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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III
Circuit Court Judge

The Honorable Bentley D. Price
Circuit Court Judge

Consolidated Appellate Case No. 2020-00607

Larry Rahn, ……Respondent,

v.

Barbara Smith, ……...Appellant.

Appellant's Return to Respondent's Motion to Dismiss

COMES NOW the Appellant, Barbara Smith, ("Smith") in Return to Respondent's Motion to Dismiss filed on October 26, 2022. As explained herein Respondent fundamentally misapprehends the rules of issue preservation and offers no colorable basis, in either law or fact, to support dismissal. Respondent's motion should therefore be denied.

INTRODUCTION

This matter concerns an option to purchase real property that Smith asserts expired on November 20, 2017, and which during this litigation has *twice* been improperly extended by orders issued by the Circuit Court—first to July 11, 2020, by Judge Buckner, then years later extended

again to February 1, 2022, by Judge Price in a separate proceeding. These separate orders are before this Court in this consolidated appeal.

Despite these improper extensions, Respondent has never tendered payment. It is Smith's belief that Respondent has never been able to pay the option price and that Respondent commenced this lawsuit only to buy time in the hopes of acquiring the money to exercise his now expired option. The instant motion is just further support for that belief.[1]

The instant motion is a thinly veiled attempt to avoid appellate review by a full panel of this Court. This ulterior motive is exposed by the fact that Respondent has submitted 164 pages of "exhibits" which constitutes *almost all* the material Smith designated to be included in the record on appeal. Plainly, Respondent does not want this Court to review everything. That is telling. If Respondent wants to assail the arguments set out in Smith's Brief, those attacks should have been made in Respondent's Brief, not a motion to dismiss. This Court should not permit Respondent to make an end-run around the appellate process. That is particularly true here, where Respondent's motion is based on a complete perversion of the rules of issue preservation.

ORDERS ON APPEAL IN THIS CONSOLIDATED APPEAL

As a threshold point, Respondent seems to overlook that **this is a consolidated appeal from <u>two separate</u> Circuit Court Orders arising from separate proceedings.**[2]

<u>Appeal No. 1 – (Original Appeal No. 2020-000607)</u>: The first appeal arises from the grant of Respondent's Motion for Summary Judgment that was filed on June 14, 2019. The Order

[1] Respondent's Initial Brief was due on October 24, 2022, but that brief was not filed. Instead, this motion to dismiss was filed on October 26, 2022, simultaneous with Respondent filing a separate Motion to file his Initial Brief out of time.

[2] *See* This Court's Order of Feb. 11, 2022, consolidating appeals Nos. 2020-000607 and 2021-001540 under the earlier appellate case number.

granting this motion was entered by Judge Perry M. Buckner on December 3, 2019, and found Respondent's right to specific performance of the option expired on July 11, 2020.

Appeal No. 2 (Original Appeal No. 2021-001540): The second appeal arises from Smith's Motion pursuant to Rule 60(b), filed on November 30, 2020, seeking relief from Judge Buckner's expired order. The order denying this motion was issued by Judge Price on December 14, 2021. Although Judge Price found that Judge Buckner's order had expired on July 11, 2020, Judge Price nonetheless denied Smith's Rule 60 motion by *sua sponte* tolling the expiration of the option until February 1, 2022—a completely arbitrary date.

As a consolidated appeal, Smith was required to assert her arguments regarding both these orders in a single Appellant's Brief which she filed on July 25, 2022, setting out three issues on appeal: (1) that *both* of the above orders became moot during the pendency of the appeal(s); (2) that Judge Price erred in *sua sponte* extending the expiration of the option to February 1, 2022; and (3) that Judge Buckner erred in finding the option period extended to July 11, 2020, when it should have been determined to have expired on November 20, 2017.

