The State of South Carolina
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case Nos. 2018-001969, 2019-001270

Lady Beaufort, LLC & Tideland Realty, Inc.....*Petitioners*,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,

And

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Respondents.

PETITION FOR A WRIT OF CERTIORARI

EPTING & RANNIK, LLC

/s/ Jaan Rannik
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ATTORNEY FOR PETITIONERS

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that a Petition for Rehearing was submitted to the Court of Appeals, and a final ruling was entered on July 28, 2022 in both of the above-listed appeals.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding:
    a. that title to real property that was subject to an undisclosed SCDOR tax lien on the day of a commercial real estate closing was nevertheless "good and marketable title free of liens and encumbrances,"
    b. that a seller's refusal or inability to supply the required Certificate of Tax Compliance to the buyer at or before closing would not raise reasonable doubts in the mind of a prudent buyer as to whether title was valid, thus precluding title from being "good and marketable,"
    c. that the pre-closing dissolution of the seller, a Georgia entity, would not raise reasonable doubts in the mind of a prudent buyer as to seller's ability to own or convey title to property, thus precluding title from being "good and marketable,"
    d. that the seller's contractual requirement to convey good and marketable title free and clear of liens and encumbrances was nevertheless satisfied in light of these irregularities,
    e. that the seller's noncompliance with the contractual requirement to convey good and marketable title free and clear of liens and encumbrances was not an "unsatisfied contingency" under the contract,
    f. that the refusal of title insurers to issue title insurance on the property in light of the above irregularities did not support the validity of buyer's concerns regarding the validity of title and had no impact on whether the title was "good and marketable," and
    g. that the trial court's finding of the existence of "unsatisfied contingencies" that would operate extend the contract term was a question of law, rather than a question of fact amply supported by evidence.
2. Whether the Court of Appeals erred in reversing the trial court's finding of seller's liability.
3. Whether the Court of Appeals erred in declining to award Petitioner (the buyer) its attorneys' fees as provided for in the contract between buyer and seller.

INTRODUCTION

Though the Court of Appeals' opinions in the above-referenced appeals were *per curiam*, it has not escaped the notice of the South Carolina real estate bar that the Court of Appeals has ruled (i) that a South Carolina Department of Revenue tax lien on a property at the time of closing is *not* a material contingency and does *not* preclude the conveyance of "good and marketable title, *free and clear of any liens and encumbrances*," (ii) that a seller's refusal or inability to provide a certificate of tax compliance in the face of the afore-mentioned tax lien is *not* a material contingency and does *not* constitute a cloud on title in the eyes of a reasonable buyer, (iii) that the continued existence of a foreign seller entity is *not* a material contingency in a real estate contract, and (iv) that the unwillingness of a title insurer to insure the title to a property with the foregoing defects does *not*, in conjunction with those defects themselves, create doubt in the mind of a prudent buyer regarding the validity of title. Petitioners Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland") (hereafter, collectively referred to as "Lady Beaufort") request this Court take notice that the Court of Appeals' opinions constitute a complete sea change as to foundational tenets of real estate transactions, recognize the significance and impact of these holdings—despite being issued *per curiam*—to the real estate business in this State, grant Lady Beaufort's Petition for a Writ of *Certiorari*, and revisit and reverse the Court of Appeals' holdings.

STATEMENT OF THE CASE

A. The Transaction

On August 19, 2013, Lady Beaufort entered a contract with Respondent Hird Island Investments, Inc. ("Hird") for the purchase of a 2.99-acre parcel of real estate located in Beaufort County. Tideland Realty was the broker. **R. p. 076**. The contract provided a due diligence

period ending on October 1, 2013, with closing to occur within seven days of that time. The closing date would be automatically extended by five business days should there be any "unsatisfied contingencies" at the time of closing, and Hird was required to convey good and marketable title to Lady Beaufort free and clear of any liens or encumbrances.

