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Jan 12 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
Appellate Case No.: 2021-000756

Henry Brewington, Individually and d/b/a Levelz Bar & Grill, Respondent,

v.

City of Myrtle Beach, Appellant,

Horry County Court Of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Trial Court Case No. : 2017-CP-26-685

APPELLANT'S FINAL BRIEF

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II. Did the trial judge commit reversible error when he refused to give the Appellant's complete request to charge that the jury should consider the social interests in protecting the freedom of action of the Appellant in determining whether the Appellant tortiously interfered with a contract?

STATEMENT OF THE CASE

The above lawsuit was filed on February 2, 2017 by Respondent Henry Brewington and Virginia Brewington, Individually and d/b/a Levelz of Myrtle Beach against Defendants Melvina Devine Davis, Appellant City of Myrtle Beach, and Horry County in the Court of Common Pleas for Horry County. Virginia Brewington, Melvina Divine Davis, and Horry County were dismissed by court order. After the dismissals, the remaining parties in the lawsuit are Appellant City of Myrtle Beach (hereinafter "City") and Respondent Henry Brewington (hereinafter "Brewington").

Brewington's lawsuit alleged claims for tortious interference with two contracts under 42 U.S.C.A. § 1983; violation of 42 U.S.C.A. § 1983 and breach of contract by Melvina Davis. The City responded with a qualified general denial and affirmative defenses of res judicata, laches, estoppel and the S.C. Tort Claims Act. The City removed the lawsuit to U.S. District Court and moved for summary judgment. The federal claims under 42 U.S.C.A. § 1983 were dismissed by Judge Bryan Harwell and the state claims were remanded to the Horry County Court of Common Pleas.

The state court lawsuit was tried before Judge Steven John and a jury June 21-23, 2021. The City moved for nonsuit and a directed verdict on both claims for tortious interference during the course of the trial. The City's motions were denied. During the jury charge conference, Judge John's, sua sponte, refused to charge the *Restatement (Second) of Torts §767* and Judge Ralph King Anderson's complete charges on tortious interference with a contract as requested by the City. He stated his refusal was because of a general "philosophical" difference with Judge Anderson. [R 391] The part of the jury charge Judge John refused to charge the jury was that the jury should consider the "social interests in protecting the freedom of action of the defendant and the contractual interests of the other" in determining whether the City's conduct was improper. Instead he charged the jury that they should only consider "the social interests of the freedom of contractual interests." [R 451 - 452] The City objected to Judge John's refusal to charge the requested charge during the general charge conference. [R. 391-393] Also, before the jury began deliberations, the City specifically objected to the Judge John's refusal to charge the City's requested charge. [R 456].

The jury deliberated and returned a verdict which found that the City did not interfere with the underlying contract between Brewington and his landlord Melvina Divine Davis. But the jury found that the City did interfere with Brewington's subsequent contract to sell his business to Blazian Promotions & Company, LLC. The jury awarded a verdict of $500,000 actual damages to Brewington against the City. On the City's motion Judge John reduced the verdict to $300,000 pursuant to the S.C. Tort Claims Act. The City made post-trial motions for judgment notwithstanding the verdict

and new trial and new trial nisi remittitur. Those motions were denied by Judge John on June 23, 2021. The City duly filed its notice of appeal on July 15, 2021.

STATEMENT OF FACTS

On January 27, 2015, Henry Brewington d/b/a Levelz of Myrtle Beach (hereinafter "Brewington") and Blazian Promotions & Company, LLC (hereinafter "Blazian") entered a contract in which Brewington agreed to sell his nightclub business and transfer his lease with Melvina Davis to Blazian for a price of $150,000. The purchase was contingent upon Brewington providing Blazian with the necessary documentation to transfer the business. On February 20, 2015, Brewington's business was closed for one year by a public nuisance consent order. On March 16, 2015, Brewington and Blazian (through its owner Natalie Litsey) released each other from purchase agreement. The reasons given by the parties for rescinding the contract were because the business location was closed and because Ms. Davis refused to lease her property to Blazian. Brewington blamed the City's alleged tortious interference with his contracts for the rescission of the subsequent contract with Blazian. [R.138].