Respondent's motion to dismiss is premised on his assertion that Smith was required to raise *all* her arguments to Judge Buckner before his summary judgment order was entered in 2019. Including those arguments relative to her later filed Rule 60 motion. But this is both illogical and impossible. It would require Smith to travel backward in time—*i.e.*, making arguments to Judge Buckner in 2019 concerning a Rule 60 motion that would not be made or ruled on for more than two years. There is no way Smith could have known, in 2019, what issues would be relevant to a Rule 60 motion, or what errors would be contained in Judge Price's order before this order was issued. Simply because this is a consolidated appeal does not mean that the rules of issue preservation require Smith to have a crystal ball. Respondent's premise is utterly absurd.

BACKGROUND[3]

On March 21, 2019, Respondent sued for specific performance of an option contract which Smith claimed had expired on November 20, 2017. It is not disputed that the option, which was part of a settlement agreement executed on November 20, 2015, provides that Respondent "[had] 24 months to deliver [the] funds" to Smith. The dispute was over when this 24-month period began to run. On the one hand, Smith asserted it ran from the day the agreement was executed and therefore expired long before Respondent brought suit. (Resp.'s Exhibit B) (Answer ¶¶ 9-10); (Resp.'s Exhibit D) (Trans. p. 21). On the other hand, Respondent claimed there was a condition precedent to the commencement of the 24-month period that did not occur until July 11, 2018, which therefore meant the option would not expire until July 11, 2020. (Resp.'s Exhibit D) (Trans. pp. 15-16).

On December 3, 2019, Judge Buckner issued an order granting Respondent's Motion for Summary Judgment and finding Respondent's right to specific performance of the option expired on July 11, 2020. Although Smith appealed, because this Order directed the conveyance of real property it was not stayed by that appeal. As a result, when Respondent declined to tender payment by July 11, 2020, the option expired, and Judge Buckner's order (whether right or wrong) became moot. *See* S.C. Code Ann. § 18-9-170; Rule 241(b)(4), SCACR; *and* Rule 70, SCRCP. Therefore, on November 30, 2020—after receiving leave of this Court to do so— Smith filed a motion pursuant to Rule 60(b), SCRCP, seeking relief from Judge Buckner's expired order.[4]

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[3] For a more detailed recitation of the facts, procedure, and arguments on appeal, Smith directs the Court to her Initial Appellant's Brief, attached hereto as (**Appellant's Exhibit 3**) and fully incorporated herein by reference.

[4] Smith's October 2, 2020, Motion for Leave, (**Appellant's Exhibit 4**), attached her proposed Rule 60 Motion and supporting affidavits. Respondent did not respond to or oppose Smith's request for leave. This Court granted Smith leave on November 20, 2020, and her Rule 60 Motion was filed with the Circuit Court on November 30, 2020.

Smith's Rule 60 Motion was heard by Judge Price, who, on April 5, 2020, issued an order finding that Judge Buckner's order had expired on July 11, 2020. However, Judge Price went on to *sua sponte* declare this deadline was equitably tolled. Based on this after-the-fact declaration, Judge Price denied Smith's Rule 60 Motion. Because Respondent neither requested, nor submitted any evidence to support equitable tolling, Smith filed a motion under Rule 59(e), SCRCP. *See Stanley v. S. States Police Benevolent Ass'n*, 435 S.C. 524, 527-28, 868 S.E.2d 412, 414 (Ct. App. 2021) ("When a party receives an order containing relief that was not requested or contemplated, the party must present its objections to the issue to the trial court in a Rule 59(e), SCRCP, motion to preserve the issue for appeal."). On December 2, 2020, Judge Price amended his *sua sponte* decision to provide that the July 11, 2020, deadline would only be equitably tolled until February 1, 2022. Again, Respondent decided not to tender payment or seek enforcement of Judge Price's Order, which expired by its own terms on February 1, 2022, while this appeal was pending.

ARGUMENTS IN RETURN TO RESPONDENT'S MOTION TO DISMISS

Citing the general rules of issue preservation, Respondent's motion to dismiss consists of a brief series of generalized and conclusory statements masquerading as arguments. As best Smith can decipher them, Respondent's claims are addressed below.

