

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

RECEIVED

Jan 12 2022

SC Court of Appeals

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 REPLY BRIEF

Michael W. Battle (SC#584)
Battle Law Firm, LLC
PO Box 530
Conway, SC 29528
843-248-4321
mbattle@battlelawsc.com
Attorneys for Appellant City
of Myrtle Beach

Table of Contents

Table of Authorities.....	1
Statement of Issues.....	1
Appellant’s Reply to Respondent’s Statement of Facts.....	2
Appellant’s Reply to Respondent’s Arguments.....	3
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 Natalie Litsey d/b/a Blazian Promotions & Company, LLC.....	3
A. Respondent incorrectly claims the only issue is whether there was evidence to show improper methods or motives on behalf of the city.....	3
B. City’s Reply to Brewington’s specific arguments on directed verdict and judgment N.O.V.....	4
1. Retaliation was not the City’s motive.....	4
2. Alleged threats were not communicated to Litsey.....	5
3. The City’s communications did not cause rescission of Litsey contract.....	5
4. False advice to Brewington was not relevant to the Litsey contract rescission.....	6
5. Judge John’s denial was not evidence.....	7
II. The trial judge committed 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?	8
A. Restatement (Second) of Torts §767 applies to the present case.....	8
B. Restatement (Second) of Torts §767 is recognized by SC Appellate Courts...9	
C. Trial Judge’s refusal to give requested charge is reversible error.....	9
D. Failure to charge the jury to consider the social interests in the City’s conduct was prejudicial to the City.....	9
Conclusion.....	10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Baker v. Weaver</i> , 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983)	9
<i>Cohens v. Atkins</i> , 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998)	9
<i>Disabato v. S.C. Ass'n of Sch. Adm'rs</i> , 404 S.C. 433, 746 S.E.2d 329 (2013)	8, 9
<i>Eldeco, Inc. v. Charleston Cty. Sch. Dist.</i> , 372 S.C. 470, 642 S.E.2d 726 (2007)	3, 9
<i>Rowe v. Home Sec. Life Ins. Co.</i> , 289 S.C. 236, 345 S.E.2d 758 (Ct. App. 1986)	9
<i>Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.</i> , 433 S.C. 278, 857 S.E.2d 902 (Ct. App. 2021)	9
Statutes	
<i>S.C. Code Ann. § 30-4-15</i>	8
Other Authorities	
<i>56 Am. Jur. 2d Municipal Corporations, Etc. § 381</i>	8
<i>Anderson, S.C. Requests to Charge - Civil, 33-3</i>	9
<i>Restatement (Second) of Torts §767</i>	8, 9, 10

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in denying Appellant's motions for directed verdict or judgment N.O.V. and by 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.

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?

APPELLANT’S REPLY TO RESPONDENT’S STATEMENT OF FACTS

In his statement of facts, Respondent Brewington claims the only criminal activity at his club prior to initiating the nuisance action was five charges for simple possession of marijuana, illegal fireworks and serving alcohol after hours. [Resp. Brf. 5] Brewington’s claim is incorrect for three important reasons. First, although the City did the investigation, the Solicitor, not the City, made the final decision to initiate the nuisance proceedings. [R 359] Second, the report of the City’s investigation file shows numerous criminal and nuisance activities beginning in October of 2014, which Brewington did not mention. [R 528] Third, the jury decided City’s involvement with the solicitor’s closure of Brewington’s club was not tortious interference.[R.758].

Respondent also claims the contract between Brewington and Litsey d/b/a Blazian Promotions & Company, LLC (hereinafter “Litsey contract”) was terminated solely because of what the City had told Litsey. [Resp. Brf. 5] Respondent’s claim is not a reasonable inference to be drawn from the evidence. The only reasonable inference to be drawn from the evidence is that Litsey and Brewington both terminated the Litsey contract because they discovered Brewington’s club premises would be closed as a public nuisance notwithstanding her offer to put her own club in the building and Melvina Davis was not going to lease Litsey the business premises. [R. 96 & 141 - 145]

In a nutshell, Brewington realized his nightclub business had become a public nuisance in the eyes of the City. [R 71] He attempted to sell his business to Natalie Litsey. [R 71] After the murder of a patron leaving his business premises, Brewington allowed his attorney to consent to an order which closed his nightclub and the business premises for one year. [R 97] Brewington’s consent to the court order prepared by the

solicitor infuriated his property owner, Melvina Davis. [R 224] After Ms Davis discussed the matter with the solicitor's assistant, James Battle, about reopening the premises, she decided not to lease the business premises to Litsey. [R 368] When Brewington and Litsey discovered the effect of the court order closing Brewington's business and they discovered Ms. Davis was not going to lease the property to Litsey, they agreed to rescind the Litsey contract and return Litsey's downpayment. [R 141-145 & R 95-96] [R 490-494]

APPELLANT'S REPLY TO RESPONDENT'S ARGUMENTS

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 Natalie Litsey d/b/a Blazian Promotions & Company, LLC.

