THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2019-001446

Case No. 2016-CP-22-00961

The Gulfstream Café, Inc., ...Respondent,

v.

J. Mark Lawhon, Individually, and
Palmetto Industrial Development, LLC, ...Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

Wm. Grayson Lambert
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211
(803) 799-9800

Henrietta U. Golding
BURR & FORMAN LLP
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577
(843) 444-1107

Counsel for Appellants

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INTRODUCTION

Everyone agrees that this appeal comes down to a central question: whether parking a golf cart in a parking space in front of a delivery gate violates the injunction. The disagreement arises (unsurprisingly) in the answer to that question.

Gulfstream insists the answer is "yes." Its position, however, suffers from multiple flaws. Gulfstream first tries to justify its answer with a misguided law-of-the-case argument that ignores two critical facts: (1) the contempt motion that gives rise to this appeal was filed before and decided the same day as the motion to amend the injunction on which its law-of-the-case argument is based, and (2) Palmetto Industrial and Lawhon have never given up their challenge to the contempt finding. When it does finally turn to the facts, Gulfstream never engages with the precise language of the easements on which the injunction is based, and it never bothers to explain the inconsistent position it takes here with its own admissions at trial that Palmetto Industrial and Lawhon could use any space in the parking lot.

These shortcomings in Gulfstream's argument make clear the answer to this central question is "no." Palmetto Industrial and Lawhon never gave up fighting the circuit court's conclusion on contempt, despite the circuit court's denial of their motion to amend the injunction. Thus, the question presented here is an active one, appropriate for this Court's determination now. In answering that question, the easement is unequivocal: it is nonexclusive and allows Palmetto Industrial and Lawhon to park in any space at any time. Gulfstream admitted as much during the

trial. Its contrary argument now does not justify the contempt finding. The circuit court's contempt order should therefore be reversed.

ARGUMENT

I. The law-of-the-case doctrine does not apply here.

Gulfstream's primary argument is that the law-of-the-case doctrine bars Palmetto Industrial and Lawhon from challenging the contempt finding. *See* Gulfstream's Br. 6–10. Neither the logic nor the language of that doctrine supports Gulfstream's position.

A. Palmetto Industrial and Lawhon have never given up their challenge to the contempt order.

In its law-of-the-case argument, Gulfstream harps on the circuit court's order denying Palmetto Industrial and Lawhon's motion to amend the injunction. But it ignores the circuit court's order—entered the same day—finding Palmetto Industrial and Lawhon in contempt. This context is critical, as it shows why the logic of the law-of-the-case doctrine does not apply here.

That doctrine seeks to "promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015) (internal alteration omitted) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). In other words, the doctrine aims to push a case toward a conclusion by preventing the parties from fighting repeatedly over the same issues.

That is not what happened here. This appeal is the first fight over a contempt finding that interprets the injunction as restricting where Palmetto Industrial or

Lawhon can park in Palmetto Industrial's own parking lot. A review of what transpired below makes this clear. After the June 2018 trial, the circuit court entered an injunction that prohibited Palmetto Industrial and Lawhon from "preventing [Gulfstream] from enjoying the right granted to it in the recorded nonexclusive joint easement." (R. p. ___ (June 12, 2018 Order, p. 2).) Gulfstream soon moved to hold Palmetto Industrial and Lawhon in contempt, for, among other things, parking a golf cart in a parking space in front of the delivery gate, (R. pp. ___–___ (Second Mot. for Contempt)). The first argument that Palmetto Industrial and Lawhon raised in opposing that motion is the one at the center of this appeal: Parking in a parking space did not violate the injunction. (R. pp. ___–___ (Opp'n to Mot. for Contempt 18–19)).

While the motion for contempt was pending, Palmetto Industrial and Lawhon moved to amend the injunction. (R. pp. ___–___ (Mot. to Alter or Am.)). That motion raised various arguments, ranging from the inappropriateness of any injunction at all to the restrictions on the Palmetto Industrial's proposed new building to Gulfstream posting a no-parking sign in front of its delivery gate. Given that both motions involved the same injunction, some overlap of arguments was to be expected.

The circuit court heard both motions on November 14, 2018. (R. p. ___ (Nov. 14, 2018 Hr'g Tr. p. 1).) It also decided both motions on November 14. In one order, the court denied the motion to amend the injunction "as filed" and "reaffirm[ed]" the injunction "in its entirety." (R. p. ___ (Nov. 14, 2018 Order).) In a second order, the

court granted the motion for contempt only as to the golf cart being parked in the space in front of the delivery gate. (R. p. ___ (Nov. 14, 2018 Order).)