1. ***Respondent's claim that Smith was required to raise her mootness argument even before the matter became moot is illogical, absurd, and contrary to the fundamental legal principle of mootness.***

First, Respondent summarily claims that Smith "failed to raise any of her arguments with specificity in opposition to [Respondent's] motion for summary judgment prior to the Circuit Court's entry of [summary] judgment." (Memo p. 6). However, as stated above, because Smith cannot travel backward in time, the only arguments Smith was required to raise at the summary judgment hearing were those arguments that relate to that summary judgment motion.

It seems Respondent is suggesting that Smith was required to raise her mootness arguments prior to the December 2019 summary judgment order. [5] To the extent this is Respondent's claim, Respondent fundamentally misapprehends the concept of mootness. A case becomes moot "when intervening events prevent a decision on appeal from having an immediate impact on the parties." *See Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015). It has long been recognized that the passage of time can render a matter moot during the pendency of an appeal. *See e.g., Strickland v. Chaplin*, 199 S.C. 203, 205, 18 S.E.2d 736, 737 (1942) ("[P]ending this action and appeal the question [on appeal] has become a moot one . . . by lapse of time.").

That is precisely what happened here. Because an order directing the conveyance of land is not stayed by an appeal, the law affords a litigant, like Respondent, with the means to prevent such an order from becoming moot while on appeal. *See* (Appellant's Initial Brief § I). But Respondent decided to let both Judge Buckner's order and Judge Price's order expire. Accordingly, Respondent would have no right to obtain the property under either order even if this Court were to affirm. Naturally, because mootness is premised on the passage of time, Smith's mootness argument did not exist until the deadlines contained in these orders had passed (*i.e.*, July 11, 2020, for Judge Buckner's Order; and February 1, 2022, for Judge Price's Order). Thus, it was impossible for Smith to raise this mootness argument in December of 2019.

[5] Respondent also asserts "[Smith], for the first time, has contested mootness and equitable tolling in [sic] ***after*** she had already filed a Notice of Appeal, and over eight months after the Order she is contesting was filed by the Circuit Court." (Memo p. 6). Smith is uncertain what this means. It seems that Respondent has forgotten this Court specifically granted Smith leave to make these arguments when it granted her motion for leave to file her Rule 60 Motion. Respondent did not oppose that motion. Nonetheless, Smith addresses the timeliness of her arguments on mootness and equitable tolling herein.

Furthermore, to the extent Respondent suggests Smith's mootness claim was not specifically raised to the Circuit Court, this too is wrong. In her Rule 60 Motion—which was also included as an exhibit to her Motion for Leave filed with this Court—Smith specifically claimed that "**during the pendency of the appeal the Order was rendered moot by the expiration of the deadline** imposed therein [, and] this matter is no longer justiciable." (Resp.'s Exhibit H) (App. Rule 60 Motion p. 1 ¶ 3) (emphasis added). Smith also specifically argued "the Supreme Court has recognized that **Rule 60(b)(5) provides an avenue for relief from judgments that have become moot**." (Resp.'s Exhibit H) (Appellant's Rule 60 Motion p. 2) (citing *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013)) (emphasis added); *see also* (**Appellant's Exhibit 4**) (Motion for Leave ¶5) (asserting her Rule 60 Motion was necessary because "[Judge Buckner's] **Order has expired rendering the issues moot** or otherwise not justiciable.") (emphasis added). Thus, there is simply no merit to Respondent's claim that mootness was not raised below. This is clear from the exhibits Respondent attached to his own motion. Respondent's motion should therefore be denied.

2. *Respondent's claim that Smith was required to raise her arguments concerning Judge Price's sua sponte grant of equitable tolling before Judge Price issued his order is illogical and impossible*.

