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SC Court of Appeals

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 BRIEF OF APPELLANT

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CERTIFICATE OF COUNSEL

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

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November 27, 2019

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PROOF OF SERVICE

I hereby certify I have served the Final 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:

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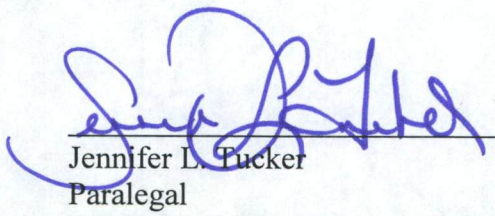

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STATEMENT OF ISSUES ON APPEAL

I. WHEN THE GRANTOR OF AN EASEMENT HAS INCLUDED WARRANTIES IN HIS EASEMENT AND REPUDIATES THAT EASEMENT, IS THE GRANTEE ENTITLED TO RECOVER ATTORNEY'S FEES ONCE THE GRANTEE VINDICATES THE EASEMENT?

STATEMENT OF THE CASE

This is the second of two related cases. Appellant sued Respondent in 2016 ("Gulfstream I") in an attempt to protect certain easement rights Respondent repudiated. In 2018, the jury found for Appellant, and the trial court entered a permanent injunction vindicating the easement. Appellant then sued Respondent seeking attorney's fees for breach of the warranties that came with the easement ("Gulfstream II").

Specifically, Appellant filed a Summons and Complaint in Georgetown County on February 23, 2018, asserting claims for declaratory judgment and breach of warranty against Respondent (R. pp. 26-27) Appellant claims Respondent breached a warranty provision set forth in several easements for use of a parking lot (R. pp. 28-30 ¶¶ 5-17). The warranty provision from the easements provide: "And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof." (R. p. 30 ¶ 15). Appellant sought actual, incidental and consequential damages for the declaratory judgment action, as well as attorneys' fees and costs incurred in a case brought by Appellant against Respondent to defend Appellant's easement rights from Respondent's intentional interference. (R. pp. 31-32 ¶¶ a-b).

On February 19, 2019, Appellant filed a Motion for Summary Judgment. (R. p. 112). Respondent filed its own Motion for Summary Judgment, along with a supporting memorandum

on March 19, 2019 (R. p. 262); (R. p. 328). Appellant filed a Response in Opposition to Respondent's Motion for Summary Judgment on April 18, 2019. (R. p. 265).

The trial court held a hearing on both motions on April 26, 2019. (R. pp. 338-363). Three days later, on April 29, 2019, the trial court entered a Form 4 Order denying Appellant's Motion for Summary Judgment and Granting the Respondent's Motion for Summary Judgment. (R. pp. 6-8). The trial court entered a formal order on May 6, 2019 (R. pp. 9-10). Appellant filed its Notice of Appeal on May 24, 2019. (R. pp. 18-20).

STATEMENT OF THE FACTS

Since 1986, Appellant has owned and operated the "Gulfstream Café," located in the Marlin Quay Marina in Garden City, South Carolina. (R. p. 124 ¶ 1.) When Appellant purchased the restaurant, the Marlin Quay Marina Company owned the adjacent lot, which included a small building, the "Marina Club & Snack Bar" (the "Snack Bar"), and a parking lot (the "Parking Lot") that served both the restaurant and the snack bar. (R. p. 124 ¶ 4.) Marlin Quay Marina Corp. expressly granted Appellant a perpetual, appurtenant easement to utilize the Parking Lot. The easement was recorded in the Georgetown County Deed Book 234 at Pages 790, 797, and 803 (the "1986 Easement") (R. pp. 127-143, pp. 145-153). Specifically, the 1986 Easement grants Appellant, including its successors and assigns:

> a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the *full and free right* of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property.

(*Id.*) (emphasis added.) Except for the portion of the property that was occupied by the Snack Bar and an unrelated sign easement, the 1986 Easement by its terms encumbers all of the Parking Lot, which is on Lots 3, 4, and 5 of Tract 3, as shown on the Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point (the "Plat"). (*Id.*); (R. p. 144).

The 1986 Easement expressly recognizes that "Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening." (R. pp. 127-143, pp. 145-153). The 1986 Easement also includes a warranty provision requiring that Grantor warrant and forever defend Appellant's right to the easement. (*Id.*) Appellant depended upon the easement rights to the Parking Lot for parking and otherwise to run the restaurant. (R. p. 124 ¶ 7.)

In 1990, the Marlin Quay Marina Corporation again expressly granted a perpetual easement for the use of the Parking Lot to Appellant, its successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement") (collectively with the 1986 Easement, the "Gulfstream Easement" or the "Easement") recorded with Georgetown County in Deed Book 382, Pages 217 to 226 (R. pp. 145-154).

