THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Ralph P. Stroman, Special Referee
Case No. 2009-CP-26-1909

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM

Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and

Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

Appellate Case No. 2012-212984.

FINAL BRIEF OF APPELLANTS

James P. Stevens, Jr.
S.C. Bar No. 0534
Stevens Law Firm, P.C.
Post Office Drawer 127
Loris, SC 29569
(843) 756-7652

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorneys for Appellants.

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QUESTION PRESENTED

Did the circuit court err in holding that the only remedies available to the seller for breach by the buyers were forfeiture of the earnest money and specific performance?

STATEMENT OF THE CASE

This action was commenced by Randy A. Beverly, LLC, and Donald Godwin, LLC, respondents herein, against Bucksville Farms, Inc., an appellant herein, by service of a summons and complaint dated February 24, 2009. The plaintiffs as purchasers sought a declaratory judgment to the effect that the defendant as seller was in material breach of a contract for the purchase and sale of real estate, so that the contract was terminated. The defendant denied that it was in breach, counterclaimed for damages alleging that the purchasers were in breach, and filed a third-party complaint against Randy A. Beverly and Donald Godwin individually. When impleaded, Randy A. Beverly and Donald Godwin filed a fourth-party complaint against Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc.

The case was referred to the Honorable Ralph P. Stroman, as Special Referee. The case was tried nonjury on January 12–13, 2012.

By order dated May 14, 2012 and entered on May 15, 2012, the court held that the agreement precluded an action for actual damages by the seller for breach of contract by the purchasers. The court held that the agreement was terminated and concluded without liability of either side to the other.

Appellants' timely motion for reconsideration was denied by order dated August 8, 2012 and entered on August 15, 2012.

Appellants received written notice of the entry of the order of August 8, 2012 on August 20, 2012, and served notice of appeal on September 18, 2012.

STATEMENT OF FACTS

Bucksville Farms, Inc., a company of Benjamin J. Creel, an appellant herein, owned a tract of about 320 acres on U.S. Highway 701, south of Conway. When Mr. Creel offered the tract for sale to his uncle-by-marriage, Randy Beverly, a successful residential developer, Mr. Beverly decided that the parcel was too large for his interest. [R. 94.] Mr. Creel then listed the tract with a realtor. The realtor contacted Mr. Beverly again, this time proposing that the tract be purchased in stages over a period of several years. [R. 94–95.] Mr. Beverly discussed this possibility with Donald Godwin, with whom he had developed a dozen subdivisions in the lowcountry over the space of many years. [R. 270–71. *See* R. 83–85.] They were interested in this approach. Negotiations ensued.

On October 2, 2005, Mr. Creel (through his corporation) agreed to sell, and Mr. Beverly and Mr. Godwin (through their LLCs) agreed to buy, the Creel tract[1] in four separate transactions ("takedowns") spaced a year apart.[2] [Def. Exh. 33, ¶ 22, R. 671.]

Wetlands are often an issue in lowcountry real estate development, and that was the case here. The extent of wetlands on the Creel property would greatly affect the purchase price. The price per acre of uplands was set at $17,000 in the first takedown, $18,000 in the second, $19,000 in the third, and $20,000 in the final takedown. The price per acre of wetlands would be $1,000 regardless of when purchased. The agreement called for Beverly and Godwin to purchase at least fifty *upland* acres in the first takedown; then at least a second fifty a year later; then at least a third fifty a year later; and finally the balance of the tract a year after that. Thus, the fourth and final takedown would take place three years after the first one, without regard to its uplands content.

The first parcel was to be bought within fifteen days of the end of a 120-day

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[1] Creel exempted from the sale his 40-acre homeplace, so the acreage being sold was roughly 280. The homeplace was to be identified on the boundary survey. [Agreement, Def. Exh. 33, ¶ 1, R. 663.] There has been no controversy as to the location of this retained parcel. [R. 105; 258; 338; Def. Exh. 31,R. Vol. II, Pocket Part.]

[2] "Beverly and Godwin" hereinafter refers to Mr. Beverly and Mr. Godwin and to their LLCs and related companies. "Creel" refers to Mr. Creel and to Bucksville Farms, Inc.