Secondly, Respondent states "[Smith's] equitable tolling arguments were raised for the first time in a Rule 59 motion." (Memo p. 6). This statement shows that Respondent misapprehends the rules of issue preservation. Equitable tolling was raised for the first time **by the Court** when Judge Price *sua sponte* granted Respondent this unrequested relief in response to Smith's Rule 60 Motion. Because Respondent neither requested nor provided evidence in support of equitable tolling, Smith raised this problem in her Rule 59 motion—precisely as the law requires. It was in

response to this Rule 59 motion that Judge Price amended his *sua sponte* ruling to provide that the "equitable tolling" (which had previously been indefinite) would end on February 1, 2022.

The law is quite plain: "**When a party receives an order containing relief that was not requested or contemplated, the party must present its objections to the issue to the trial court in a Rule 59(e), SCRCP, motion to preserve the issue for appeal**." *Stanley v. S. States Police Benevolent Ass'n*, 435 S.C. 524, 527-28, 868 S.E.2d 412, 414 (Ct. App. 2021) (emphasis added); *citing, Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60-61, 427 S.E.2d 673, 675-76 (1993); *and citing, In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Thus, Respondent's argument misses the boat entirely. Smith did **precisely** what the law demands. The fact that Smith raised this argument in a Rule 59 motion is the reason why this argument is preserved, not the other way around.

3. *Respondent's remaining preservation claims are so patently unsupported they should not warrant a response*.

On the last page of his motion, Respondent makes two conclusory and unsupported statements. First stating that "[Smith] never specifically argued prior to the Circuit Court's order on [Respondent's] motion for summary judgment that the settlement agreement did not contain a condition precedent to the two-year deadline for performance." (Memo p. 7). This claim might be the pinnacle of disingenuousness.

This entire case is about when the 24-month option period began to run. Respondent claimed this period did not begin to run on the execution of the agreement, but on a later date because there was a purported condition precedent to this period commencing. Smith denied this contention from the beginning claiming the period ran from the execution of the agreement. Naturally, Smith's position was that nothing needed to occur before the clock began to run. *See* (Resp's Exhibit B) (Smith's Answer ¶¶ 9-10). At no point prior to the summary judgment hearing

did Respondent ever claim there was a condition precedent to the 24-month period, and Respondent filed no written argument in support of his motion for summary judgment.[6] Nonetheless, anticipating this possibility, in her memorandum opposing summary judgment Smith plainly asserts: "The contract does not contain any contingencies **or conditions precedent**." (**Appellant's Exhibit 1**) (App's Memo in Opp. to Summ Judg. p. 5) (emphasis added). Respondent conveniently omits this from the exhibits to his motion to dismiss.

Moreover, throughout the hearing Smith's trial counsel repeatedly pushed back against Judge Buckner (who as an aside was making Respondent's arguments for them) by pointing out that unlike Respondent, Smith's contention was that the 24-month period ran from the execution of the agreement rather than some other event. *See e.g.,* (Resp.'s Exhibit D) (Trans. 22; 20-24); (Trans 28; 7-15). There is simply no way to colorably say that Smith did not oppose Respondent's contention regarding a condition precedent to the commencement of the 24-month option period.

Finally, Respondent states; "Lastly, [Smith] never argued that there was any dispute that [Respondent] was ready, willing, and able to perform on the agreement." (Memo p. 7). This claim just shows that Respondent has no fidelity to the truth. In opposition to summary judgment Smith submitted a detailed affidavit establishing that Respondent never tendered the money. (**Appellant's Exhibit 2**) (Affidavit ¶ 21) ("I was never contacted regarding payment of the $312,000, nor was I ever contacted with any request for extension of the 24-month timeframe."). Respondent conveniently omits this Affidavit (and Smith's memo opposing summary judgment) from the exhibits to his motion to dismiss. Moreover, it bears mention that this affidavit submitted

[6] It was not until the summary judgment hearing that Respondent's counsel first claimed a condition precedent, which he suggested required Respondent's sister (Loretta Harriett) to execute a deed relative to a separate property before the 24-month period would start. Because Respondent filed no written argument or evidence in support of his motion for summary judgment, there was no way for Smith to address this point prior to the hearing. (Trans. p. 15-16).

by Smith **was the only evidence before the Court at summary judgment**. As the moving party, Respondent had the burden of producing evidence and was entitled to no assumption or benefit of doubt at summary judgment. Yet, Respondent submitted no written argument and no evidence in support of his offensive motion for summary judgment. Instead, the only "evidence" of Respondent's ability to tender payment were the statements of his counsel at the summary judgment hearing. *See* (App. Br. pp. 6; 24-27).

