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SC Court of Appeals

THE STATE OF SOUTH CAROINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

Sea Island Food Group, LLC, d/b/a Squeeze…….……Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership……Defendants,

Michael J. Quillen Family Limited Partnership……...Third-Party Plaintiff,

v.

Top of the Bay, LLC…….Third-Party Defendant,

Top of the Bay, LLC d/b/a Club Light……..Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises.....Fourth-Party Defendant, Appellant.

PETITION FOR REHEARING

E. Brandon Gaskins, Esquire
MOORE & VAN ALLEN PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
Phone: (843) 579-7000

Attorney for Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

Pursuant to Rules 221(a) and 240, SCACR, Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises ("Yaschik") files this Petition for Rehearing as to Opinion No. 5794 of the Court of Appeals, filed on January 27, 2021.

STANDARD OF REVIEW

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR, states: "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." To prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001).

ARGUMENT

I. The Court Misapprehends the Elements of Contractual Interference by Affirming the Trial Court Despite Finding that the Master Tenant Had Been Relieved of Its Duties Under the Master Lease.

In affirming the trial court's denial of directed verdict on Top of the Bay's contractual interference claim, the Court misapprehends Yaschik's primary argument that the claim should have been dismissed on directed verdict because the Master Tenant did not breach the sublease. The Court acknowledges that the "the trial court found the Master Tenant was relieved of its duties under the subleases once Yaschik declared the building a total loss and terminated the master lease." (Op. p. 6.) However, the Court fails to apprehend that if the Master Tenant was relieved of its duties under the subleases, it could not have breached the subleases, which is an essential element of Top of the Bay's interference claim.

As the Court correctly states in its decision, "An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the

contract's breach. Where there is no breach of the contract, there can be no recovery." (Op. p. 5) (citing *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007)). Yet the Court disregards that element and rules that the interference claim could stand even without a breach of the subleases.

The Court's decision fails to explain how Top of the Bay could establish that the Master Tenant breached the subleases if the Master Tenant had been relieved of its duties under the subleases. Instead, the Court claims that the interference "claim could stand as long as there was evidence Yaschik's declaration of a total loss kept the Master Tenant from honoring the sublease." Under the Court's analysis, a party can establish a claim for contractual interference if the defendant caused a third-party not to perform its contract with the plaintiff, even if the third-party did not breach the contract.

The Court's ruling, therefore, departs from well-established precedent from the South Carolina Supreme Court holding that "[w]here there is no breach of the contract, there can be no recovery" for contractual interference. *Eldeco*, 372 S.C. at 481, 642 S.E.2d at 732.

II. The Court's Ruling on the Absence of Justification Is Contradicted by Its Findings and Based on a Misreading of Its Precedent.

The Court also misapprehends the test for determining whether Yaschik's purported interference with the subleases was justified. Again, the Court correctly states that "[i]nterference with a contract is justified when it is motivated by legitimate business purposes." (Op. p. 5) (citing *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995)). Yet the Court misapplies this principle by narrowly focusing on whether Yaschik's conclusion that the building was totally destroyed was justified. By focusing only on the issue of total destruction, the Court overlooks the fact that Yaschik's termination of the master lease was motivated by a legitimate business purpose, regardless of the articulated basis for termination.

In upholding the award on the interference claim, the Court concludes that there were "conflicting inferences about Yaschik declaring the building totally destroyed." (Op. p. 6.) The Court states, "There was certainly evidence from which the jury could conclude Yaschik's decision to declare the building 'totally destroyed' was justified in light of the large amount of money it would take in excess of the insurance coverage to restore the building." (*Id*.) And the Court also finds that there was "evidence that Yaschik did not believe the building was 'totally destroyed' and **terminated the master lease (as well as the subleases) out of a desire to protect its own interests**." (*Id.*) (emphasis added). The Court then acknowledges that Yaschik terminated the master lease because it "was interested in saving money." (*Id*. at p. 7.)

The error in the Court's analysis is that, regardless of whether Yaschik was justified in declaring the building "totally destroyed," the decision to terminate the master lease was justified by a legitimate business purpose. Although the Court concludes that there was "conflicting evidence" as to whether Yaschik believed the building was totally destroyed, it acknowledges that Yaschik's underlying motive was tied to the costs of the rebuild and "a desire to protect its own interest." By expressly finding that the evidence supporting Top of the Bay's interference claim indicated that Yaschik terminated the master lease "out of a desire to protect its own interest," the Court should have ruled that Yaschik was legally justified in terminating the master lease.

The Court's error in determining whether there was absence of justification is compounded by the cases it relies on. Most problematically, the Court states that in *S. Contracting, Inc. v. H.C. Brown Const. Co.*, 317 S.C. 95, 96, 450 S.E.2d 602, 603 (Ct. App. 1994), "[t]his court also previously upheld an intentional interference claim when there was evidence an insurance

company cancelled a policy (causing the insured to breach a contract with someone else) not for reasons grounded in the insurance policy, but for its own business interests."[1] (Op. p. 6.)