Palmetto Industrial and Lawhon appealed the order denying the motion to amend the injunction. (R. p. ___ (Dec. 13, 2018 Notice of Appeal).) But they eventually withdrew that appeal. (R. p. ___ (Feb. 1, 2019 Court of Appeals Order).)

During this same time, Palmetto Industrial and Lawhon challenged the contempt finding, moving to reconsider that order. (R. pp. ___–___ (Mot. to Alter or Amend Nov. 14, 2018 Order).) Once again, their first argument was that parking in a parking space did not violate the injunction. (R. pp. ___–___ (Mot. to Alter or Amend Nov. 14, 2018 Order 5–6).) After the motion to reconsider was denied, (R. pp. ___–___ (Aug. 7, 2019 Order)), Palmetto Industrial and Lawhon appealed the contempt finding, (R. pp. ___–___ (Notice of Appeal)).

To apply the law-of-the-case doctrine on these facts would pervert the purpose of that doctrine. For one, it would unnecessarily increase the amount of litigation by forcing parties to pursue unnecessary appeals. In this instance, Palmetto Industrial and Lawhon would have had to pursue the appeal of the denial of their motion to amend the injunction (thereby consuming more of this Court's time and energy), when their greater concern was the contempt finding. Requiring parties to pursue additional appeals is antithetical to the doctrine's goal of streamlining litigation. These unnecessary appeals would also increase burden this Court's limited resources. *Cf. City of Columbia v. Assa'ad-Faltas*, 420 S.C. 28, 34–35, 800 S.E.2d 782, 785 (2017) (noting the judiciary's limited resources).

For another, applying the doctrine here would force the Court to answer a specific question in the abstract. Requiring Palmetto Industrial and Lawhon to have pursued their arguments in an appeal from the denial of their motion to amend the injunction makes no sense. Of course, Palmetto Industrial and Lawhon cannot infringe on Gulfstream's easement rights, which is all of the injunction as "reaffirmed" prohibited (at least as relevant to this appeal). The real argument is about whether certain conduct violates those rights. The argument about where the golf cart could be parked is better litigated on appeal from the contempt order, when the facts and arguments are concrete, rather than in the abstract, as it would have been in an appeal from the denial of the motion to amend the injunction, potentially raising a ripeness question.

For a third, applying the doctrine here casts aside the doctrine's core goal of preventing relitigation of issues. The motion for contempt was filed before the motion to amend the injunction, and the motions were heard and decided the same day. It was not as if the motion to amend the injunction was decided months or years earlier, then Palmetto Industrial and Lawhon later renewed those same unappealed arguments, which is what typically happens when the law-of-the-case doctrine applies. As a full picture of the proceedings below demonstrates, Palmetto Industrial and Lawhon have never given up their challenge to the circuit court's contempt finding, and their leading argument has always been that parking in a parking space did not violate the injunction. This appeal is therefore the first time this issue has been fully litigated.

Ultimately, the rationale for the law-of-the-case doctrine does not fit here. Even if somehow the doctrine could technically could apply (it cannot—more on that below), applying it "would place form over substance when doing so would not further the interests of justice." *Atkins v. Wilson*, 417 S.C. 3, 18, 788 S.E.2d 228, 236 (Ct. App. 2016). The Court should therefore not apply it. *See Flexon*, 413 S.C. at 572, 776 S.E.2d at 403 (noting that this doctrine is "discretionary").

B. The question presented here was not necessarily decided in the circuit court's order denying the motion to amend the injunction.

In addition to the logic of the doctrine not applying, the specific language of the doctrine makes clear that the doctrine does not apply here. Under this doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The doctrine "applies both to those issues explicitly decided and to those issues that were necessarily decided." *Flexon*, 413 S.C. at 572, 776 S.E.2d at 403.

Here, the issue of whether the injunction limited where Palmetto Industrial or Lawhon could park was raised in opposing the motion to amend the injunction, but the circuit court did not expressly or implicitly rule on it. All the circuit court did was "reaffirm[]" its injunction. (R. p. ___ (Nov. 14, 2018 Order).) It never said anything in its order about whether the injunction limited where Palmetto Industrial or Lawhon could park. (The circuit took a position on that issue in the order on the motion for contempt that is the subject of this appeal.) Thus, as in other cases when a lower

court had not "specifically ruled on the issue," the law-of the-case doctrine does not apply. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The fact that the circuit court did not rule on whether the injunction limited where Palmetto Industrial or Lawhon could park in denying the motion to amend distinguishes this case from *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014). There, the abatement issue was ruled on below but was never appealed. Hence, the law-of-the-case doctrine applied. In this case, by contrast, the lower court did not rule on the specific question that is on appeal now.