"feasibility period," at the conclusion of which the buyers could rescind the transaction. [Def. Exh. 33, ¶ 7, R. 664.] If they elected to proceed, they were bound to purchase the entire tract in stages, as stated. The feasibility period would begin when Creel delivered "a Boundary Survey and Wetlands Survey by a professional surveyor licensed in South Carolina * * * ."[3] [Agreement, Exh. 33, ¶ 7, R. 664.] This "feasibility period" provision of the agreement was left over from a draft of a sales contract originally written for another potential purchaser, Hall Development. [R. 95; 323–24.] Having already decided to buy the tract, Beverly and Godwin ignored the "feasibility period" protocol, and preparation for the first takedown proceeded apace.

Experienced lowcountry developers prefer to control the wetlands delineation process themselves, regardless of where the buy/sell agreement may place that duty. [R. 84; 128; 277; 342.] Beverly and Godwin had done that with all twelve subdivisions they had developed together [R. 342], and they did so here. [R. 84; 269.] They sought a bid from an environmental company, S&ME, with which they had done business before [R. 200], to delineate the wetlands on the entire 280-acre tract. [R. 479; 396.] They passed along to Creel the bid [Def. Exh. 1, R. 615] obtained from S&ME for this work — $3,750 — since technically they were doing Creel's work for him, and Creel was obligated

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3 The draftsman must have known little of the wetlands delineation process. A "wetlands survey" is the *last* step — not the *first* step — in a process consuming a year or more. [R. 385; 420.] Although anyone can try his hand at wetlands delineation, there being no official qualification for that task [R. 187; 193], the usual process is for the landowner to employ a specialist, such as Charles Oates at S&ME. The specialist begins with "remote sensing," an office job in which aerial photographs, soil surveys, tax maps and the like are overlaid to allow an approximate location of wetlands. [R. 190–92; 204; 300.] Next is the field work, where the wetlands boundaries are located and demarcated on the ground with flags. [R. 389.] The specialist then submits to the Corps of Engineers a "Request for Wetlands Determination" accompanied by a sketch (not a plat) of the wetlands. [R. 389–91.] With or without field work, the Corps determines the wetlands boundaries. If the proposed boundaries are approved, a professional land surveyor is employed by the landowner to survey the wetlands boundaries, flag to flag. [R. 385; 389–91. *See* Def. Exh. 28, R. Vol. II, Pocket Part.] Finally, the Corps approves the plat. [Def. Exh. 14, R. 640.] Thus, the "wetlands survey" by a land surveyor is the final step [R. 199] and may not happen until eighteen months after the process begins, as was the case here. The first takedown, in June 2006, and the second takedown, in June 2007, both took place before the "wetlands survey" was done in October 2007. [Def. Exh. 28, R. Vol. II, Pocket Part.]

to pay half the cost. [Agreement, Def. Exh. 33, ¶ 10(j), R. 665.] Creel responded favorably to the bid and thereafter took no active part in wetlands delineation. [R. 320.] Beverly and Godwin (acting through Southern Asphalt, a Godwin company [*see* R. 126]) accepted S&ME's proposal in January 2006 [R. 396] but instructed S&ME not to do its field work until the spring, when the property would be drier. [R. 102.]

Subject to minor conditions, the sales agreement allowed the purchasers to select the location of each successive parcel to be taken, with one exception. The parties agreed that the southwesternmost corner on U.S. 701 was not to be taken until the fourth and final takedown, which would include the purchase of everything remaining after the first three takedowns.[4] [Agreement, Def. Exh. 33, ¶ 22 (last sentence), R. 672; R. 97–99.] Unlike the rest of the tract, the southwestern corner was known to contain a substantial percentage of wetlands. Mr. Oates estimated that it contained about 50 wetlands acres. [*See* R. 426; 222; 374.] The reason for deferring its purchase until the end was to allow time for certain forestry management work — such as clearing existing ditches — in an effort to dry out the parcel to the extent possible before it changed hands. This would benefit both sides to the extent that the effort succeeded. Creel, the seller, would benefit because the purchase price was substantial for upland acres but nominal for wetlands acres. The purchase price would increase as wetlands became uplands. Despite an increase in purchase price, the purchasers also would benefit. An effort to dry the southwestern corner to the extent possible was Mr. Beverly's idea. [R. 481; 521.] Wetlands have little development value [R. 481], and forestry management work which tends to dry out the property would be