In this statement, the Court mistakenly explains its own precedent. In *S. Contracting*, the Court of Appeals did not uphold an intentional interference claim, as the Court asserts. Instead, the Court in *S. Contracting* rejected the plaintiff's contractual interference claim by affirming the trial court's granting of summary judgment to the insurer. In other words, the *S. Contracting* court did the exact opposite of what the Court now says that it did.

The Court's misapprehension of *S. Contracting* is not mere harmless error. Instead, it demonstrates that the Court incorrectly applies its own precedent to resolve the justification issue against Yaschik. In *S. Contracting*, the Court upheld summary judgment on the grounds that the insurer was justified in enforcing its contractual rights with a general contractor, which led to the termination of the subcontract between the subcontractor plaintiff and the general contractor. *Id.*, 317 S.C. at 101-02, 450 S.E.2d at 605-06. In rejecting the interference claim, the Court declared that the subcontractor "was not a party to that contract [between the insurer and general contractor] and had no contractual right to require good faith and fair dealing by [the insurer]. Therefore, any inquiry into the manner or uniformity with which [the insurer] chose to enforce its contract with [the general contractor] is irrelevant." *Id.* at 101, 450 S.E.2d at 605.

Yaschik relied on *S. Contracting* as one of the primary cases supporting directed verdict on the interference claim and reversal on appeal. Similar to the insurer in *S. Contracting*, Yaschik

[1] The Court also cites *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 191, 336 S.E.2d 472, 472 (1985), in its discussion of justification. However, the issue of justification was not at issue on appeal in *Todd.* And unlike in this case, there was no evidence that the defendant in *Todd* was acting in pursuit of his own contractual rights or was motivated by a legitimate business interest when he fabricated information that led to the termination of plaintiff's employment. As a result, *Todd* is so factually distinguishable from this case that it has no applicability.

was exercising it contractual right under the master lease when it declared the building totally destroyed and consequently terminated the master lease. And just as the insurer's enforcement of its contractual right led to the termination of the subcontract in *S. Contracting*, Yaschik's enforcement of its right under the master lease led to the termination of the subleases. Therefore, under *S. Contracting*, the manner of Yaschik's exercise of its contractual right under the master lease is irrelevant. However, Top of the Bay's interference claim, as well as the Court's analysis of whether Yaschik was justified in terminating the master lease, is based entirely on the manner in which Yaschik enforced its right under the master lease. As a result, *S. Contracting* supports reversal of the trial court's denial of directed verdict rather than affirming it, as the Court mistakenly contends.

III. The Court Overlooks Mitigating Evidence and Makes Conclusory Findings on the Purported Reprehensibility of Yaschik's Conduct That Are Not Supported by the Record.

In upholding the punitive damages awarded to Top of the Bay, the Court misapplies the reprehensibility factors and overlooks key mitigating evidence. Although the Court correctly finds that the first two reprehensibility factors favor Yaschik, it wrongly determines that the other three factors favor Top of the Bay.

With respect to the third factor, which is whether Top of the Bay had financial vulnerability, the Court concludes that this factor favors Top of the Bay without providing any analysis or citing to any evidence in the record. (Op. p. 8.) Furthermore, it is impossible to determine the evidentiary basis for the Court's finding on this factor because Top of the Bay did not include anything in the record on appeal indicating that it was financially vulnerable. Instead, the only evidence in the record shows that Top of the Bay presented evidence at trial that its business was so financially successful that it lost over $1.2 million as a result of the building not

being restored after the fire. (R. p. 391.) Put simply, there is no basis to support a finding of financial vulnerability when the only evidence in the record is that Top of the Bay was a financially successful business.

With respect to the fourth reprehensibility factor, which is whether Yaschik's conduct was repeated or an isolated incident, the Court acknowledges that the termination of the master lease was an isolated incident. (Op. p. 8.) Yet it nevertheless concludes that this factor favors Top of the Bay because "the case centered on a series of actions that played out over several months." (*Id.*) While it is true that the termination occurred immediately after the Master Tenant abandoned responsibility for rebuilding the premises months after the fire occurred, the Court fails to identify any acts by Yaschik during this period that were tortious or directed towards Top of the Bay.

Instead, the only specific evidence that the Court relies upon to uphold the award of punitive damages is that Yaschik "conducted private negotiations to sell the property."[2] But negotiating to sell property is not reprehensible – especially when faced with having to pay over a million dollars out of pocket to rebuild a substantially underinsured building that was badly damaged by fire. Moreover, the Court overlooks the facts that Yaschik disclosed to the Master Tenant that negotiations to sell the property were occurring and that Yaschik had separate discussions with the Master Tenant about selling the property to him. (R. pp. 363-64.)