Following completion of the due diligence period, closing was scheduled for October 7, 2013. However, certain irregularities came to light in the days after the due diligence period but before closing:

(i) a new South Carolina Department of Revenue tax lien;

(ii) the absence of a certificate of tax compliance from the seller, as required by statute because the property being conveyed constituted more than 50% of the assets of the entity selling it, any taxes owed would constitute a lien against the assets of the buyer absent the provision of a certificate of tax compliance. Seller refused, and so this did not occur.

(iii) As the seller was a dissolved Georgia entity, a question arose as to whether it could properly transfer title.

These issues, which also prevented title insurers from writing coverage on the title, remained outstanding on the scheduled closing date and prevented the buyer from closing. Although the transaction did not close on October 7, the parties' attorneys continued thereafter to work together to resolve these issues and close the deal.

However, on October 10, 2013—while the parties' counsel still attempted to close—Hird hired new counsel and sold the property to a third party, Inverness LLC ("Inverness"). The transaction with Inverness included an additional property, meaning that the seller received an additional $60,000 in proceeds.

B. Procedural Facts

1. In the Trial Court

Upon learning of the sale to Inverness, Lady Beaufort filed a *lis pendens* on the property

and filed suit against Inverness and Hird on January 7, 2014, alleging breach of contract and fraudulent conveyance relating to the sale of the property to Inverness while Hird remained under contract for the sale of that property with Lady Beaufort. **R. p. 039.** On May 30, 2014, Lady Beaufort settled with Inverness and acquired the subject property for $25,000.00 more than the price agreed with Hird. The complaint was amended to name Sherwood N. Fender ("Fender"), the principal of Hird, as a defendant (hereafter, Hird and Fender will be collectively referred to as "Hird"). 2nd Am. Compl., **R. p. 060**. The Second Amended Complaint included claims for breach of contract against Hird and breach of contract accompanied by a fraudulent act and negligent misrepresentation against both Hird and Sherwood Fender individually.

A bench trial was held on March 1, 2017. On May 11, 2017, judgment was entered in favor of Lady Beaufort for $33,654.15 in actual damages and prejudgment interest, in favor of Tideland Realty for $17,500.17 in actual damages and prejudgment interest, and for $53,924.41 in attorneys' fees and costs. **R. p. 018**.

Hird moved for reconsideration on May 19, 2017 (**R. p. 070**), and the Court conducted a hearing on that motion on November 13, 2017. On February 14, 2018, Hird's motion was denied as to reconsideration of Hird's liability and Lady Beaufort's actual damages, but the court allowed additional evidence as to the award of attorneys' fees. **R. p. 013**. A hearing on the amount of fees was held July 23, 2018.

On October 26, 2018, the trial court entered an order reducing Lady Beaufort's attorneys' fee award from $53,924.41 to $17,857.00. **R. p. 001**. On November 5, 2018, Hird filed a notice of appeal of both the underlying judgment and the amended judgment. **R. p. 037**. On November 15, 2018, Lady Beaufort cross-appealed with regard to the amended judgment's reduction of attorneys' fees. **R. p. 035**.

Subsequently, Lady Beaufort learned that Mr. Fender had engaged in seemingly fraudulent transfers of property immediately before and on the day of trial, transferring property to family and business partners for no consideration. Concerned about its ability to recover its judgment, Lady Beaufort sought to undo the transfers pursuant to the Statute of Elizabeth. Mr. Fender instead sought to obtain a bond from the trial court that would remove the judgment lien from his remaining assets and allow him to post a bond that would not protect the attorneys' fee award that in Lady Beaufort's estimation it was entitled to. The trial court granted Mr. Fender's motion to post a bond.

2. In the Court of Appeals

On November 5, 2018, Hird filed a notice of appeal of both the underlying judgment and the amended judgment. **R. p. 037**. On November 15, 2018, Lady Beaufort cross-appealed with regard to the amended judgment's reduction of attorneys' fees. **R. p. 035**. Eight months later, on July 31, 2019, Lady Beaufort timely appealed the trial court's granting of Mr. Fender's motion to post a bond.