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[4] A map of the southwestern corner should have been attached to the contract of sale but was not, but there was no controversy as to its location. [R. 97–99.] Although it is not identified as such on the plat of the entire tract [Def. Exh. 28, R. Vol. II, Pocket Part], the southwestern corner consists of two parcels: North of Santee Cooper's transmission line is an unnamed parcel. This parcel was dubbed at trial "the asterisk tract" because counsel marked it at trial with an asterisk! [R. 179; 215; Def. Exh. 28, R. Vol. II, Pocket Part.] South of the transmission line is the second component of the southwestern corner, Parcel B. As noted, Beverly and Godwin could not take the southwestern corner until the fourth and final takedown. [Agreement, Def. Exh. 33, ¶ 22 (last sentence), R. 672.]

prohibited once the parcel changed hands for development. [R. 266; 275; 358; 481–83.]

Having hired S&ME to delineate the wetlands on the entire 280-acre tract, on March 8, 2006 Godwin's agent [R. 126; 259] instructed Charles Oates of S&ME to eliminate from delineation the southwestern corner.[5] [R. 212; 259.] Some drying would be attempted there before the fourth takedown, which would include that corner. [R. 102.] Beverly hired a contractor to do the work, and charged Creel for it at the second takedown. [Def. Exh. 9, line 517, R. 635.] Creel was not notified that the southwestern corner was removed from the delineation contract with S&ME, being left to think that S&ME had been hired to delineate everything. [R. 259; Def. Exh. 2, R. 626–28.]

Deferring delineation of the southwestern corner left about 222 acres to be delineated in preparation for the first three takedowns. [R. 132.] Oates did his field work on these 222 acres in a single day on April 10, 2006. [R. 212.] He submitted his wetlands determination request to the Corps on April 19th. [R. 212.] It was accompanied by supporting data sheets and by Mr. Oates' sketch delineating the wetlands.[6] [R. 90; 204; Oates dep. Exh. 10, figure 3, R. 704.] Oates had found only two acres of wetlands among these 222 acres. [R. 250.]

The purchasers wished to begin their multistage purchase in the part of the tract on Highway 701 nearest Conway. [Def. Exh. 3, R. 628.] They employed Carolina Land Surveyors to survey the parcel they wanted, containing a little more than fifty acres, and supplied a copy of the resulting first takedown plat to Creel before the closing on June 8,

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5 *See* Exhibits 1, 2, and 3 to Mr. Oates' deposition, R. 693–95, showing how the southwestern corner was excluded from the initial work order to delineate the entire tract.

6 As the Court noted in *Spectre, LLC v. South Carolina Dep't of Health and Environmental Control,* 386 S.C. 357, 367–68, 688 S.E.2d 844, 849 (2010):

> The term "delineate" is defined in part as ". . . represent by sketch . . . ." *Webster's Third Int'l Dictionary* 597 (2002).

2006. [Def. Exh. 29, R. Vol. II, Pocket Part.] Beverly and Godwin learned from their wetlands delineator, Mr. Oates, that he had found no wetlands on this first takedown parcel. However, since only the Army Corps of Engineers can make a definitive wetlands determination [R. 100], the parties agreed to figure the purchase price on the assumption that the parcel was entirely uplands, as Oates thought, with an adjustment to be made at the second takedown, a year later, if the Corps were to find any wetlands there. (The Corps of Engineers lagged eighteen months behind in issuing a formal wetlands determination letter in response to the submittal of Mr. Oates in April 2006.) Before the second takedown closing a year after the first, the Corps informally told Mr. Oates that he had missed 0.32 acre of wetlands on the first takedown tract. An adjustment in the second takedown purchase price was made accordingly, even though the Corps had yet to issue its formal wetlands determination letter.