The intervening events between January 27, 2015, and March 16, 2015, are the framework for Brewington's tortious interference claim against the City of Myrtle Beach. Those events are set forth as follows.

On February 2, 2015, Brewington and his wife Virginia Brewington met with City employees who informed them their business had become a public nuisance. The following day, Myrtle Beach Police Department's Chief of Police, Warren Gall returned the phone call of Ms. Brewington. In the call Chief Gall explained to Ms.

Brewington the nuisance process and the role of the police and the role of the Solicitor in a civil public nuisance lawsuit. Ms. Brewington then called the property owner, Melvina Davis to ask if she would allow them to sell the business and transfer Levelz' lease to a third party. Ms. Davis indicated that if the third party had good references she didn't think she would have a problem with a transfer of the lease. Ms. Brewington then called the Myrtle Beach Police Department's regulatory officer, Lisa Robertson, and asked her if Brewington sold the business to a third party, would that third party have a fresh start or would they inherit Levelz' nuisance. Officer Robertson indicated that she thought the new third party should get a fresh start. [R. 199] Ms. Brewington then asked officer Robertson to run that question by the City attorney and let her know if he confirmed a third party would get a fresh start. [R. 214]Officer Robertson stated she would. Officer Robertson later called Ms. Brewington and said she needed more information about the third-party purchaser. [R 502 (page 24)]

After officer Robertson requested the additional information about the third-party purchaser, Ms. Brewington initiated a series of three way telephone calls between herself, the owner of the third-party purchaser, Natalie Litsey, and Officer Robertson. Those calls were recorded by Ms. Brewington. [R504 (page 310) – R507 (page 42)] During those calls officer Robertson asked Ms. Litsey about Blazian's plans to open a new business where Levelz was located and she explained to Ms. Litsey the steps she needed to take to get a City business license. Ms. Robertson also discussed the public nuisance claims against Levelz and her opinion of how such claims may influence the use of Levelz' business location. [R 502 (page 24)]

On February 10, 2015, pursuant to S.C. Code Ann. § 15-43-10 to § 15-43-130 James Battle, acting as the Solicitor's Assistant for Horry County, sent an official notice of public nuisance at Levelz to the property owner, Melvina Davis. [R 486] On February 13, 2015, Ms. Davis sent the Solicitor's public nuisance notice to Brewington and informed him he had to be out of the property within 10 days. [R190] Around February 14, 2015, Brewington was personally served with the solicitor's notice of public nuisance. [R. 221]

On February 15, 2015, a patron of Levelz was murdered immediately after he left Levelz. The Solicitor was informed that the murder was a gang assassination and that the rival gang planned to retaliate at Levelz the following weekend. [R 346] Upon inquiry from officer Robertson, Brewington revealed that he was going to host a promoted event on Saturday, February 20, 2015. The featured entertainers were Young Dolph, DJ Money and Kush Blowa. On February 17, 2015, the Solicitor filed suit under S.C. Code Ann. § 15-43-10 seeking temporary and permanent injunctive relief to abate the nuisance. A hearing was scheduled for February 20, 2015. Prior to the hearing, the attorney for Brewington, Shannon Prosser, and the Solicitor agreed to present a consent order that immediately closed Levelz and prevented Brewington from operating Levelz for one year. [R.365] The consent order was presented to Judge Benjamin Culbertson who signed and filed the consent order closing the property for one year. [R. 367].

Prior to the February 17, 2015 , Litsey withdrew Blazian's business license application for a business license at the Levelz location from the City of Myrtle Beach. [R. 139] However the purchase agreement was not rescinded by Litsey until March 16, 2021. She testified that she was waiting to see whether the Levelz location would be

allowed to reopen. When she heard from Ms. Davis the business location was not likely to reopen and she learned Ms. Davis would not lease her the Levelz property, she and Brewington rescinded their purchase agreement and Ms. Litsey began looking for a new business location. [R. 146, R 490] The purchase agreement was formally rescinded on March 16, 2015 at the law offices of Shannon Prosser. [R. 96; R 490].