The 1990 Easement includes a substantially similar warranty provision to the 1986 Easement, requiring that Defendant warrant and defend Appellant. This warranty states:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(*Id.*)

Mr. Edward Cribb, former President of The Gulfstream Café, sold the business in 1996, along with its easement rights. (R. p. 126 ¶ 18). Cribb signed both Gulfstream Easements and understood the warranty provisions to mean that the Grantor, Marlin Quay Marina Corp., would pay for Appellant's defense, including attorneys' fees and costs, if the use of the Parking Lot and/or Appellant's easement rights were challenged. (R. p. 125 ¶ 10.) Mr. Cribb would not have

signed the Easements had they not included the warranty language. (R. p. 125 ¶¶ 9, 15.) During the negotiation of the Easements, it was clear the representative of the Grantor had the same understanding as Mr. Cribb. (R. p. 125, 126 ¶¶ 11, 17.)

For many years the Gulfstream Café and Marlin Quay Marina Corporation operated harmoniously. However, in 2014, Respondent purchased the Marlin Quay Marina Property subject to the Gulfstream Easement, including the provisions requiring Respondent to warrant and forever defend the Easement. (R. pp. 155-161). Thereafter, Respondent demolished the Snack Bar in order to build a new structure. (R. p. 167, line 20 – p. 168, line 3). Since that time, Respondent's hostile actions have demonstrated its repudiation of the easement by:

- Placing construction containers in parking spaces during its demolition of the Snack Bar (R. p. 169, line 3 – p. 170, line 19.)
- Erecting a construction fence around the Parking Lot (R. p. 171, line 7 – p. 173, line 18.)
- Blocking a U.S. Foods delivery driver's ability to deliver food to Gulfstream (R. p. 192, line 4 – p. 197, line 20.)
- Calling the sheriff on two separate occasions on workers performing work on the Gulfstream Café, once on window washers and once on painters. The trial court would later hold Respondent in criminal contempt for calling law enforcement on the individuals performing work for Appellant (R. p. 183, line 15 – p. 191, line 15.)

And it only got worse.

Respondent tried to construct part of a new building directly in the Easement. (R. p. 163, lines 16-21, R. p. 164, line 23 – p. 165, line 19, R. p. 166, lines 6-17.) Respondent later changed

the plans for its building (hereinafter "Building 2.0") (R. p. 174, line 13 – p. 175, line 6) and then tried to build what we call Building 2.0 on yet another part of the Gulfstream Easement. (R. p. 199, lines 6-9.)

Further, Respondent attempted to substantially increase the parking burden placed on the Easement. For instance, Respondent planned to serve a full-scale dinner at night at the new restaurant. (R. p. 179, line 25 – p. 180, line 2.) Mr. Lawhon wanted the new restaurant to include nightlife as well. (R. p. 11, lines 15-19.) The plans for Building 2.0 had an occupancy limit of 359 people, and Building 2.0 would include 8500 square feet, compared to 4500 square feet for the original Snack Bar. (R. p. 181, lines 10-14, R. p. 182, lines 3-12.)

In response to Respondent's repudiation of the easement, Appellant sued Respondent and Lawhon on November 16, 2016 in Gulfstream I. (R. pp. 201-229.) Specifically, Appellant sued Respondent for: (1) intentional interference with easement rights, (2) trespass and nuisance, and (3) forcible entry and detainer. Appellant sought an injunction prohibiting Respondent from engaging in future interference, and it also sought damages.

Respondent not only contested that lawsuit but also brought its own counterclaims against Gulfstream for: (1) forcible entry and detainer, (2) trespass, (3) declaratory judgment, (4) promissory estoppel, and (5) breach of easement. (R. pp. 230-241.)

After a week-long trial in Gulfstream I, the jury returned a verdict for Appellant. On the issue of Respondent's interference with the Gulfstream Easement, the jury found that "[w]e, the jury, by unanimous decision find for the Plaintiff on its claim of interference with its easement." (R. pp. 242-243.) The jury awarded Gulfstream damages. (*Id.*)

After the jury's verdict, the trial court entered a permanent injunction against Respondent. (R. pp. 244-246.) Thereafter the trial court entered an amended permanent

injunction prohibiting Respondent from denying Appellant the rights contained in the Easement and from constructing a building outside the boundaries of the demolished Snack Bar. (R. pp. 247-249.)

In December 2017, Appellant tendered a "Notice and Demand for Defense and Indemnification" to Respondent, demanding that Respondent fulfill its warranty and defense obligations by paying Appellant's costs, including attorney's fees, incurred in having to vindicate its Easement. (R. pp. 250-252.) Respondent refused, (R. p. 253), so Appellant brought this action, Gulfstream II, to recover its attorney's fees pursuant to the warranty in the easement. The trial court granted Respondent's Motion for Summary Judgment, finding, as a matter of law, Appellant could not recover fees. This appeal followed.