In June 2007, the second takedown proceeded in much the same manner as the first. Beverly and Godwin selected a further fifty acres on 701 adjacent to the first parcel. A copy of the survey done for them by Carolina was delivered to Creel before closing. Oates had found no wetlands on this parcel when he delineated in April 2006 and neither did the Corps (although a formal wetlands determination letter was still five months away.)[7]

The sales price of the Creel property was favorable to Beverly and Godwin. After the second takedown, they sold to Connecticut investors a 50% interest in the first two takedown parcels at a per-acre price more than fifty percent greater than they had paid to Creel for these one hundred acres. [R. 121; Sciaretta dep. Exh. 4, R. 745.] Beverly, Godwin, and the Connecticut investors formed a new developer LLC, to which these two parcels were deeded. [Sciaretta dep. Exh. 6, R. 755.] The Connecticut investors took an

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[7] Although the purchasers had no right to choose land in the southwestern corner until the fourth takedown, Creel permitted Beverly and Godwin to include a 14-acre field on the asterisk tract as part of the second takedown. The parties were sure that no wetlands were present in this field. The 14-acre field is seen at the upper left of the asterisk tract on Defendant's Exhibit 31, R. Vol. II, Pocket Part. The field is bounded by 701 on the north and Shelley Farm Road on the east.

option from Beverly and Godwin to buy into the third and fourth takedowns on the same basis. [Sciaretta dep. Exh. 2, R. 661.] If the Connecticut investors were to exercise these two options, Beverly and Godwin would be gaining a half-interest in the property to be purchased in the third and fourth takedowns while paying only a third of the purchase price.

Beverly and Godwin commissioned engineering for residential development of the land taken in the first two takedowns, although no work on the ground was begun. [R. 91.]

The future course of the economy was part of the risk assumed by Beverly and Godwin in agreeing to purchase in stages so large a tract at a favorable price. The real estate market began its reversal soon after the second takedown in June 2007. [R. 519.] The Connecticut investors announced that they would not exercise their option to buy into the third takedown, scheduled for June 2008. [Def. Exh. 26, R. 660.] Even so, they were willing to participate in the third takedown as equal partners with Beverly and Godwin (but not at the inflated price they had paid for a share in the first and second takedowns). [Def. Exh. 27, R. 661.]

Even with outside support for half the purchase price of the third takedown, Beverly and Godwin decided to stop. As justification, they announced that Creel was in breach of the contract for two reasons. First, he had failed to deliver a "Boundary Survey and Wetlands Survey" under paragraph 7 of the agreement. Second, he had failed to obtain an official wetlands determination from the Corps of Engineers for the southwestern corner. [Def. Exh. 20, R. 650, and 22A, R. 654 (hand-written note of Mr. Godwin at bottom).]

A survey of the entire tract including the platted wetlands locations — less the southwestern corner — had been delivered to Beverly and Godwin by Carolina Land Surveyors in October 2007. [Def. Exh. 28, R. Vol. II, Pocket Part.] Creel was obliged to pay half the cost. [R. 321; Agreement, Def. Exh. 33, ¶ 10(c), R. 665.] This would have been included in his closing costs at the third takedown (if there had been one).

As noted, in April 2006 Mr. Oates had delineated the wetlands on all but the southwestern corner of the tract, Beverly and Godwin having deleted the southwestern

corner from their contract with S&ME without Creel's knowledge.[8] Beverly and Godwin now claimed that Creel's failure to obtain a wetlands delineation of the southwestern corner was a breach, as was his failure to obtain an official wetlands determination from the Corps of Engineers for the southwestern corner. [R. 116; Def. Exh 22A, R. 664.] "[Beverly and Godwin] insist that they will not proceed with the closing unless [Creel] provides an official certified Army Corps of Engineers wetlands delineation." [Def. Exh. 23, R. 655; R. 116.] Having renounced the agreement, Beverly and Godwin failed to perform further.[9]

In devising this pretextual claim of breach, Beverly and Godwin overlooked two elements of their purchase agreement: First, they had no right to purchase the southwestern corner until the *fourth* takedown — still a year away — not the third as they thought. Second, the contract provided that Creel had no obligation to obtain any wetlands determination from the Corps.