Notwithstanding that the arguments of counsel are not "evidence," at the summary judgment hearing Smith's counsel specifically spoke to the issue of Respondent's inability to perform by referring to Smith's Affidavit (*i.e.*, actual evidence) and stating: "Mr. Crosby's contention is that his client [Respondent] has been ready, willing, and able to deliver the [money] to [Smith but] which she has never been offered." (Resp.'s Exhibit D) (Trans. p. 25; 21-25). In short, the exhibits Respondent attached to his own motion show the incredulity of his conclusory argument on this point.

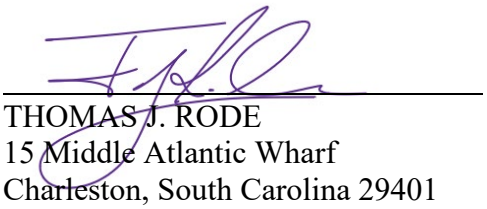
CONCLUSION

For the reasons stated herein, Respondent's motion to dismiss should be denied. Furthermore, and in consideration of the utter lack of merit offered for Respondent's motion, to the extent the Court finds it just, it should Order that Smith is entitled to recover the costs and fees incurred in responding to this motion from Respondent.

[signature block to follow]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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STATE OF SOUTH CAROLINA)) COUNTY OF COLLETON)	IN THE COURT OF COMMON PLEAS CASE NO. 2019-CP-15-00218
LARRY RAHN,)) Plaintiff,) vs.)) BARBARA SMITH,)) Defendant.)	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, by and through her undersigned counsel, and submits this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. In his Motion, Plaintiff asserts that he is entitled to judgment as a matter of law as there is no genuine issue of material fact. The Motion is based on the mediation agreement signed by Plaintiff and Defendant, which is attached as "Exhibit A" to the Motion. Defendant opposes the Motion.

I. STATEMENT OF THE CASE

Plaintiff initiated this action on March 21, 2019 with the filing of a Complaint requesting that Defendant be compelled to execute a deed in performance of the terms of a mediated agreement, "Settlement Agreement 2." Defendant filed an Answer on May 27, 2019 denying the relief requested in the Complaint based on the lack of enforceability of "Settlement Agreement 2" due to the expiration of the contract. Plaintiff filed this Motion for Summary Judgment on June 14, 2019. Defendant filed an Affidavit on July 25, 2019, which is attached to this memorandum. On or about August 29, 2019, Defendant served Interrogatories and Requests for Production on Plaintiff and received Plaintiff's responses on October 2, 2019.

EXHIBIT 1

II. STATEMENT OF THE FACTS

Marvin F. Rahn died in January of 1968. In his Last Will and Testament, Mr. Rahn devised his real property to his wife, Myrtie S. Rahn, for her life, with the remainder to his four (4) children Brantley Vernon Rahn, Barbara R. Smith, Loretta R. Harriett and Larry L. Rahn. The real property owned by Marvin F. Rahn consisted of two (2) tracts: the "Home Place Tract" and the "Glover Place Tract." Myrtie S. Rahn died in June of 2006. Following Myrtie S. Rahn's death, each child owned a one-fourth (1/4) interest in the real property. Brantley Vernon Rahn died in June of 2011 and his one-fourth (1/4) interest passed to his children, Kenneth Rahn and Nancy Crosby. The various owners attended a mediation on November 12, 2015 to attempt to divide the real property. Two agreements resulted from the mediation, "Settlement Agreement 1" and "Settlement Agreement 2."