STANDARD OF REVIEW

The Court of Appeals, in reviewing a motion for summary judgment, applies the same standard of review as the trial court under Rule 56(c), SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Under Rule 56(c), SCRCP, "summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." *Id.* (quoting *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990)). Whether a party is authorized by statute or contract to recover attorney's fees is a question of law that this court reviews de novo. *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016).

ARGUMENT

I. WHEN THE GRANTOR OF AN EASEMENT HAS INCLUDED WARRANTIES IN HIS EASEMENT AND REPUDIATES THAT EASEMENT, IS THE GRANTEE ENTITLED TO RECOVER ATTORNEY'S FEES ONCE THE GRANTEE VINDICATES THE EASEMENT?

The trial court failed to recognize that when one gives another an easement, includes warranty language in that easement, and later repudiates the easement, the grantee of the easement is entitled to recover attorney's fees from the grantor for having to vindicate his easement. *Black v. Patel*, 357 S.C. 466 at 471 n. 4, 594 S.E.2d 162 at 164, n. 4 (2004). Hence, the order should be reversed and the case remanded for a determination of the amount of attorney's fees the grantee is entitled to recover.

In most cases where a grantor has failed to defend an interest in real property only "lawful"—that is, successful— claims justify an award of attorney's fees. *Id.* at 471, 594 S.E.2d at 164. But the trial court failed to recognize the separate rule in *Black* to the effect that a party who has had an interest in land upheld is entitled to recover attorney's fees **where it was the wrongful conduct of the grantor himself that gave rise to the underlying litigation for which the duty to warrant and defend is sought**. *Id.* at 471 n.4, 594 S.E.2d at 164 n.4. The trial court's failure to recognize this rule constitutes reversible error.

Consideration of the *Black* case illustrates this critical distinction. In *Black*, the Patels purchased a tract of land to build a motel. *Id.* at 468, 594 S.E.2d at 163. When they purchased the property, they received a general warranty deed containing the following clause:

> And the Grantor does hereby bind himself and his Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

Id. This warranty language is virtually identical that the warranty language found in the easements in this *Gulfstream* case.

After building the motel, the heirs of a neighboring landowner brought an action for trespass and nuisance asserting the motel encroached on their property. *Id.* The Patels requested the original seller provide a defense, but did not receive a response to their demand. *Id.* Accordingly, the Patels brought a third-party action against the seller for recovery of attorney's fees incurred defending their title. *Id.* The Master-in-Equity found in the Patels' favor against the heirs of the neighboring landowner. *Id.* at 469, 594 S.E.2d at 163. The Master also awarded costs against the original seller for failure to provide a defense, but found attorney's fees were prohibited as a matter of law. Id.

Our supreme court agreed. The court noted "[t]he general rule for cases in this context is that only 'lawful' – that is, successful – claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend." *Id.* at 471, 594 S.E.2d at 164. The court noted this rule make sense for two reasons. First, "the covenantor has not conveyed bad title in any way, so it seems unfair to shift the burden of the costs of defense to him," if the landowner prevails. *Id.* at 472, 594 S.E.2d at 165. Additionally, the court found "the language in the general warranty deed itself . . . compels application of this rule." *Id.*

However, the court's analysis did not end there. While basing its ruling in *Black* on the general rule that only successful claims asserted against title justify an award of attorney's fees, the court recognized, "[t]here 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." *Id.* at 471 n. 4, 594 S.E.2d 162 at 164, n. 4.

It is pursuant to this rule that Appellant requests this court reverse the circuit court's grant of summary judgment in favor of Respondent. The present case does not involve claims to the easement by a third party. Instead, the Grantor itself wrongfully sought to repudiate the easement and forced Gulfstream into litigation. That wrongful conduct falls squarely within the exception identified in *Black*.

The court's exception stated in *Black* makes sense. The court's ruling in *Black* was grounded in the principle of fairness: a grantor should not be held responsible for unsuccessful litigation brought by an unrelated third-party challenging the title the grantor gave. Here, Respondent is the one who caused the issues Appellant was forced to remedy. There is nothing remotely unfair about requiring Respondent to pay the legal fees that Appellant incurred as a direct result of Respondent's wrongful conduct.

Furthermore, a contrary result would constitute a re-write of the warranty itself. It would now read:

> AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against ~~itself and its Successors and Assigns and~~ all others whomsoever lawfully claiming, or to claim the same or any part thereof.

Such a result would provide a perverse "heads I win, tails you lose scenario." A grantor could repudiate its easement with impunity and lose nothing if it were unsuccessful in court.

CONCLUSION

In sum, the trial court erred when it found that the South Carolina Supreme Court's decision in *Black* bars Appellant's claim as a matter of law. The trial court failed to apply the exception recognized in *Black* for cases that arise due to the grantor's own wrongful conduct.

Accordingly, the trial court's order granting Respondent's motion for summary judgment should be reversed.

Respectfully submitted,

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