If any doubt remained that the doctrine does not apply here, consider what reversing the circuit court means. The contempt finding and penalty is reversed, but the injunction remains in effect. This appeal is thus not about the same issue that was decided in motion to amend the injunction, so the law-of-the-case doctrine has no relevance.

II. The injunction does not limit where Palmetto Industrial or Lawhon can park.

Gulfstream offers only a brief argument on the merits of the circuit court's conclusion that the injunction limited where Palmetto Industrial or Lawhon could park. Its argument is unpersuasive.

As a threshold problem, Gulfstream's position is inconsistent with the plain language of the easements. For whatever reason, Gulfstream never actually quotes the exact language of the easements on which the injunction is based. (Recall that the injunction, in violation of Rule 65(d), SCRCP, prohibited Palmetto Industrial and

Lawhon from violating the rights granted by the easements, without specifically stating what they were not allowed to do. (R. p. ___ (June 12, 2018 Order, p. 2).)) Because that language is critical to determining whether Palmetto Industrial and Lawhon were enjoined from using certain spaces, it warrants this Court's attention. The grants to Gulfstream provide:

> a non-exclusive perpetual easement appurtenant to the premises of the [Gulfstream] hereinafter described for the full and free right of ingress and egress on, over and across the following described property of [Palmetto Industrial], together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or law, the premises of [Palmetto Industrial] hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to [Gulfstream's] hereinafter described property.

(R. p. ___ (Compl. Ex. A, p. 2).) In other words, Gulfstream and its invitees had two rights under the easements: (1) for "ingress, egress and vehicular parking on and . . . access to" Gulfstream's building and (2) for the "maintenance, repair, alteration and/or improvements" of that building. Additionally, under the easement, both Palmetto Industrial and Gulfstream "have *joint and non-exclusive use at all times* of the" parking lot. (R. p. ___ (Compl. Ex. A, p. 2) (emphasis added).)

Gulfstream's argument assumes that the delivery driver had a right to use a particular parking spot at a particular time. But it never offers any justification for this assumption, and it never points to what language in the easements gives that right. Presumably that is because none exists.

The easements are joint and nonexclusive. Indeed, the circuit court recognized as much. (R. p. __ (June 12, 2018 Order).) And Gulfstream acknowledges as much. *See* Gulfstream's Br. 2. This fact is critical. It means that Palmetto Industrial and Lawhon are entitled to use any parking space at any time. And that is what Chris Lawhon did when he parked the golf cart in a parking space.

The joint, nonexclusive nature of the easements also means that that although Gulfstream and its invitees like the delivery driver have a right to use the parking lot, they do not have a right to use any particular part of the parking lot at a given time. (Just as Palmetto Industrial and Lawhon do not have the right to use any particular space in the parking lot.) The easements—or better yet, the injunction itself, *see* Rule 65(d), SCRCP—say nothing about the particular parking spot where the golf cart was parked. Put differently, Gulfstream has no exclusive right to use that spot, under either the easements or the injunction. *See Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016) (explaining that the plain language of an easement controls); (R. p. ___ (Compl. Ex. A, p. 2); p. __ (June 12, 2018 Order)).

Two simple hypotheticals prove this point. First, had the golf cart been parked in any of the other sixty spaces in the parking lot, it is unlikely that Gulfstream would have raised a fuss about it. But the easements do not give Gulfstream greater rights to the parking space where the golf cart was parked than to any other space. Second, if one of Gulfstream's invitees or even Palmetto Industrial's invitees had been parked in that spot, it is still unlikely that Gulfstream would have moved for contempt. Thus,

Gulfstream's complaint is not *that* a vehicle was parked in that spot, but rather *whose* vehicle was parked in it.

Ultimately, all Gulfstream and its invitees had was the right to enter, park, and exit from the lot and to use the lot for maintenance, repair, alteration, or improvements to its property. The golf cart being parked in a parking spot did not deny the delivery driver any of those rights. As Gulfstream's own pictures show, the delivery driver could—and did—enter the lot, park, enter Gulfstream's building, and exit the lot. (R. p. ___ (Second Mot. for Contempt, Ex. C at 5).) Palmetto Industrial and Lawhon therefore did not prevent the delivery driver from enjoying the first right granted by the easements. And the delivery driver was not attempting to do any maintenance, repair, alteration, or improvements to Gulfstream's building, so the second right granted by the easements could not have been violated.