Thereafter, Ms. Davis and assistant solicitor James Battle had a number of telephone conversations about Ms. Davis' options on reopening her property and renting her property to a new tenant. [R. 368] Mr. Battle testified he told Ms. Davis she needed to speak with Judge Culbertson about reopening the property. [R. 370] Thereafter, Ms. Davis retained the Bellamy Law Firm who assisted her in her efforts to reopen the Levelz location. [R. 370]

DISCUSSION OF ISSUES

I. The trial judge erred in denying the City's motions for directed verdict or judgment JNOV and finding there was evidence in the case to support a reasonable inference that the City had tortiously interfered with a contract between Henry Brewington d/b/a Levelz of Myrtle Beach and Blazian Promotions & Company, LLC.

Standard of Review

When reviewing the trial court's ruling on a motion for a directed verdict, an appellate court must apply the same standard as the trial court. Viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, "[t]he trial court must deny a motion for a directed verdict ... if the evidence yields more than one reasonable inference." *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 35, 737 S.E.2d 857, 860 (Ct. App. 2013).

Discussion of Elements

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726 (2007). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 604, 753 S.E.2d 840 (2012). An essential element to the cause of action for intentional interference with prospective contractual relations requires that the interference be for an improper purpose or by improper methods. *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481–82, 642 S.E.2d 726 (2007).

The City acknowledges that Brewington presented evidence of the existence of a contract and the City's knowledge of the contract. However, the City contends Brewington did not present evidence from which a reasonable jury could find that the City's motives or methods were improper. Further, the City's actions did not proximately cause injury to Brewington. The closing of the property for public nuisance by a consent order and the refusal of Davis to rent the property to Blazian proximately caused Brewington and Blazian to rescind the purchase agreement. The City contends its acts were justified and Brewington cannot prove absence of justification.

1. City's motives were proper.

The City contends its actions were motivated by a proper purpose. The City has the statutory right to abate public nuisances. S.C. Code Ann. § 5-7-30. The City's purposes were to abate a public nuisance and to discourage a second public nuisance from occurring at the same place. [R 370] The City's regulatory officer testified that her

purpose was to provide information to Brewington and Natalie Litsey about the effect of the nuisance abatement action on Brewington's business. [R.283-284]

The City contends that Robertson's motive to give information and her own opinions about the effect of a public nuisance abatement action on a prospective business were proper motives. If such motives for public regulatory officers were found to be improper, the City contends its ability to prevent public nuisances from occurring would be harmed.

Brewington's theory for his claim is that the public nuisance abatement action was a pretext to cover up the City's alleged motives to acquire the Levelz location for the City's own development purposes. Brewington's theory is untenable. Brewington did not introduce any evidence that the people responsible for the nuisance abatement action had any knowledge of the City's alleged motives. It is important to note that the jury found in favor of the City on Brewington's tortious interference claim in connection with the primary underlying

contract between Brewington and the property owner Davis. Further, Brewington did not introduce any evidence that any City employees who communicated with Ms. Litsey had any knowledge of the City's alleged motives.

Officer Robertson testified she did not have knowledge of any plans by the City to acquire the Levelz property. [R 282] She testified she was not instructed to find a way to obtain the Levelz property. [R 282]. The City should not be liable because its regulatory officer gave truthful information that was requested by member of the public. [R 145] See Restatement (Second) of Torts § 772 (1979); *Walnut St. Assocs., Inc. v.*

Brokerage Concepts, Inc., 610 Pa. 371, 20 A.3d 468 (2011); and *Fortson v. Brown*, 302 Ga. App. 89, 92, 690 S.E.2d 239 (2010).