"Settlement Agreement 1" was executed on November 20, 2015 by Loretta R. Harriett, Larry L. Rahn, Barbara R. Smith, Kenneth Rahn, and Nancy Crosby. In "Settlement Agreement 1," the parties to the contract addressed the "Glover Place Tract" and agreed for Loretta R. Harriett to receive all interest in the "Glover Place Tract" in exchange for Loretta R. Harriett's interest in "Home Place Tract."

"Settlement Agreement 2" was executed on November 20, 2015 by Larry L. Rahn, Barbara R. Smith, Kenneth F. Rahn, and Nancy R. Crosby. In "Settlement Agreement 2," Barbara R. Smith agreed to transfer her interest in the "Home Place Tract" to Larry L. Rahn, Kenneth F. Rahn, and Nancy R. Crosby in exchange for Three Hundred Twelve Thousand Dollars ($312,000.00). "Settlement Agreement 2" includes a provision requiring the payment of funds to Barbara R. Smith in exchange for her interest in the land within twenty-four (24) months.

EXHIBIT 1

On January 23, 2017, Plaintiff filed a Complaint against Loretta Harriett requesting that Loretta Harriet be compelled to execute the deed in performance of the obligation she agreed to in "Settlement Agreement 1." On July 26, 2017, Barbara R. Smith executed all deeds presented to her and fulfilled her obligation under "Settlement Agreement 1." On May 4, 2018, Plaintiff and Loretta Harriett settled their dispute and an Order was issued. Loretta R. Harriett executed a deed transferring her interest to Larry L. Rahn, Barbara R. Smith, Kenneth Rahn, and Nancy Crosby in accordance with the terms of "Settlement Agreement 1." All deeds arising from "Settlement Agreement 1" were recorded in Colleton County on October 1, 2018.

In the Fall of 2018, Barbara R. Smith was contacted by Larry Rahn and Nancy Crosby. They requested that Ms. Smith consent to the sale of the timber on the "Home Place Tract" without receiving her one-third (1/3) share of the timber proceeds. Larry Rahn, Kenneth Rahn and Nancy Crosby have expressed that they need to cut the timber to use the timber proceeds to pay Barbara R. Smith the Three Hundred Twelve Thousand ($312,000.00) pursuant to the terms of "Settlement Agreement 2."

III. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340 (S.C. App. 2012) (citing *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E. 2d 766, 769 (2011)). "A

EXHIBIT 1

court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Id.* at 541-42 (citing *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Id.* at 542 (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)). "This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Id.*; Rule 56(e), SCRCP.

B. The Contract is Unambiguous and, Based on the Clear Language, Plaintiff's Motion Should be Denied.

Plaintiff is not entitled to a judgment as a matter of law based on the clear and unambiguous language in the contract. Plaintiff and Defendant disagree regarding the terms and obligations contained in "Settlement Agreement 2." "In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Kinghorn v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 749 (Ct. App. 2019), quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "An action to construe a contract is an action at law." *Kinghorn, 426 S.C. at 151*, quoting *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined

EXHIBIT 1

by the contract language." *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571, 574 (2009), citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill*, citing *Schulmeyer*,353 S.C. at 495, 579 S.E.2d at 134.

The language contained in "Settlement Agreement 2" is clear and unambiguous. The contract expressly requires Plaintiff, Kenneth F. Rahn, and Nancy R. Crosby to deliver Three Hundred Twelve Thousand Dollars ($312,000.00) to Defendant within twenty-four (24) months of the agreement in exchange for Defendant's interest in the "Home Place Tract." The contract does not contain any contingencies or conditions precedent. The contract does not reference "Settlement Agreement 1." They are separate contracts with different parties. Defendant did not receive the payment outlined in the contract within twenty-four (24) months of the agreement. Rather, Plaintiff is seeking to have Defendant forced to consent to Plaintiff selling timber in which Defendant has a one-third (1/3) interest and allow Plaintiff to use Defendant's portion of the timber proceeds to pay Defendant the Three Hundred Twelve Thousand Dollars ($312,000.00). Plaintiff is further seeking to have Defendant compelled to sign a deed upon receipt of the timber proceeds from Plaintiff even though nearly forty-eight (48) months have passed since the contract was executed.