Both appeals were heard by the Court of Appeals on April 7, 2022, and a per curiam ruling followed on June 8, 2022 in favor of Hird. Petitioners petitioned for rehearing on June 23, 2022, and that petition was denied on July 28, 2022. The Petition for a Writ of *Certiorari* follows.

ARGUMENT

"Good and marketable title" is one that is free of reasonable doubt and that a reasonably prudent person with an understanding of the applicable facts and law would be willing to accept. *See infra* Part I; *Gibbs. v. G.K.H. Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). The Court of Appeals ruled that certain issues discovered immediately prior to closing (i) did not

prevent the passage of good and marketable title free of liens and encumbrances and (ii) did not constitute "unsatisfied contingencies" such as would extend the closing date by five business days, per the terms of the contract. Accordingly, the Court found Hird did not breach the contract nor commit a fraudulent act by failing to close the transaction and instead selling the property to a third party during the five-business-day window following the original closing date.

Specifically, the issues discovered by Lady Beaufort were: (i) an undisclosed South Carolina Department of Revenue tax lien, (ii) the lack of a certificate of tax compliance as required by South Carolina law under the circumstances, and (iii) the lack of the proper documentation allowing Hird, a dissolved Georgia entity, to sell property (collectively, "the Issues"). Prior to and on the day of closing, Lady Beaufort suggested reasonable, non-burdensome solutions to each of the Issues that would allow the deal to close and permit Lady Beaufort to verify it was receiving good and marketable title as bargained for and as required under the contract. In furtherance of that end, Lady Beaufort sought title insurance, but the insurers took the same view as Lady Beaufort and would not issue title insurance without resolution of the Issues.

Nevertheless, in spite of these circumstances and in spite of the unrefuted trial testimony in the record that the Issues precluded passage of good and marketable title, the Court of Appeals found (i) that Hird *was* able and prepared to convey good and marketable title free of liens and encumbrances on the day of closing, (ii) that the Issues were not "unsatisfied contingencies" per the contract, and that (iii) the absence of any "unsatisfied contingency" meant that Hird was not liable to Lady Beaufort for selling the property to a third party.

The Court of Appeals' ruling fails to appreciate the critical importance of a buyer's ability to verify that title is good and marketable before closing a commercial real estate

transaction, not only because real estate contracts require it, but because it is a fundamental tenet of property law. Further, the Court of Appeals failed to recognize that, as "good and marketable title free and clear of encumbrances" was a contractual requirement, the failure to present the same at closing constitutes the failure of a material contingency, as it would in any real estate transaction. Accordingly, if the Court of Appeals' ruling is permitted to stand, it will signal a complete sea change in the foundational concept of "good and marketable title" that will wreak havoc in one of the largest commercial sectors in this State.

I. Good and Marketable Title

"Good and marketable title" is defined as:

> [Title] acceptable to a reasonable purchaser, informed as to the facts and their legal meaning, willing to perform his contract in the exercise of that prudence which business men usually bring to bear on such transactions.

BLACK'S L. DICT. (rev. 4th ed. 1968). In South Carolina, it is a title "free from encumbrances and *any reasonable doubt* as to its validity" and that an informed and reasonable purchaser "is ready and willing to accept." *Gibbs. v. G.K.H. Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Lady Beaufort adduced testimony consistent with this understanding of the term regarding what is customary in commercial real estate transactions and what is meant by "good and marketable title." **R. p. 200–01**. For example, Mr. Rogers testified that the tax lien prevented the passage of good and marketable title, especially in conjunction with the lack of a certificate of tax compliance[1]:

> And the problem is if, in fact, we were to close, 'we' meaning Lady Beaufort, on this purchase and didn't follow these steps [to obtain a certificate of tax compliance] and the Department of Revenue was

[1] Which is a requirement in all non-residential real property transactions in South Carolina.