Brewington claims the mere fact that the City purchased the Levelz location approximately two years after the nuisance abatement action had concluded was sufficient evidence to prove a pretext. [R.439] His claim appears to be based on a theory taken from Title VII litigation on retaliatory actions that a temporal proximity between the protected conduct and an employer's adverse action may be proof of a pretext. See *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 114–27 (4th Cir. 2021); *Hinton v. Designer Ensembles, Inc.,* 343 S.C. 236, 236–46, 540 S.E.2d 94, 94–99 (2000). The City contends that even if such a theory were applicable to nuisance abatements, temporal proximity alone, will not support an inference of retaliatory discrimination when there is no other compelling evidence. *45A Am. Jur. 2d Job Discrimination § 249;* Further, a time lapse of two years between the Brewington's nuisance abatement action and the City's purchase of the Levelz location does not create temporal proximity. *See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)* (per curiam) (citing with approval circuit cases rejecting temporal proximity of three and four months as evidence of causation).

Even if the City did have some economic interest in acquiring real estate in the area where Levelz was located, that motive was not the City's dominant purpose in the nuisance abatement action or the dominant purpose of the communications between Officer Robertson and Ms. Litsey. Officer Robertson was a police officer. Her primary concern was public safety not property acquisition. As stated above, officer Robertson was not aware of any economic interest the City may have had in the Levelz location. [R

282] If a defendant is acting for dual purposes, one of which was improper the improper purpose must predominate in order to create liability. *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179 (1990).

2. City's methods were proper.

The City's interference with Brewington's business and the public nuisance action were done using proper methods. The City compiled an investigative report of activities associated with Levelz and provided it to the Solicitor. The Solicitor made an independent decision to send official notice of a public nuisance to Brewington and the property owner. [R.341] Brewington's attorney and the assistant solicitor entered a settlement agreement to close Levelz for one year. That agreement was presented to a circuit court judge who exercised his discretion to make the settlement a court order. No appeals were taken from that court order.

During the public nuisance proceedings, regulatory officer Robertson advised Natalie Litsey of the consequences of the Solicitor's public nuisance action and gave her own opinions on how those proceedings may affect Blazian's operation of Brewington's business. In connection with Robertson's communications with Blazian, the owner of Blazian, Natalie Litsey, testified that she could not recall anything the City communicated to her that was not true. [R 145]

As noted by U.S. District Court Judge Bryan Harwell, it was the State of South Carolina acting through the solicitor that closed Levelz by circuit court order. See *Brewington v. Davis*, No. 4:17-CV-00387-RBH, 2019 WL 132588 (D.S.C. Jan. 8, 2019) The sole authority to close or reopen Levelz rested with Circuit Court as provided in S.C.

Code Ann. § 15-43-10, et. seq. The property on which Levelz was located was closed by consent order for one year. [R. 367]. See S.C. Code Ann. § 15-43-80. At the time the City purchased the property where Levelz was located, the property was free of any nuisance orders. By statute, the nuisance had been abated. *Id.* Any person, including Brewington or Blazian/Litsey, would have had an opportunity to either lease or purchase the property and to open a business at the Levelz location at the time the City purchased the Levelz location.

3. Issue of proximate cause.

In a cause of action for tortious interference, the interference must cause injury to the plaintiff. Thus, where an existing contract is involved, the interference must proximately cause the breach; where there is no breach or where the breach would have occurred anyway, then there is no cause of action. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907 (Ct. App. 1994); Also See F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 313 (3d ed.2004) pg. 401.

Natalie Litsey testified she thought she had a ten day window to rescind because of clause in her contract allowing her to rescind after the occurrence of a property casualty event. She considered a casualty as the City of Myrtle Beach interfering by stating that they were not going to reopen that building for any other business. Litsey's information about reopening the Levelz location was communicated to her by Melvina Davis who Litsey said told her that she (Davis) was having a hard time with the City to reopen her property. [R 138].