Based on the plain language of the contract, Plaintiff's Motion for Summary Judgment should be denied and his case dismissed as he failed to fulfill his obligation under the contract. Due to the expiration of the twenty-four (24) month provision in the contract, the contract is no longer enforceable.

C. In the Alternative, if the Terms of "Settlement Agreement 2" are Ambiguous Then a Genuine Issue of Material Fact Exists.

EXHIBIT 1

Although Defendant believes the terms of "Settlement Agreement 2" are clear and unambiguous, if the Court finds that the terms are ambiguous and that the contract contains contingencies and conditions precedent, then Defendant argues that there are genuine issues of material fact. "[A] contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 47, 747 S.E.2d 178 (2013). "When a written contract is ambiguous, parol and extrinsic evidence may be admitted regarding the parties' intent." *Id.*, citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 888-89 (Ct. App. 1997). Defendant's Affidavit was previously filed and is incorporated herein by reference.

Plaintiff and Defendant disagree regarding the facts surrounding the mediation and the terms of the agreement. By way of background, Defendant didn't even know mediation was being considered prior to being contacted by the mediator's office for scheduling. (Def. Affid. 11). Defendant appeared at the mediation and participated without an attorney. (*Id.* at 12). Plaintiff was represented by Ronnie Crosby. Defendant never discussed or negotiated the following: (a) completion of "Settlement Agreement 1" as a prerequisite or condition for Settlement Agreement 2; (b) the "method" of funding the payment of $312,000.00 was not specified or stipulated;" and (c) the cutting of timber on the "Home Place Tract," of which Defendant is a one-third (1/3) owner, without receiving any of the proceeds, was not specified as a prerequisite. (*Id.* at 18). Defendant believed the twenty-four (24) month payment period began on the date of agreement, November 20, 2015 and expired on November 20, 2017. (*Id.* at 21). If the twenty-four (24) month payment period were to expire any time after November 20, 2017, Defendant would have negotiated a different price or the requirement of an updated appraisal. (*Id.* at 23).

EXHIBIT 1

It is Defendant's understanding that Plaintiff believes "Settlement Agreement 1" and "Settlement Agreement 2" are connected in some way so that the expiration period for the payment contemplated in Settlement Agreement 2 would have been extended due to the delayed completion of the obligations contained in Settlement Agreement 1. Further, Plaintiff has taken the position that the source of the $312,000.00 payment was discussed at mediation. In a letter from Plaintiff's attorney to Defendant, dated January 2, 2019, Plaintiff's attorney indicates that the only way for Plaintiff, Kenny Rahn, and Nancy Crosby to pay the money ($312,000.00) is to cut timber which, according to Plaintiff, was contemplated at the mediation. As noted previously, Defendant disagrees with Plaintiff.

Regarding the actual language used in the agreement, Defendant did not participate in drafting the agreement. Although the mediator may have been the primary author of the agreement, Plaintiff's counsel likely had an opportunity to review and provide feedback. As such, any ambiguity should be construed in favor of Defendant as a *pro se* party with minimal input into the drafting of the agreement other than negotiating the final payment amount of $312,000.00.

IV. CONCLUSION

Based on the clear and unambiguous of the contract, the contract is unenforceable and Plaintiff's Motion should be denied. If the Court finds that the language contained in the contract is ambiguous, genuine issues of material fact exist regarding the parties' intent and Plaintiff's Motion should be denied.

