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 REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

1. Creel had no duty to obtain Corps certification. Beverly and Godwin had no right to take property in the southwestern corner in the third takedown.

Respondents' brief is premised entirely on the claim that Creel was obliged to obtain a wetlands certification from the Corps. This is simply untrue, as the agreement makes clear. (The pertinent provision of the agreement is cited in appellants' principal brief and hence will not be repeated here.) The respondents use words such as "delineate" and "survey" as though interchangeable with obtaining a Corps certification. That is simply wrong. That duty was expressly disclaimed in the agreement.

Respondents fail to address or even to acknowledge the decisive fact that they had no right to include any acreage in the southwestern corner in the third takedown. The lack of this right was not a favor they did for Creel as they claim: it was an express term of the bargain — a term which they proposed. Creel, an amateur, knew nothing of silvaculture and converting wetlands to uplands. Having agreed that Creel had no duty to obtain Corps certification of anything, and having agreed that the southwestern corner was reserved entirely until the fourth and final takedown, when the economy went south Beverly and Godwin announced that they would refuse to perform the third takedown unless Creel obtained Corps certification for the southwestern corner in the third takedown. By the plain terms of the contract, Creel had no obligation to seek Corps certification of *any* wetlands anywhere; and Beverly and Godwin had no right to take property in the southwestern corner until the fourth takedown. This claim of breach by Creel was obviously pretextual.

2. The circuit court made no finding on the question of breach or no breach.

Beverly and Godwin appear to suggest that the circuit court absolved them of breach of contract, but this is incorrect. The court found it unnecessary to decide whether they breached because, in the court's view, the contract withheld from the seller the remedy of

damages. Hence, it made no difference whether the purchasers were in breach or not. The court decreed that "Paragraph 20 of the **Agreement** . . . gives only the purchasers, Beverly and Godwin, the right to pursue damages in addition to the Earnest Money." [Order, p. 7, ¶ 3, R. 9.]

3. Authorship of the agreement is immaterial.

The respondents repeatedly claim that Creel wrote the contract, as though this complex agreement were a contract of adhesion and the respondents were babes in the woods. (The opposite is nearer the truth.) They cite the maxim that ambiguities are resolved against the drafter while acknowledging that there are no ambiguities.

The parties used as a template for their agreement a draft of a sales contract originally written for another potential purchaser, Hall Development. [R. 95; 323–24.] Creel put this draft on the table as a starting point for a contract with Beverly and Godwin. The draft was rewritten to provide that the purchase would occur in a series of takedowns instead of a single sale. There is no evidence of which party's counsel initiated the needed modifications, nor does it matter.

In any case, the maxim that ambiguities are resolved against the author has no play here since no party has ever contended that the agreement is ambiguous. Even if the agreement were ambiguous, this maxim is one of *last* resort, not *first* resort, in the search for the truth. If it were a maxim of first resort, it would decide almost every such case. It is strictly a tie-breaker since the goal of the court is to discern the true intent of the parties and not to penalize one side or the other for poor draftsmanship. Moreover, this maxim has no place — even as a tie-breaker — where sophisticated business people and companies engineer a detailed contract involving large sums of money. No more so would a court resolve an ambiguity against Microsoft and in favor of IBM where it happened that Microsoft had placed the first draft on the table.

4. The test of *Bannon v. Knauss* is not met.

The respondents ask the Court to *infer* that the parties intended to exclude the damages remedy for *the seller* because they expressly limited *the purchasers'* damages remedy. They contend that the limitation placed upon *the purchasers'* right to sue for breach implies that *the seller* has no right to sue for breach at all. On the contrary, this provision is not a *grant* of a remedy to the purchaser while withholding it from the seller. It is a *limitation* upon what otherwise would be the purchasers' *Bannon* right to seek a remedy not expressly identified in the agreement. *The purchasers* may sue *the seller* for breach only if the breach is wilful. *The seller* is subject to no such limitation in a suit against *the purchasers.*

This Court has rejected *inference* or circumstantial evidence as a basis for finding that the parties to a real estate contract of purchase and sale meant to exclude the damages remedy of the common law. The exclusion of that remedy must be **clearly stated** in the agreement. *Bannon v. Knauss,* 282 S.C. 589, 592–93, 320 S.E.2d 470, 472 (Ct. App. 1984). **Clearly stated** means **clearly stated**. The respondents have not asked the Court to overrule *Bannon* — a carefully considered decision in which the Court weighed the policy arguments for and against and chose its path. That case has laid down the law of this State for nearly three decades and there is no reason to reconsider it now.

5. The Fourth Circuit case follows this Court's *Bannon* decision.

The unpublished decision of the Fourth Circuit in *Richman Enterprises, Ltd. v. Pamplin,* 1996 U.S. App. LEXIS 4848 (4th Cir. 1996), cited by the respondents, gives them no help. In *Richman* the contract of purchase and sale declared that the remedies expressly granted to *the seller* were not exclusive. The agreement contained no such declaration of non-exclusivity for the remedies granted to *the purchaser.* The court found that an express declaration of non-exclusivity for the seller but not the purchaser was clear language limiting the purchaser to the remedies granted in the contract. The decision

appears correct, but the Fourth Circuit's prediction of how a South Carolina court would apply South Carolina law is informational, at most. *See, e.g., Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004) (rejecting a Fourth Circuit prediction of how our State courts would rule).

CONCLUSION

For these reasons and those discussed in the appellants' principal brief, the appellants again urge the Court to reverse and remand for judgment on the merits.

Respectfully submitted,

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April 26, 2013.

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CERTIFICATE OF COUNSEL

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

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May 1, 2013.

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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:

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