> to file a tax lien against Hird Island post-closing, that that would be a lien against the property that the buyer would be required to pay. Okay? Which would be, you know, a lien or encumbrance on the property which is contrary to good and marketable title.

R. p. 101:4–13. He further testified:

> Q. Was this tax lien disclosed to you?
>
> A. No.
>
> Q. Was it disclosed by Mr. Fender?
>
> A. No.
>
> Q. Okay. And so if everything had gone to plan and the documents had been transferred and then, like you said, you updated title and found this lien, would you have been able to close on October 7th?
>
> A. No.

R. p. 186:20–187:5.

The existence of a new tax lien—one from the Department of Revenue no less, rather than a lien of more limited scope, *e.g.*, unpaid county property taxes—would give any reasonably buyer pause in closing a transaction, let alone such a lien in conjunction with the seller's refusal to provide a certificate of tax compliance to shield the buyer from liability for any additional or future liens resulting from seller's delinquency. A reasonable buyer would do precisely what Lady Beaufort did in this situation — seek reasonable assurances as to tax compliance and request measures to shield itself from liability for future liens resulting from seller's conduct and ultimately, should the seller not agree to these requests, decline to close. Accordingly, the title was not "good and marketable." That the title insurance company agreed and refused to issue title insurance further demonstrates the point.

The Court of Appeals' ruling characterizes the lien as "a small tax lien." However, the precise amount of a lien from the South Carolina Department of Revenue is not knowable until the Department provides a payoff amount to account for penalties and interest accrued since the date of the lien, which requires written authorization of the seller. This is a critical point. The

buyer could not know, without the seller's authorization, how much would be required to satisfy the tax lien. A seller's failure to give such an authorization, as Hird did here, clouds the title by preventing buyer from knowing the amount required to satisfy the lien. In this context, the Court of Appeals' statement that, "as a matter of law, there can be no breach of Hird Island's contemporaneous duty to convey marketable title so long as Hird Island discharged the $514.01 tax lien with the proceeds from closing" fails to understand this critical reality.

A. The Effect of the Court of Appeals' Ruling

In effect, the Court of Appeals' holding means that a prospective buyer's inability to verify that title is good and marketable and free and clear of encumbrances does not matter, even though that is precisely what buyer has bargained for and what seller is contractually obligated to deliver in every real estate transaction in this State. This ruling represents a radical departure from a foundational principal of property law and, though issued per curiam, will not remain hidden from real estate practitioners, wreaking havoc on South Carolina real estate transactions and leading to a barrage of litigation of this question based on each transaction's unique circumstances.

It is essential that parties purchasing commercial real estate (oftentimes for millions of dollars) be able to verify that the property they purchase is free of liens and encumbrances and ensure they are protected in the event an undisclosed issue becomes a problem in the future. To this end, buyers hire closing attorneys to analyze the title and seek title insurance as a matter of course. When a title insurance company will not insure title to a property, it invariably raises title concerns in the mind of a reasonable buyer. As the determination of whether title is "good and marketable" is inextricably bound to whether a reasonable buyer would close the transaction in the customary exercise of prudence, the unwillingness of an insurer to write coverage in the

face of obvious title defects is a powerful factor in whether title is "good and marketable." As a matter of public policy, a party must not be forced to close a transaction when it is unable to verify that it is obtaining the benefit of its bargain, nor be penalized for requesting that the seller provide assurance of the same. But that is the effect of the Court of Appeals' ruling.

Hird has argued that such assurance by the seller is unnecessary because other means of adequate assurance exist, such as the provision of a general warranty deed. However, a warranty deed does not protect a buyer from being sued; it only provides the buyer an indemnity claim against the seller, whose solvency, ability to defend and indemnify the buyer, or even continued existence are not guaranteed. Providing such a deed does not absolve a seller of the requirement to convey good and marketable title.

The better policy is to ensure buyers have the ability to verify that good and marketable title is being passed before closing the deal and, if necessary, work with the seller to solve any defects in title so that the transaction may close, as Lady Beaufort did. The trial court's ruling on liability furthered such a policy, while the Court of Appeals' ruling cuts directly against it.