With respect to the fifth reprehensibility factor, which is whether the harm was the result of intentional malice, trickery, or deceit, rather than mere accident, the Court makes no findings of intentional malice, trickery, or deceit by Yaschik. However, the Court finds that this factor

[2] The Court cites this evidence, "combined with rest presented at trial," as sufficient to support the jury's award of punitive damages. The fact that the Court fails to identify any other specific evidence and makes only a vague, conclusory reference to the "rest" of the evidence seemingly confirms that such other evidence was not included in the record on appeal.

favors Top of the Bay because Yaschik's termination of the lease was not a "mere accident." But a finding that the termination of the master lease was not accidental does not mean that it was accompanied by malice, trickery, or deceit. The undisputed evidence shows that Yaschik made a business decision to terminate the master lease to protect its own interest but was not deceitful or malicious. (R. pp. 318-320, 321, 363, 412-413, 423.) In fact, Yaschik even attempted to protect the subtenants by securing space for them in the restored building as part of its negotiations to sell the property. (R. pp. 318-320, 540-541, 612.) The Court overlooks this evidence and instead accepts the findings of the trial court without question, despite the fact that Top of the Bay did not include counter-evidence in the record on appeal.

IV. The Court Failed to Apply the Presumption That a 133,333:1 Ratio Between Punitive and Compensatory Damages is Unconstitutional or Require that Top of the Bay Rebut Such Presumption.

The Court misapprehends the proper standard for determining the constitutionality of the punitive damages award and errs in upholding the jury's award. In reviewing the disparity between the actual and potential harm suffered by Top of the Bay and the amount of punitive damages, the Court relies on non-binding decisions from other jurisdictions instead of clearly established South Carolina law recognizing that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (Ct. App. 2009) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). Furthermore, the Court failed to apply precedent from the South Carolina Supreme Court holding that a "sizable disparity between punitive and compensatory damages establishes a presumption that the punitive damages award is an unconstitutional deprivation of property." *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 171, 604 S.E.2d 385, 393 (2003).

In *Atkinson*, the jury awarded the plaintiff a relatively low amount of compensatory damages but awarded punitive damages at a ratio of 127:1. *Id.* The Supreme Court recognized that the amount of compensatory damages in that case "was particularly low," but it nevertheless ruled that the plaintiff had failed to rebut the presumption that the three-digit punitive-compensatory damages ratio was unconstitutional because the defendant's actions were not sufficiently egregious to support such a significant disparity. *Id.*

Instead of relying on out-of-state precedent, the Court should have applied the presumption against constitutionality established under *Atkinson* given the enormous disparity between nominal and punitive damages in this case. Although Yaschik cited *Atkinson* in its brief for the proposition that such a disparity was presumptively unconstitutional, the Court fails to cite *Atkinson* in its opinion or apply the presumption recognized in that case. If *Atkinson* is applied, Top of the Bay cannot meet its burden of rebutting the presumption of unconstitutionality, especially considering that the Court recognizes that Yaschik's termination of the master lease resulted from "a desire to protects its interest" and that Top of the Bay failed to include any evidence in the record on appeal demonstrating reprehensibility.

CONCLUSION

For the aforementioned reasons, Yaschik requests that the Court order a rehearing as prayed above and reverse the Court's decision in Opinion No. 5794.

E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: 843-579-7000
Facsimile: 843-579-7099
brandongaskins@mvalaw.com

Attorney for Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

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Top of the Bay, LLC d/b/a Club Light……..Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises.....Fourth-Party Defendant, Appellant

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PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **PETITION FOR REHEARING** by electronic mail and by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

William K. Swope, Esquire
The Swope Law Firm, PA
1525 Sam Rittenburg Blvd, Suite 208
Charleston, SC 29407

W. Tracy Brown, Esquire
The Brown Law Firm
110 N. Main Street
Summerville, SC 29483

Attorneys for Respondent Top of the Bay, Inc. d/b/a Club Light

E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: 843-579-7000
Facsimile: 843-579-7099
brandongaskins@mvalaw.com

Attorney for Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

February 11, 2021
Charleston, South Carolina

Moore&VanAllen

February 11, 2021

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth Street
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

VIA EMAIL ONLY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: Sea Island Food Group, LLC d/b/a SQUEEZE v. Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, et al.
Case No.: 2013-CP-10-7107
Appellate Case No.: 2018-000906
MVA File No.: 029018.000023

Dear Ms. Kitchings:

Pursuant to Section (c)(6) of the Supreme Court's Amended Order regarding Operation of the Appellate Courts During the Coronavirus Emergency dated May 29, 2020, please accept the enclosed **Petition for Rehearing** and **Proof of Service** for filing in the above matter. The required filing fee in the amount of $50.00 is being mailed to the Court.

By copy of this letter, I am serving Respondent's attorneys with a copy of the Petition for Rehearing.

Thank you for your assistance with this matter. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

E. Brandon Gaskins

EBG/llp

Enclosure: As stated.

cc: **VIA EMAIL AND U.S. MAIL**
William K. Swope, Esquire
W. Tracy Brown, Esquire