The City's employees who were involved with the nuisance action testified they never spoke with Ms. Davis. In her written deposition, Ms. Davis testified she had no idea on the difference between the Solicitor's employees and the employees of the City of Myrtle Beach. [R 352] She did not know from whom who she received her information, but she believed it was the assistant solicitor, James Battle. [R. 353] Assistant Solicitor Battle confirmed her testimony and testified that he spoke with Ms. Davis a number of times. Each time Battle spoke with Ms. Davis, he was representing the Solicitor. [R.368] He testified that Ms. Davis wanted to know about a new property owner or a new business going in the Levelz location, and he told her he didn't really have control over that. He told her she needed to speak with the judge. [R. 370] Ms. Davis then hired the Bellamy Law Firm to assist her in getting her property reopened. [R.370]

The City contends that the proximate cause of the termination of the Blazian/Brewington contract was the fact that the Levelz location was closed by a public nuisance consent court order and by Ms. Davis' refusal to rent the property Blazian. The following telephone exchange between Virginia Brewington and Melvina Davis supports that contention:

> Virginia Brewington: We would have been -- we would have had it sold, but because you were calling Natalie and reporting to Natalie, she backed out of the sale. We were ….
>
> Ms. Davis: You did not have it sold to anybody; you couldn't. The City wasn't gonna let you reopen it. Y'all had a nuisance down there. Nobody could go in there. Before the killing this weekend, nobody could go in there for at least a year. [R. 225]

Ms. Litsey testified that until she learned of Ms. Davis' refusal to rent the property to her, she was waiting to see what would happen with the Levelz location. [R. 146]

Ms. Litsey learned of Ms. Davis' refusal to rent her the property in March when she met with Brewington and their attorney Shannon Prosser to close the When Ms. Litsey learned Ms. Davis would not rent to her and she began considering another location for the first time. [R. 146]

Brewington claims Ms. Davis' statements that the City of Myrtle Beach would not let her reopen the Levelz location is evidence of the City's tortious interference with Brewington's contract with Blazian. Even if Ms. Davis had talked with someone from the City, Brewington's claim hinges on the theory that the City's was motivated to interfere with the contract between Blazian and Melvina Davis to prevent Blazian from buying Brewington's business. Brewington did not offer evidence to show how the City interfered or how the City would have benefitted by preventing Blazian from buying his business. In fact, there was no benefit to the City. The property was closed. A court order was required to open the property. Brewington had already moved Levelz out of Myrtle Beach by February 23, 2015. [R. 97]

In addition, Brewington was not a party to the alleged contract between Blazian and Ms. Davis. Even if the City had procured the breach of the contract between Blazian and Ms. Davis, which is denied, that interference would not make the City liable to Brewington. See *Threlkeld v. Christoph*, 280 S.C. 225, 312 S.E.2d 14 (Ct. App. 1984); *Egrets Pointe Townhouses Prop. Owners Ass'n, Inc. v. Fairfield Communities, Inc.*, 870 F. Supp. 110, 110–18 (D.S.C. 1994).

The breach of the contract between Davis and Blazian may have hindered Brewington's performance of his contract with Blazian, but there is no evidence that the City intentionally procured the breach of the Brewington's contracts by procuring the

breach of the Blazian/Davis contract. The Brewington/Davis contract had already been breached. [R. 355] Levelz was closed by consent order and Brewington stopped paying rent before the Blazian purchase agreement was rescinded in March. [R 355] Brewington had moved his personal belongings on February 23, 2015. [R. 97] Brewington did not have a lease on a business to transfer to Blazian when the purchase agreement was rescinded. [R. 225]

The South Carolina Court of Appeals appears to have rejected the approach that the City is liable for injury caused by interference with a third party contract that may have hindered a plaintiff's ability to perform his own contractual obligations . *Id.* Also See F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 313 (3d ed.2004) pg. 402. The City would not be liable to Brewington even if it had procured the breach of the Blazian/Davis contract. *Id.*