Under the circumstances of this case, the failure of the closing was—as the trial court found—squarely the fault of the seller, because the seller failed to comply with the contractual requirement to convey good and marketable title at the closing. In finding the contrary, the Court of Appeals erred. If the error is not reversed, and such title is in fact deemed "good and marketable," the commercial real estate business in South Carolina will be cast into disarray.

II. The Requirement of Presenting Good and Marketable Title Is a Material Contingency in All Real Estate Transactions.

A "contingency" in the context of a real estate contract means something that must happen as part of performing the contract. *See, e.g.*, *Desmear Sys. Inc. v. Vines*, 305 Ga. App. 730, 732, 700 S.E.2d 711, 713 (2010) (noting that a contingency is "not a condition precedent *to*

the existence of a valid contract" but is "a condition precedent to the duty of both parties to render their promised performances"). A contingency is "unsatisfied" if that which is supposed to happen does not, which is a question of fact.

Of central, fundamental importance to a purchaser of real estate is the knowledge that there are no defects in the title of the property. All contracts in South Carolina for the purchase of real property require the seller to convey good and marketable title, free of any liens and encumbrances. This requirement is therefore a contingency that, if not satisfied, relieves the buyer of closing the transaction. The Court of Appeals indicated that Lady Beaufort could still have closed the transaction at closing. Opinion at 5. True, a buyer can still close such a transaction if he chooses; but he is not receiving the benefit of the bargain, and he cannot be required to close in those circumstances. The failure to satisfy that most fundamental tenet of the contract and of real estate law generally is the failure of a material contingency that means a seller has not satisfied his contractual obligations. This is true not just in the instant transaction, but in any real estate transaction in South Carolina.

In the context of the contract between Lady Beaufort and Hird, this unsatisfied contingency automatically extended the contract date by five business days, meaning Hird was prohibited from selling the property to another party during that time.

III. The Court of Appeals Misconstrued the Parties' Contractual Intent.

The interpretation of a contractual provision is a question of law; however, if a provision is not clear and unambiguous, interpreting the provision requires determining the intention of the parties, and the parties' intentions are questions of fact. *See, e.g.*, *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181,184 (Ct. App. 2007).

The term "unsatisfied contingencies" in the Parties' contract is undefined, however the

intent behind the term is discernable. In providing for a five-day extension of the closing date for "unsatisfied contingencies," the contract between Lady Beaufort and Hird contemplated issues that could be resolved in short order. The title issues that arose are precisely of this kind.

Prior to closing, at closing, and after the attempted closing, Lady Beaufort's closing attorney, Carl Rogers, provided Hird with various straightforward, non-burdensome steps that would solve the Issues, namely (i) signing an affidavit that the sale was part of Hird's winding up process, (ii) submitting a form prepared by Mr. Rogers requesting a certificate of tax compliance, (iii) reinstating the corporation with the Georgia Secretary of State, (iv) indemnifying Lady Beaufort for further undisclosed tax liens, or (v) obtaining title insurance. **R. pp. 189–95**. Any or all of these solutions could have been implemented within five business days. Hird refused to take any of these steps. As Hird's principal testified at trial, he had grown paranoid that Lady Beaufort was trying to back out of the deal, and so he simply sought another buyer. **R. p. 256–57**. However, Hird's closing attorney, Derek Gilbert, evidently believed that the contract remained in force, as he continued to work with Mr. Rogers to close the deal, unaware that Hird had sold the property to Inverness.

The trial court recognized that the spirit and intent of the contract was to further the mutual goal of closing the transaction by allowing additional time to solve the kinds of unexpected issues that often arise and that can be resolved in short order with cooperation between the parties. Accordingly, it properly interpreted "unsatisfied contingencies" to encompass the Issues and the resultant inability of Hird to convey good and marketable title. Further, the trial court recognized after hearing the evidence that Lady Beaufort acted in good faith and that, while Lady Beaufort was still working in good faith with Hird's counsel to close the deal, Hird breached the contract and committed a fraudulent act by selling the property out

from under them and without forewarning.