For the next takedown — the third — Beverly and Godwin had no right to take anything in the southwestern corner. They mistakenly thought otherwise.[10] [*See* R. 495;

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Creel had been led to believe that Mr. Oates had delineated the entire tract, as he was originally employed to do. In April 2006, two months before the first closing, Beverly advised Creel that he and Godwin had "concluded our preliminary wetland evaluation * * *." [Def. Exh. 3, letter of 4/18/06, R. 628.] Creel would naturally infer that the wetland evaluation having been concluded was Oates' evaluation of the *entire* tract, which S&ME had contracted with Godwin's agent three months earlier to perform. [Def. Exh. 2, R. 626–27, S&ME's proposal to delineate wetlands on all 280 acres.] Then, in March 2007, Beverly and Godwin told Creel that "our wetlands evaluation" had been submitted to and audited by the Corps of Engineers. [Def. Exh. 8, R. 634.] Again Creel was not told that the southwestern corner had been removed from Oates' delineation contract and hence had not been a part of the determination request made to the Corps.

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The next step would have been for Beverly and Godwin to provide Creel with a survey of the property chosen for the third takedown. *See* Agreement, Def. Exh. 33, ¶¶ 9 & 16(b)(iii), R. 665 & 670. Such a survey would have identified the land in Parcel C or Parcel D (or both) to be purchased in the third takedown. (Parcels C and D were the only remaining parcels eligible for purchase in the third takedown. The Corps of Engineers had issued its wetlands determination for these parcels eight months earlier, in November 2007. [Def. Exh. 14, R. 640.])

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On Defendant's Exhibit 11, R. 638, Mr. Beverly hand-wrote the phrase "Purposed [*sic*] 3rd phase" on the "asterisk tract," a part of the southwestern corner, further evidencing his erroneous belief that this property could be included in the third takedown. *See* (continued...)

108; 273; Def. Exh. 11, R. 638.] This corner was reserved to comprise part of the *fourth* and final takedown, at which time the buyers were to purchase the balance of the overall tract. In the year remaining until the final takedown, Creel could easily have obtained a delineation of the southwestern corner if Beverly and Godwin eschewed that self-appointed role themselves. Flagging the wetlands on the southwestern corner might take a day's field work by Mr. Oates and would likely cost less than the $3,750 fee which his company had charged two years earlier for delineating the other 222 acres of Creel's property.[11]

Unknown to Creel, the buyers had already asked Mr. Oates to estimate the extent of wetlands on the southwestern corner and he had done so. Mr. Oates estimated that the corner included about 50 acres of wetlands. Oates gave Beverly and Godwin a sketch of his approximation. Oates compiled this sketch using "remote sensing" with no field work.[12] [R. 204; 422.] If anyone were to seek an official wetlands determination of the southwestern corner by the Corps of Engineers, the better practice would be first to flag the wetlands boundaries in the field, but this was not required by the Corps. The only submission required to generate an official determination is a one-page "REQUEST FOR WETLAND DETERMINATION" together with two maps. [*See* Oates dep. Exh. 10, page 1, R. 701 ("Information Required to Accompany Request").] The better practice of course is

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[10](...continued)
Defendant's Exhibit 2, R. 626, Mr. Beverly's fax note to Mr. Creel, where he misspelled the same word in the same way. The handwriting is obviously the same.

[11]
S&ME had contracted to delineate the entire 280-acre tract for $3,750. When Beverly and Godwin withdrew the southwestern corner from the work, S&ME made no reduction in the contract price for delineating the remaining 222 acres.

[12]
> **Remote sensing.** Remote sensing is one of the most useful information sources available for wetland identification and delineation. Recent aerial photography, particularly color infrared, provides a detailed view of an area; thus, recent land use and other features (e.g. general type and areal extent of plant communities and degree of inundation of the area when the photography was taken) can be determined.

Paragraph 54(g), U. S. Army Corps of Engineers WETLANDS DELINEATION MANUAL (1987), available on the Worldwide Web. *See* R. 383, line 13. "Delineation" is not a term defined in the Manual.

to submit a sketch of the wetlands as found in the field, which Oates did in his submittal in regard to the 222 acres. [*See* sketch, Oates dep. Exh. 5, R. 697.] This is not required, however. [R. 191.]

When Beverly and Godwin claimed that Creel was in breach for having failed to obtain a delineation of the southwestern corner, Creel met with Oates and learned that he had already estimated the wetlands on the corner. Attempting to mollify Beverly and Godwin, Creel got a copy of Oates' sketch and gave it to Beverly and Godwin, who rejected it.