4. Issue of Justification.

The City contends the jury correctly found the City was justified in its actions that procured the breach of the contract between Brewington and Melvina Davis. As stated above, the City has a statutory right to abate public nuisances. S.C. Code Ann. § 5-7-30. The jury verdict confirmed that the jury did not find the City's exercise of its legal right to assist in closing the Levelz business created liability for tortious interference with a Brewington/Davis contract. *Brown v. Stewart*, 348 S.C. 33, 56, 557 S.E.2d 676 (Ct. App. 2001), *S. Contracting, Inc. v. H.C. Brown Const. Co.*, 317 S.C. 95, 100, 450 S.E.2d 602 (Ct. App. 1994). The City's participation in the closure of Brewington's business to abate a public nuisance falls well within the confines of legitimate authority. S.C. Code

Ann. § 5-7-30, Also see *Brewington v. Davis*, No. 4:17-CV-00387-RBH, 2019 WL 132588 (D.S.C. Jan. 8, 2019).

The City's justification in connection with its acts in connection with the Brewington and Melvina Davis contract was the City's right to abate nuisances. The same justification applies to officer Robertson's proactive communications with Ms. Litsey. Her justification for her communications was her intention to provide information that may abate the occurrence of a future nuisance at the same Levelz location. The assistant solicitor testified that the Solicitor's concern was "we didn't want to see Levelz Part 2 going in there right after we had gotten an injunction closing the first one, that we were concerned about the same activity popping up one week later." [R 370] The City's concern was the same as the Solicitor's concern. The City contends it was justified in expressing that concern to Ms. Litsey. See *Cooper v. Lab'y Corp. of Am. Holdings*, 150 F.3d 376, 382 (4th Cir. 1998); *A Fisherman's Best, Inc. v. Recreational Fishing All.*, 310 F.3d 183 (4th Cir. 2002).

II. Did the trial judge commit reversible error when he refused to give the City's complete request to charge that the jury should consider the social interests in protecting the freedom of action of the City in determining whether the City tortiously interfered with a contract?

Standard of Review

An appellate court will reverse the trial court's decision regarding jury instructions if the trial court committed an abuse of discretion. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015)

A. The trial court's abuse of discretion in charging the jury.

When a request to charge is timely and involves a correctly stated controlling legal principle, a refusal by the trial judge to charge it constitutes reversible error if the refusal is prejudicial to the party requesting the charge. *Rowe v. Home Sec. Life Ins. Co.*, 289 S.C. 236, 236–39, 345 S.E.2d 758 (Ct. App. 1986), *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983). See also *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993) (the law to be charged to the jury is determined by the evidence presented at trial; conversely, the trial judge commits reversible error if he fails to give a requested charge on an issue raised by the evidence).

The City formally requested the trial judge to give the following jury charge on the law:

> § 33-3 Tortious Interference with Contract - Factors in Determining Whether Interference is Improper
>
> In determining whether a defendant's conduct in intentionally interfering with a contract of another is improper, you should consider the following factors:
>
> (1) the nature of the defendant's conduct;
>
> (2) the defendant's motive;
>
> (3) the interests of the other with which the defendant's conduct interferes;
>
> (4) the interests sought to be advanced by the defendant;
>
> (5) the social interests in protecting the freedom of action of the defendant and the contractual interests of the other;
>
> (6) the proximity or remoteness of the defendant's conduct to the interference; and
>
> (7) the relations between the parties.
>
> *See 44B Am. Jur. 2d Interference § 3; Restatement (Second) of Torts § 767 (1979); § 33-3 Tortious Interference with Contract - Factors in Determining Whether Interference is Improper, § 33-3 Tortious Interference with Contract -*

Factors in Determining Whether Interference is Improper, § 33-3 Tortious Interference with Contract - Factors in Determining Whether Interference is Improper, Anderson, S.C. Requests to Charge - Civil, 33-3

The requested charge represents South Carolina law on the factors a jury should consider in determining whether interference is improper in a tortious interference with a contract claim. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 857 S.E.2d 902, 902–09 (Ct. App. 2021), *reh'g denied* (May 12, 2021), *reh'g denied* (Restatement (Second) of Torts § 767 (1979) (listing several factors that assist in evaluating whether interference is "improper").

