all matters" in his affidavit, including those assertions about the grantor's intent. (R. p. 124.). But Cribb cannot possibly know what someone else was thinking. *See, e.g.*, *Fairow v. Texas*, 943 S.W.2d 895, 899 (Tex. Crim. App. 1997) ("It is impossible for a witness to possess personal knowledge of what someone else is thinking."). Nor does he quote anything the grantor said in 1986 or 1990 (even if he did, such an old hearsay statement would be problematic for multiple reasons) or cite anything the grantor did in 1986 or 1990. Cribb likewise did not attach any document that supports his bald assertion about the grantor's intent.

Although a witness's own testimony can, in some instances, be sufficient to prove actual knowledge, *see* Rule 602, SCRE, it is not sufficient here. Cribb testified about events that are more than thirty years old, and he offered nothing—no foundation, no details, no corroboration—other than self-serving, generalized statements. Without anything more, the affidavit does not establish that Cribb has personal knowledge about the grantor's intent.

CONCLUSION

The judgment should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

I certify that this FINAL BRIEF OF RESPONDENT complies with Rule 211(b), SCACR.

Wm. Grayson Lambert