The second error of Beverly and Godwin was their belief that Creel was required to obtain a wetlands determination from the Corps of Engineers for the southwestern corner. [R. 274; 282; Def. Exh. 22A (hand-written note of Godwin at the bottom), R. 654; Def. Exh. 23, R. 655; R. 489.] Not only does the agreement place no duty upon Creel to do this, it provides the opposite: "Seller is not required to have the wetlands permitted with the U. S. Corps. of Engineers." [Agreement, Def. Exh. 33, ¶ 7, R. 664.] If the purchasers wish to have an official wetlands determination from the Corps, it is up to them to get it. That is what Beverly and Godwin did, of course, with respect to all but the southwestern corner before renouncing the contract. The property eligible for purchase in the third takedown consisted of acreage of the purchasers' choice in Parcel C and Parcel D. [*See* Def. Exh. 28, R. Vol. II, Pocket Part.] The Corps of Engineers had issued its official wetlands determination for those two parcels in November 2007, eight months before the date scheduled for the third takedown, June 2008. These two parcels contained 87.69 upland acres — ample to allow the purchasers to include their minimum of fifty upland acres in the third takedown. [Def. Exh. 28, R. Vol. II, Pocket Part.]

Beverly and Godwin had no wetlands excuse for refusing to perform the third takedown.

Beverly and Godwin filed suit, seeking a declaration that Creel was in breach and

that the agreement was terminated. Creel counterclaimed for damages for breach.[13]

The special referee found that Creel, the seller, was limited to a forfeiture of the earnest money or to an action for specific performance, but was barred by paragraph 20 of the agreement from seeking damages for breach.

ARGUMENT

The contract does not limit the seller's remedies for the buyers' breach to a forfeiture of the earnest money or an action for specific performance.

The evidence would have permitted the circuit court to find as a fact that Beverly and Godwin were in breach for refusing further performance after the second takedown. Instead, the court found that the remedy provisions of the contract made it unnecessary to decide whether Beverly and Godwin were in breach. The court found that paragraph 20 of the contract limits the seller to forfeiture of the earnest money or an action for specific performance because those are the only two remedies expressly granted. An action for damages was found to be barred.

Paragraph 20 reads:

> 20. Default and Remedy. If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: (i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser. Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreements under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific

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13 The parties agreed upon a uniform per-acre purchase price for Creel's 280-acre tract. Obviously, some portions of so-large a tract are more valuable than others, but this makes no difference where the whole tract is sold. By reneging after taking the choice acreage on U.S. 701, Beverly and Godwin left Creel with Parcels C and D in the rear — the least valuable part of the tract.

> performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by Seller, Purchaser may pursue any other remedy at law or in equity.

Agreement, Def. Exh. 33, ¶ 20, R. 671.

The circuit court's view is contrary to the rule in South Carolina that remedies specified in a real estate sales agreement are not the exclusive remedies of the seller unless the agreement *clearly* limits the seller to those remedies. In the case of *Bannon v. Knauss,* 282 S.C. 589, 592–93, 320 S.E.2d 470, 472 (Ct. App. 1984), Judge Bell fully stated for the Court of Appeals the law which applies to the case at bar, as follows:

> In the absence of clear language in the contract to the contrary, a nonbreaching party may normally elect either to pursue a remedy specified in the contract or to sue for any other remedy available for the breach. The presence of a liquidated damages clause in a contract does not in itself limit the remedies available to the nonbreaching party. *Rubinstein v. Rubinstein,* 23 N.Y.2d 293, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968); *Fletcher v. United States,* 303 F.Supp. 583 (N.D. Ind.1967), *aff'd,* 436 F.2d 413 (7th Cir.1971). However, the parties may agree that the liquidated damages specified in the contract are the sole remedy for breach. *Cooley v. Call,* 61 Utah 203, 211 P. 977 (1922). If such a limitation is reasonable in the circumstances, the courts will enforce it. *Id.*; *Curran v. Williams,* 352 Mich. 278, 89 N.W.2d 602 (1958); *cf., Tate v. LeMaster,* 231 S.C. 429, 99 S.E.2d 39 (1957); *Owens v. Hodges,* 26 S.C.L. (1 McMul.) 106 (1841).
>
> In a contract for sale of real estate, a clause providing forfeiture of the earnest money if the purchaser defaults is ordinarily construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. *First Trust & Savings Bank v. Pruitt, et al.,* 121 S.C. 484, 113 S.E. 469 (1922); *Stewart v. Griffith,* 217 U.S. 323, 30 S.Ct. 528, 54 L.Ed. 782 (1910); *Biscayne Shores, Inc., to Use of New Biscayne Shores Co. v. Cook,* 67 F.2d 144 (3d Cir. 1933). If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.,* 237 Ga. 227, 227 S.E.2d 340 (1976).
>
> We find no language in the Bannons' contract which makes retention of the earnest money the seller's exclusive remedy. Nothing suggests the parties intended the forfeiture clause to limit the purchaser's liability for breach. On the contrary, the clause appears to be included for the benefit of the seller and the real estate agent, not the purchaser. We, therefore, see no reason to depart from the ordinary construction given to such