The Court of Appeals failed to consider the intent of the Parties in construing an undefined term in the Parties' contract, and its per curiam opinion should be vacated and the trial court affirmed as to the Defendants' liability.

IV. The Court of Appeals Erred in Failing to Recognize That the Master's Rulings Were as to Questions of Fact and Were Amply Supported by Evidence

To the extent the trial court's rulings constitute questions of law, this Court reviews those rulings *de novo*. However, they are more properly questions of fact, as discussed herein, and should not have been disturbed because the rulings were supported by ample credible evidence.

The interpretation of a contractual provision is a question of law; however, if a provision is not clear and unambiguous, interpreting the provision requires determining the intention of the parties, and the parties' intentions are questions of fact. *See, e.g.*, *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181,184 (Ct. App. 2007). Factual findings are to be affirmed on appeal unless they are without any evidence reasonably supporting them. *E.g.*, *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002). Parol evidence is admissible for the purpose of determining the parties' intentions. *HK New Plan*, 375 S.C. at 23–24, 649 S.E.2d at 184.

As noted *supra*, the term "unsatisfied contingencies" is not defined in the contract. In the context of a real estate deal, a "contingency" is something a party must do before the other party is required to perform. *Desmear Sys. Inc. v. Vines*, 305 Ga. App. 730, 732, 700 S.E.2d 711, 713 (2010). Whether that thing is done is a question of fact. Accordingly, and appropriately, Lady Beaufort adduced testimony regarding what is customary in commercial real estate transactions to assist the Court in its interpretation of the term, and in understanding what is meant by "good and marketable title." *Supra* Part II.

The trial court, based in part on Mr. Rogers' testimony about what is customary in commercial real estate transactions, found that the Issues reflected necessary actions by Hird in order to convey marketable title, actions that had not been taken. Finding as a question of fact that those actions could have been but were not taken by Hird prior to or on the closing deadline, the Master ruled that the contract was automatically extended by five business days per the terms of the contract on account of the undefined term "unsatisfied contingencies." Further, the trial court weighed the testimony of the respective parties and determined that the deal failed to close because Hird grew paranoid, stopped cooperating, and sold the property to Inverness in a transaction that yielded him more money, while his closing attorney was still trying to close the deal with Lady Beaufort.

The Court of Appeals concluded differently, ruling that the Issues did *not* prevent the passage of good and marketable title and were *not* unsatisfied contingencies. In doing so, the Court reversed rulings by the trial court as to questions of fact that were amply supported by evidence, often unrefuted evidence. The trial court properly found—based on ample evidence, including Mr. Rogers' testimony—that the Issues—which could be resolved within the five-day timeframe provided by the contract—were issues of the nature contemplated by the parties when referring to "unsatisfied contingencies."

The Court of Appeals erred, and the Master's findings as to the Defendants' liability ought to be reinstated.

V. The Master's Error Regarding the Award of Attorneys' Fees

The Court of Appeals, because it reversed the Master's finding of liability on the part of Hird, did not reach Lady Beaufort's contention that the Master erred in reducing its initial award of attorneys' fees to Lady Beaufort.

The contract between the Parties provided that, "[i]f Seller defaults in the performance of any of the Seller's obligations, Buyer may . . . [r]ecover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller." Contract at 6, § 27(A) (**R. p. 081**). In the trial court, Lady Beaufort brought and prevailed in an action arising out of Hird's default, and was awarded its attorneys' fees incurred through the date of trial. On reconsideration, the trial court reduced the award of attorneys' fees to Lady Beaufort, capping the amount of fees to those incurred only through the time that Lady Beaufort purchased the property in question from Inverness (the third party to whom Hird sold the property while still under contract with Lady Beaufort).