When Gulfstream argues that the circuit court had to decide whether Palmetto Industrial and Lawhon "properly used the space," Gulfstream's Br. 12, Gulfstream is subtly asking the Court to expand the scope of the easements to limit how or when Palmetto Industrial and Lawhon could use a space. It seemingly wants the Court to impose a "motive" requirement on the use of a parking space. The easements impose no such restriction. And their plain language is, of course, what controls. The Court should accordingly reject Gulfstream's invitation to do what the easements do not.

What is remarkable about all of this is that during the trial, Gulfstream's manager testified and its counsel acknowledged during closing argument that Palmetto Industrial and Lawhon had the right to use any parking space. Jef Kirk,

the manager on whose testimony Gulfstream relies on appeal, was asked, "Mr. Lawhon can park in the parking spaces on the parking lot; can he not?" (R. p. ___, lines 3–4 (Tr. p. 372, lines 3–4).) Kirk answered, "Yes." (R. p. ___, line 5 (Tr. p. 372, line 5).) Then, during closing argument, Gulfstream's counsel admitted that Lawhon "had a right to park wherever he wanted." (R. p. ___, lines 14–15 (Tr. p. 1095, lines 14–15).) Somewhere in the six weeks between the trial and the motion for contempt, Gulfstream apparently changed its mind on what the nonexclusive nature of the easements meant. Yet nowhere in its brief does Gulfstream try to explain its inconsistent positions or its attempt to expand the easements once the injunction was entered.

Gulfstream had it right at trial: Palmetto Industrial and Lawhon can use any space in the parking lot. The golf cart being parked in a parking space therefore did not violate any right that Gulfstream had under the easements, so the circuit court was wrong to hold Palmetto Industrial and Lawhon in contempt.

III. The record lacks sufficient evidence for a finding of criminal contempt.

Criminal contempt exists only if "willful disobedience of an order of the court" is proven beyond a reasonable doubt. *Miller v. Miller*, 375 S.C. 443, 454, 457, 652 S.E.2d 754, 759, 761 (Ct. App. 2007). Here, that high burden of proof was not met.

On Chris Lawhon's intent when parking the golf cart, Gulfstream calls his affidavit "self-serving" and summarily dismisses it. Gulfstream's Br. 13. That the affidavit was beneficial for Palmetto Industrial and Lawhon is not a sufficient reason to reject the testimony. Gulfstream simply asserts that because there had been

conflict between Palmetto Industrial and Gulfstream, the only reasonable conclusion is that Chris Lawhon's act here was willful.

This is not, however, the only reasonable conclusion from the facts surrounding the golf cart. Chris and Mark Lawhon had both parked in this space in the past because it was out of the way of their customers at the marina. And on the one occasion when Gulfstream claimed Chris Lawhon parked the golf cart and walked away from the marina, Chris Lawhon said he dropped something while driving the golf cart and simply went back to pick it up. Tellingly, Gulfstream offered only a still photograph of Chris Lawhon walking away, without any evidence of when he returned. Finally, Chris Lawhon said that he did not receive any text messages about where the golf cart was parked, and he stopped parking in that spot once he learned about Gulfstream's complaints. (R. pp. ___–___ (Aug. 20, 2018 C. Lawhon Aff. ¶¶ 6–7).) Given the trial testimony and arguments about Palmetto Industrial being allowed to park anywhere, *see supra* Part II, an equally plausible interpretation is that Chris Lawhon did not believe parking in that particular spot violated the injunction, but once he learned Gulfstream claimed it did, he stopped. Put differently, a reasonable mind could conclude that Chris Lawhon did not deliberately violate the injunction (assuming the injunction actually restricted where he could park).

The circuit court's finding that Chris Lawhon's actions were willful is particularly troubling given that it reached that conclusion without ever hearing any live testimony. To be sure, the court had heard witnesses testify in the June 2018 trial, but that was five months before this motion was heard and before the events

giving rise to this motion took place. The circuit court had no opportunity to observe the witnesses speak about these events, and no witness was subject to cross-examination. *See Watkins v. Sowders*, 449 U.S. 341, 349 (1981) ("[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth."). With no live testimony on the facts relevant to the motion for contempt, the circuit court was hardly "in an ideal position to consider Chris Lawhon's credibility" or to decide whether Gulfstream had carried its substantial burden of showing a willful violation of the injunction beyond a reasonable doubt. Gulfstream's Br. 13.