clauses.

Accord: Roberson Constr. Co. v. Montoya, 81 N.M. 566, 469 P.2d 715 (1970); *Walters v. Michel,* 745 P.2d 913 (Wyo. 1987).

What the Court in *Bannon v. Knauss* characterized as "clear language" limiting the vendor to the remedies identified in the agreement is found in cases from other jurisdictions. *See, e.g., Kona Hawaiian Assoc. v. Pacific Group,* 680 F.Supp. 1438 (D. Hawaii 1988) (sales agreement unambiguously and expressly set forth that retention of the deposit was the exclusive remedy available to the vendor); *Lerner v. Perry,* 61 App.Div.2d 754, 401 N.Y.S.2d 819 (1978) (liquidated damages clause stated that vendor's "sole remedy" for purchaser's breach was retention of down payment).

The rule of law set forth in *Bannon v. Knauss* was reaffirmed by the Court of Appeals in the case of *Morris Morgan Realty, Inc. v. Johnson,* 288 S.C. 43, 339 S.E.2d 514 (Ct. App. 1985), where the Court stated:

> And in a contract of sale of real estate a clause providing forfeiture of the earnest money if the purchaser defaults, absent clear words to the contrary, is construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money. *Bannon v. Knauss,* 282 S.C. 589, 320 S.E.2d 470 (Ct. App.1984).

In the sales agreement at issue here, there is no clear language suggesting that the Section 20 remedies of earnest money forfeiture and specific performance granted to the seller are exclusive. On the contrary, the agreement limits *the buyer's* right to sue for damages to a case of intentional or willful breach by the seller, while imposing no such limitation upon the seller's right to sue the buyers for breach. [Agreement, ¶ 20, Def. Exh. 33, R. 671.]

Paragraph 20 of the agreement deals only with a breach by the purchasers occurring before the *first* takedown. Paragraph 20 states that if the purchasers are in default "by the Closing Date," the seller is entitled to retain the earnest money. There were four closing

dates, not one.[14] The earnest money deposited by Beverly and Godwin was to be applied toward the purchase price of the *first* takedown.[15] This was done. [Def. Exh. 7, lines 201 and 506, R. 632.] If the purchasers defaulted *after* the first takedown, the seller could have no right to payment of the earnest money since the earnest money had already been applied to the purchasers' credit under paragraph 4(a). The earnest money was gone. The purchasers' breach did not take place until two years after the earnest money had been applied to their credit in this manner. Paragraph 20 could not have been intended to limit the seller to payment of the earnest money for post-first takedown breach by the purchasers since the earnest money was gone. Any other reading of paragraph 20 would leave the seller with no damages remedy at all for a breach occurring after the first takedown. It is apparent that paragraph 20 applies only to a breach by the purchasers occurring "by the Closing Date" — *i.e.,* to a breach occurring *before the first takedown.* For a breach occurring *after* the first takedown, the seller possesses the usual common law remedies. By contrast, the remedies expressly granted *to the purchaser* are available for a breach by the seller occurring before "***any*** Closing Date". [Agreement, Def. Exh. 33, ¶ 20, R. 671 (emphasis added).]

So far from clearly excluding an action for damages, the agreement expressly contemplates such an action. The agreement addresses the possibility of an action for damages by either party as an alternative to specific performance. Paragraph 27(*l*) provides:

> Should *either party* hereto institute any action or proceeding in court to enforce any provision hereof *or for damages by reason*

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[14] The proposed agreement with Hall Development was the template used to draft the agreement at issue. [R. 95; 323–24.] The Hall proposal called for a single closing.