This was plainly error, as the express language of the contract does not limit the period of time during which attorneys' fees accrue and are recoverable, nor does it limit fees to a particular subject-matter such as the recovery of the property itself. Again, it simply and unambiguously provides:

> If Seller defaults in the performance of any of the Seller's obligations, ***Buyer may*** . . . ***[r]ecover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller***.

Contract at 6, § 27(A) (**R. p. 081**) (emphasis added).

It is well-settled that a court is not permitted to rewrite an agreement between parties. *E.g.*, *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the courts to rewrite contracts for parties."); *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987) ("Parties to a contract have a right to make their own contracts, and when the contracts they make are capable of clear interpretation, the court's province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own

construction for an agreement clearly entered into between the parties."). The Master rewrote the Parties' agreement to include temporal and subject-matter limitations on recoverable attorneys' fees that appear nowhere in the contract.

The Master's reduction of the attorneys' fee award was plainly an error as a matter of law and ought to be reversed.

CONCLUSION

Lady Beaufort requests this Honorable Court grant this Petition for a Writ of *Certiorari*, reverse the Court of Appeals, affirm the Master's ruling as to the Defendants' liability, reverse the Master's reduction of the amount of attorneys' fees awarded to Lady Beaufort, and award Lady Beaufort all of its attorneys' fees, included those incurred in this appeal, pursuant to the contract between Lady Beaufort and Hird.

Respectfully submitted,

EPTING & RANNIK, LLC

This 26th day of August, 2022
Charleston, South Carolina

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The State of South Carolina
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

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And

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Respondents.

.

PROOF OF SERVICE
PETITION FOR CERTIORARI BY LADY BEAUFORT, LLC & TIDELAND REALTY, INC.

I certify that I have served the Petition for Certiorari by Lady Beaufort, LLC & Tideland Realty, Inc. dated August 26, 2022, on opposing counsel via e-mail, on August 26, 2022, addressed to Respondents' attorney of record as follows:

H. Fred Kuhn, Jr., Esquire
P.O. Drawer 507
Beaufort, SC 29901
fred@mossandkuhn.com

A copy of the email is attached to this Proof of Service as Exhibit A.

By */s/ Angela Gross*
Angela Gross
Legal Assistant to Jaan G. Rannik, Esq.
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Angela Gross

From: Angela Gross
Sent: Friday, August 26, 2022 3:20 PM
To: fred@mossandkuhn.com
Cc: sue@mossandkuhn.com; Jaan Rannik; Andrew K. Epting; Angela Gross; Clinton T. Magill
Subject: Lady Beaufort, LLC v. v. Hird Island Investments, 2018-001969 & 2019-001270
Attachments: 2022 08 26 - Ltr to Supreme Court filing Petition for Cert (Lady Beaufort v. Hird Island).pdf; 2022 08 26 - Ltr to Ct. App filing Petition for Cert (Lady Beaufort v. Hird Island).pdf; 2022 08 26 -Petition for Writ of Cert (Lady Beaufort v. Hird Island).pdf

Mr. Kuhn,

Attached for service is the Petition for Writ of Certiorari by Lady Beaufort, LLC and Tidelands Realty, Inc. in the above appeals.

A Proof of Service of the Petition will follow under separate cover email.

With kindest regards,

Angela Gross
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EXHIBIT A

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August 26, 2022

VIA ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Lady Beaufort, LLC & Tidelands Realty, Inc. v. Hird Island Investments, Inc. and Sherwood Fender*
Case No.: 2014-CP-07-0052
Appellate Case No.(s).: 2018-001969 & 2019-001270

Dear Ms. Kitchings:

Enclosed for filing please find the Petition for Writ of Certiorari and Proof of Service in the above-referenced appeals.

With kindest regards,

EPTING & RANNIK, LLC

Angela

Angela Gross
Legal Assistant to Jaan G. Rannik

/agg

Enclosure
cc: The Honorable Daniel Shearouse, Clerk of South Carolina Supreme Court
Fred Kuhn, Esq.