The trial judge did give part of the City's requested charge on the determining factors the jury should consider, However, when he charged a portion of subparagraph (5) of the requested charge he omitted the factor of the social interests in protecting the freedom of action of the defendant/City. Instead he only charged the jury they should consider the "the social interests of the freedom of contractual interests." [R 451 - 452]

The trial judge's jury charge was improper on the factors the jury should consider when evaluating the defendant's conduct. The charge was objected to in the jury charge conference. It was also objected to after the jury charge was given but before the case was given to the jury for deliberations. [R 456]

It is not error to for a trial judge to refuse to charge a request that is a correct statement of the law where the charge actually given sufficiently covers the substance of the requested instruction. *State v. Austin*, 299 S.C. 456, 385 S.E.2d 830 (1989); *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986). However, in the present case, the City's requested charge was not covered or given in any other part of the trial judge's jury charges. The only jury charge given by the trial judge on the

determining factors for the improper interference with a contract was the incomplete jury charge on factors that should be considered by the jury. [R 451] See Restatement (Second) of Torts § 767 (1979).

The issue of the social interests in protecting the freedom of action of the City in giving information and advice to members of the public who seek to do business in the City was raised by the evidence. Regulatory officer Lisa Robertson testified during the trial that Ms. Litsey was asking her for information. She testified she gave Ms. Litsey the information she requested to the best of her ability and it was her duty to give that information as a public servant. [R 283] Ms. Litsey testified that everything Officer Robertson or anyone who worked for the City told her was true. [R 144 -145]

The City acknowledges that to warrant reversal, the trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990); *Moore v. Florence Sch. Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994); *Williams v. Addison*, 314 S.C. 35, 443 S.E.2d 582 (Ct. App. 1994).).

The City contends that the refusal of the trial judge to instruct the jury that they should consider the social interests in protecting the freedom of action of the City when determining whether the City's interference with a contract was both erroneous and prejudicial. The Restatement (Second) of Torts § 767 (1979) states in its Comment on Clause (e): g. *The social interests.* Appraisal of the private interests of the persons involved may lead to a stalemate unless the appraisal is enlightened by a consideration of the social utility of these interests. *Id*

In the present case the jury was instructed only to consider only the social utility of the freedom of contractual interests. The jury should have also been instructed to consider the social utility of the City's interest which included nuisance abatement. The jury could have found that the social utility allowing a police regulatory officer freedom to give information to the best of her ability about regulatory and public safety issues to a member of the public outweighed the social interests of parties to a private contract for financial gain. For example, if the jury had weighed the City's social interests in the safety of Blazian's future customers against Brewington's social interest in making a profit, the verdict may have been different. The trial judge's refusal to charge the jury charge as requested by the City constituted reversible error. *Rowe v. Home Sec. Life Ins. Co.*, 289 S.C. 236, 236–39, 345 S.E.2d 758 (Ct. App. 1986).

CONCLUSION

The City of Myrtle Beach requests the Appellate Court to examine the record on appeal and reverse the trial court's finding that there was evidence to support the jury's verdict on Respondent Henry Brewington's claim against the City of Myrtle Beach for tortious interference with his contract with Blazian Promotions & Company, LLC. In the alternative, the City requests the Appellate Court to order a new trial on the grounds the trial court failed to properly charge the jury the City's requested charge from the *Restatement 2nd on Factors in Determining Whether Interference Is Improper* and from *Anderson, S.C. Requests to Charge - Civil, 33-3.*

January 12, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
Appellate Case No.: 2021-000756

Henry Brewington, Individually and d/b/a Levelz Bar & Grill, Respondent,

v.

City of Myrtle Beach, Appellant,

Horry County Court Of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Trial Court Case No. : 2017-CP-26-685

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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January 12, 2022