[15] Agreement, Def. Exh. 33, ¶ 4(a), R. 664. The heading of this paragraph 4(a) erroneously is entitled: "Application of Earnest Money at Closing of the last remaining acreage of the Property." The text of 4(a), however, provides that the earnest money shall be applied to the purchase price of the *first* takedown, not the last. The agreement provides that erroneous paragraph headings "shall not be deemed to vary the contents". Para. 27(i), R. 675. There are a number of similar discrepancies and errors scattered through this agreement.

> *of any alleged breach of any provision of this Agreement or for any other judicial remedy,* the prevailing party shall be entitled to * * * attorney's fees * * *.

Def. Exh. 33, ¶ 27(*l*), R. 675 (emphasis added.) *Either party* may institute an action for damages. In the case of *First Trust & Savings Bank v. Pruitt,* 121 S.C. 484,113 S.E. 469 (1922), the court made this logical deduction from a similar provision:

> The contracts must be considered as a whole. They provide at length for the enforcement of the rights of the respective parties under the contracts by legal proceedings, and the payment of the attorney's fees by the parties who fail to carry out their part of the contract. It is manifest that, if the contract contemplated that the buyer had the right to terminate the contract by a forfeiture of the initial payment, then no legal proceedings would be had, and no attorney's fees to be paid.

Id. at 498. *First Trust* was cited with approval in *Bannon v. Knauss, supra.*

Specific performance is a remedy explicitly granted to the seller in this contract in case of a breach occurring before the first takedown. In substance, a seller's action for specific performance is an action for the purchase price. "Thus, the subject matter of the seller's action is actually money." *Truck South, Inc. v. Patel,* 332 S.C. 222, 228, 503 S.E.2d 774, 777 (Ct. App. 1998), *rev'd on other gr'ds, Truck South, Inc. v. Patel,* 339 S.C. 40, 528 S.E.2d 424 (2000). An action for money damages for breach is typically pled in the alternative in an action for specific performance. The only difference is that where specific performance is granted, the vendee is liable for the entire purchase price and receives the land, while in an action for money damages, the vendor keeps the land and receives a money judgment for the difference between the purchase price and fair market value at the time of breach. *Benya v. Gamble,* 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984). Since the buyer may be worse-off when forced to purchase land he no longer wants at full price, limiting the seller to specific performance may actually be detrimental to the buyer.[16]

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[16] That may well be the case here. Forcing the purchasers to pay full price and receive title to a large tract which may prove to be undevelopable in their lifetimes might be a more burdensome outcome from their perspective than a judgment for the difference in value.

CONCLUSION

The purchasers plainly breached this agreement. Their claim that the seller was in breach was pretextual. Even with their Connecticut investors' willingness to participate as equal partners in the third takedown, the reversal of the real estate market caused the purchasers to breach and hope for the best.

Because the agreement of these parties does not clearly eliminate the seller's right to sue for damages for breach, the judgment denying the seller that right should be reversed and the case remanded for judgment on the merits.

Respectfully submitted,

James P. Stevens, Jr.
S.C. Bar No. 0534
Stevens Law Firm, P.C.
Post Office Drawer 127
Loris, SC 29569
(843) 756-7652

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

by: James B. Richardson, Jr.
Attorneys for Appellants.

April 26, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Ralph P. Stroman, Special Referee
Case No. 2009-CP-26-1909
Appellate Case No. 2012-212984.

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

CERTIFICATE OF COUNSEL

I certify that appellants' final principal brief complies with Rule 211(b), SCACR.

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorney for Appellants.

May 1, 2013.

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OF WHOM Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

CERTIFICATE OF SERVICE

I certify that I served a copy of appellants' final principal brief and final reply brief upon the attorney for the respondents by first class mail, first class postage prepaid, addressed to him at his address of record, namely:

J. Dwight Hudson, Esq.
Hudson Law Office
1203 48th Avenue North, Suite 111
Myrtle Beach, South Carolina 29577

on May 1, 2013.

James B. Richardson, Jr.

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorney for Appellants.

May 1, 2013.