A. Respondent incorrectly claims the only issue is whether there was evidence to show improper methods or motives on behalf of the City.

To establish a cause of action for tortious interference with contractual relations, a plaintiff has the burden of showing: 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). In his brief, Brewington did not discuss his burden of proving proximate cause of resulting damages or his burden of proving the absence of justification in connection with his claim of tortuous interference with the Litsey contract. [Resp. Brf. 7] The City contends the record does not contain evidence from which a jury could reasonably infer that there was an absence of justification by the City or evidence from which a jury could reasonably infer that the City's communications to Litsey proximately caused Litsey and Brewington to rescind the Litsey contract.

The only reasonable inference to be drawn from the evidence presented was that the building's closure by the court and the fact that Ms. Davis would not rent the building to Litsey was the cause for Litsey and Brewington decision to rescind the Litsey contract in March of 2015. [R 141-145 & R 95-96] Both Brewington and Litsey waited more than a month after Litsey finished her communications with the City about Brewington's business before the Litsey contract was rescinded. [R 141-145 & R 95-96] When Ms. Litsey was asked why she and Brewington waited over a month to rescind the Litsey contract she testified: "I was still waiting for Ms. Mel Davis to see what she was able to do with the City." [R 141] Litsey was never informed by Ms. Davis that the reopening of the premises Litsey wished to lease was controlled by the court and Ms. Davis, not the City. [R 141]

Brewington testified he rescinded the contract because of the City's involvement with the public nuisance action he could not give Litsey what she was paying him for. [R 96] However, the jury found the City's involvement with the public nuisance action did not constitute tortious interference with the Brewington/Davis contract. [R 758] Therefore, it follows that the City's involvement with the public nuisance action did not constitute tortious interference with the Litsey contract.

B. City's Reply to Brewington's specific arguments on directed verdict and judgement N.O.V.

1. Retaliation was not the City's motive.

Brewington claims that retaliation against him and his wife for making complaints against the police was the City's motive for interfering with the Litsey contract.

Brewington's claim is not supported by the evidence. Brewington claims the retaliation

originated from Brewington's complaint against the police on January 26, 2015. [Resp. Brf. 7; R 176] However, the public nuisance problems with Brewington's club were first noted in an investigation report in October of 2014. [R 528] The City first began considering Brewington's club a potential public nuisance on December 14, 2014. [R 531] The solicitor filed the civil lawsuit against Brewington for public nuisance on February 17, 2015, after a patron of Brewington's business was murdered while leaving the premises. [R 364-365] Brewington's police retaliation claim of is not reasonable in light of the timeline of events that occurred, the Solicitor's ultimate decision to file a public nuisance lawsuit, and Brewington's attorney's consent to close the club. [R 365]

In addition, the record does not contain any evidence that the City sought to interfere with the Litsey contract in retaliation against Brewington. Brewington had already closed his business and vacated the premises when the Litsey contract was rescinded. [R 97]

2. *Alleged threats were not communicated to Litsey.*

The City Attorney's alleged threats occurred during a private meeting with Brewington and his wife. [R 181] The record does not contain any evidence that those threats were communicated to Litsey. Further, the alleged threat was limited to closing Brewington's business for being a public nuisance. [R181] The City Attorney was not aware of the Litsey contract. Brewington testified that he did not reveal the Litsey contract to the City Attorney during the meeting. [R 90]

3. *The City's communications with Litsey did not cause the rescission of Litsey contract.*

Litsey testified she did not go forward with the Litsey contract because someone from the City police, she did not who, told her Brewington's business would not be open that long and she should look elsewhere to invest her money or think about it a little more. [R 127] Those comments did not cause a termination of the Litsey contract. The most that can be said about the effect of those comments is that they caused Litsey to wait to see what would happen to Brewington's business and her ability to lease the business premises. [R 95, 146] Litsey did not actually terminate the contract when she allegedly heard those communications. [R 95-96, 146] Both Litsey and Brewington testified they did not rescind the Litsey contract until after Litsey and Brewington discovered the effect of the court order closing Brweington's business and they discovered Ms. Davis would not rent the premises to Litsey. [R141, 146 & R 490]. The rescission occurred over a month after the alleged communications occurred. Further, Litsey admitted the communications to her were true. [R144]. The evidence in the record supports the fact that those alleged communications were true. In addition, Officer Robertson never had any conversations with Ms. Davis. [R 321] . #

4. *False advice to Brewington was not relevant to the Litsey contract rescission.*

The alleged false advice on what events would be used to determine the existence of a public nuisance at Brewington's club that was given to Ms. Brewington was not connected to the Litsey contract. [R 285] Virginia Brewington testified Brewington planned to fight the City on those charges. [R 184]. The record does not contain any evidence that Natalie Litsey was affected by the alleged false advice. In addition, the jury found in favor of the City on Brewington's claim of the City was improperly involved in the closing of Brewington's business. [R 758] Brewington is attempting to

use unrelated evidence connected with his own business problems to support his claim against the City for alleged interference with the Litsey contract.