The problem with deciding this motion on the affidavits and briefs alone is exacerbated by Gulfstream's weaponization of contempt in this litigation. In both of its first two motions for contempt, Gulfstream took a shotgun approach in claiming conduct was contemptuous, most of which it could not come close to proving beyond a reasonable doubt. *See* Appellants' Br. 5–7, 9–11. And then Gulfstream filed a third (and baseless) contempt motion that it withdrew only the day before the hearing. *See* Appellants' Br. 8 n.2. Its accusations of contempt therefore warrant closer scrutiny from the circuit court than a review of black-and-white paper.

IV. The circuit court's order was deficient.

In attacking Palmetto Industrial and Lawhon's argument that the circuit court's order was insufficient, Gulfstream's response is that no South Carolina court has opined that a court must give an explanation of its decision in finding a party in criminal contempt when that decision is made on affidavits and briefs alone.

Gulfstream is correct that no case law exists on this point. But that appears to be because no case has raised this particular question, not because our courts have decided it in the negative.

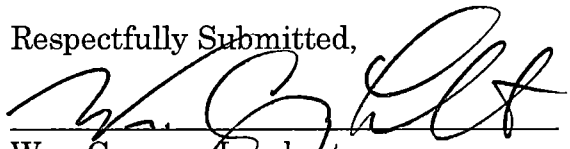
Palmetto Industrial and Lawhon's argument on this point is, at its core, one of the need for a sufficient order for appellate review. Nothing about that principle is novel. *See, e.g.*, *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007); *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). What is sufficient will vary depending on the case, and findings and conclusions are not always required. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). Still, an appellate court must understand why the circuit court did what it did, and our Supreme Court has said that "it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law." *Id.*

Here, the circuit court needed to follow that "better" and "common" practice. Akin to "showing your work" on a math test, the circuit court needed to explain, at least in a few sentences, how it weighed the black-and-white record before it. *Jackson v. Jackson*, 241 S.C. 1, 126 S.E.2d 855 (1962), demonstrates this concept. There, the circuit judge explained in a paragraph why, despite some evidence being uncontradicted, the judge was unconvinced the appellant there had not violated the order. *Id.* at 15–16, 126 S.E.2d at 863. The circuit court here did nothing of the sort, leaving this Court with no idea why parking the golf cart in a parking space violated the injunction or why Chris Lawhon's act was willful.

CONCLUSION

The circuit court's contempt order should be reversed or, alternatively, vacated.

Respectfully Submitted,



Wm. Grayson Lambert
S.C. Bar No. 101282
BURR & FORMAN LLP
Post Office Box 11390
Columbia, S.C. 29211
(803) 799-9800

Henrietta U. Golding
BURR & FORMAN LLP
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577
(843) 444-1107

Counsel for Appellants

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CERTIFICATE OF SERVICE

I certify that this INITIAL REPLY BRIEF OF APPELLANTS was served on counsel via first class U.S. Mail for the Respondent on February 18, 2020:

George W. Redman, III
Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400

Simon H. Bloom
Adam D. Nugent
Bloom Parham, LLP
977 Ponce de Leon Ave., NE
Atlanta, GA 30306
(404) 577-7710

Attorneys for Respondent

BURR & FORMAN MCNAIR

Wm. Grayson Lambert
glambert@burr.com
Direct Dial: (803) 753-3261
Direct Fax: (803) 933-1446

Burr & Forman LLP
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

Office (803) 799-9800
Fax (803) 753-3278

BURR.COM

February 18, 2020

VIA COURIER

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: The Gulfstream Cafe, Inc. v. Palmetto Industrial Development, LLC
Case No. 2019-001446

Dear Ms. Kitchings:

Please find enclosed the original and 5 copies of the Initial Reply Brief of Appellants and Supplemental Designation of Matter to be Included in the Record on Appeal in the captioned matter. I ask that you please stamp the extra copies and return them to me via the courier.

By copy of this letter, I am herewith serving a copy of the Initial Reply Brief and Supplemental Designation of Matter on counsel for Respondent.

Respectfully yours,

Wm. Grayson Lambert

WGL:lg
Enclosure
cc: George W. Redman, III
Simon H. Bloom
Adam D. Nugent
Andrea Pearson