5. *Judge John's denial was not evidence.*

Judge John's mention of Litsey's testimony and general reference to other evidence was not evidence the jury relied upon in making their decision. In addition, Judge John only mentioned that testimony in support of his own belief that there was evidence of interference. With all due respect, Judge John was mistaken about the prerequisites for establishing a claim for tortious interference with a contract. He appears to have believed that all Brewington had to show was some form of interference without consideration of the other tortious interference prerequisites. When denying the motion for directed verdict Judge John stated:

“The motion is to dismiss the intentional interference of the contract, tortious interference with the contract regarding the contract between Henry Brewington and Ms. Litsey. In her deposition testimony, which was introduced into evidence, Ms. Litsey says that Myrtle Beach, through Officer Robertson, says that Levelz will not be open much longer; go somewhere else, that the City is going to close it down; don't invest in Levelz. They declare that they believe them to be a nuisance; it wouldn't look good; they're going to have a hard time with the City of Myrtle Beach; look somewhere else; they're not gonna be open. And then, that's when she said she used her ten-day window to get out. That's tortious interfere with the contract; that simple.” [236-237]

Judge John did not consider whether the evidence supported Brewington's burden of proof on absence of justification or proximate cause of Brewington's and Litsey's decision to rescind the Litsey contract. Judge John did not claim Robertson's statements were false. As Litsey testified, Robertson's statements were true. [R.144] Judge John did not consider Litsey's testimony or Brewington's testimony on why they actually rescinded the Litsey contract. [R141 & R 490] Judge John did not consider the logical effect of jury's finding that the City's involvement with the closing of Brewington's

business was not tortious interference when he denied the City's motion for a Judgment N.O.V. on the on the Litsey contract interference claim.

II. The trial judge committed 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?

A. Restatement (Second) of Torts §767 applies in the present case.

Brewington claims that the City's requested charge that the jury consider the social interests in protecting the freedom of action of the City does not apply in the present case. His claim is based on a misinterpretation of a Restatement reporter's comment on that section. The reporter stated that 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 those interests. See *Restatement (Second) of Torts § 767 (1979)*. Brewington's claim is based on a theory that the City cannot have a private interest because it is a government entity. Brewington is incorrect. Society does have an interest in government's communications with its citizens. See *S.C. Code Ann. § 30-4-15* (The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy); Also See *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 450, 746 S.E.2d 329, 338 (2013) Society does have an interest police protection of public safety. See *56 Am. Jur. 2d Municipal Corporations, Etc. § 381*(Abatement of nuisances, as a means to promote the public health, safety, and welfare, is a valid goal of the municipal police power). And governments do have

interests that should be considered in tortious interference claims. See *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007)

B. Restatement (Second) of Torts § 767 is recognized by S.C. Appellate Courts

Brewington claims that the *Restatement (Second) of Torts § 767* is not the law in South Carolina. Brewington is mistaken. The Court of Appeals in *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 288, 857 S.E.2d 902, 907 (Ct. App. 2021), reh'g denied (May 12, 2021) recognized the *Restatement (Second) of Torts § 767* (1979) as state law when the court stated § 767 listed the factors that would assist in the evaluation of whether a party's interference is "improper". *Id.*, Also see *Anderson, S.C. Requests to Charge - Civil*, 33-3.

C. Trial Judge's refusal to give requested charge is reversible error.

The City, without objection from Brewington's attorneys, requested the trial judge to charge the factors listed in *Restatement (Second) of Torts § 767*. When a request to charge is made timely and involves a correctly stated controlling legal principle, a refusal by the trial judge to charge the requested charge 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), *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983). The trial judge's refusal to charge the jury to consider society's interest in the City's acts constituted reversible error. *Id.*

D. Failure charge the jury to consider the social interests in the City's conduct was prejudicial to the City.

The issue of the society's interests in government's communications and public safety was raised by the evidence. [R 327 – 328] The prejudice occurred because the jury was only charged to consider society's interests in Brewington's freedom of contract. The jury was not charged to consider society's interest in allowing City employees to truthfully communicate with the City's community or society's interests in the City's protection of public safety through public nuisance abatement. Like society's interest in freedom of contract or society's interest in competition, society has an interest in government's exercise of its core functions.

The jury should have been charged as requested to consider the correlative of the contractual interests of Brewington with the interests that the City intended to promote. Both are important in determining whether the interference is improper. And both are to be appraised in the light of the social interests that would be advanced by their protection. See *Restatement (Second) of Torts* § 767 (1979) (*Comments*).

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 the Litsey contract. 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 jury charge.

Attorney for Appellant City of Myrtle Beach

S/Michael W. Battle S.C. Bar #584
mbattle@battlelawsc.com

January 5, 2022

RECEIVED

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

CERTIFICATE OF COUNSEL

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

*S/*Michael W. Battle

Michael W. Battle (SC#584)

Battle Law Firm, LLC

PO Box 530

Conway, SC 29528

843-248-4321

mbattle@battlelawsc.com

Attorneys for Appellant City
of Myrtle Beach

January 12, 2022