[Signature page follows}

EXHIBIT 1

Respectfully submitted,

s/Gregory E. Parker, Jr.
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Columbia, South Carolina
October 8, 2019

Attorney for Defendant

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	Case No.: 2019-CP-15-00218
LARRY RAHN,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**AFFIDAVIT OF BARBARA SMITH**
BARBARA SMITH,	)	
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME, **BARBARA SMITH**, who being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and give this affidavit of my own personal knowledge and belief.
2. My father, Marvin F. Rahn, passed in January 1968. His Last Will and Testament directed that his real property be bequeathed to Myrtie S. Rahn, his wife, for the term of her natural life with the remainder interest to his four (4) children: Brantley Vernon Rahn, Barbara R. Smith, Loretta R. Harriett and Larry L. Rahn, "share and share alike."
3. The real property of the Marvin F. Rahn Estate included two (2) tracts of land in Colleton County, South Carolina:
    a. "Home Place Tract", approx. 296 acres per original plat, approx. 311 acres per 2007 survey; and
    b. "Glover Place Tract", approx. 132 acres.
4. My mother, Myrtie S. Rahn, passed in June 2006.
5. Following my mother's passing, all four (4) owners (Brantley Vernon Rahn, Barbara R. Smith, Loretta R. Harriett and Larry L. Rahn) cooperated and agreed to sell timber and split the proceeds equally. An agreement to purchase timber was obtained for $600,000 and signed by all heirs on Sept 17, 2007. However, timber could not be sold because the title search revealed several unpaid judgements against two (2) of the owners, Brantley Vernon Rahn and Larry L. Rahn. My sister, Loretta R Harriett, and

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I agreed to allow time for these judgments to expire before proceeding with selling timber or the distribution/division of real property, approximately 2012.

6. Since my mother's death in 2006, I have consistently paid my portion of expenses associated with the "Home Place Tract" and "Glover Place Tract" (taxes, insurance, maintenance, and repairs, including the replacement of the home's roof) without receiving any income (farmland leases, hunting rights, etc.) from the "Home Place Tract."
7. The four (4) owners had numerous meetings without reaching an agreement for the division of the real property.
8. Brantley Vernon Rahn died on June 7, 2011. His 1/4th interest passed to his children, Kenneth Rahn and Nancy Crosby.
9. After Brantley Vernon Rahn passed, several meetings occurred over several years between the five (5) owners with no agreement regarding the division of the real property.
10. I was contacted on November 12, 2015 by Reaves McLeod's office asking me to attend mediation the morning of November 20, 2015. The mediation was confirmed for November 20, 2015 at 1:00 pm.
11. Prior to being contacted by Reaves McLeod's office, I was not aware that the services of a mediator were being considered to assist with the division of real property.
12. When I arrived with my husband, Orba L. Smith, at the mediator's office on November 20, 2015, I was immediately escorted to a conference room. My husband stayed in the waiting area. Also present in the conference room were Loretta Harriett, Larry Rahn, Kenneth Rahn, Ronnie Crosby, attorney for Larry and Kenneth Rahn, and Reaves McLeod, mediator. Nancy Crosby was not present. Loretta Harriett and I were present without counsel.
13. Before the mediation began, mediator Reaves McLeod and attorney Ronnie Crosby excused themselves and left the room.
14. Upon returning to the conference room, Reaves McLeod gave a formal introduction and an overview of the mediation process.
15. Negotiations for Settlement Agreement 1, involving Loretta Harriett receiving the "Glover Place Tract," occurred first. Reaves McLeod escorted Larry Rahn, Kenneth

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Rahn and their attorney Ronnie Crosby to a separate room. Loretta Harriett did not object to my remaining in the conference room during this portion of the mediation. Therefore, I remained but did not contribute in any way. Negotiations for Settlement Agreement 1 proceeded and were concluded. Even though my signature was necessary for Settlement Agreement 1, the negotiations were between Loretta Harriett and Larry and Kenneth Rahn with the aid of their counsel Ronnie Crosby.

16. Prior to negotiations for Settlement Agreement 2, I requested to be moved to a private room and was relocated to Reaves McLeod's office. Settlement Agreement 2 negotiations involved the resolution of my 1/3rd interest in the "Home Place Tract." Larry Rahn, Kenneth Rahn, and Nancy Crosby were negotiating as a single interest with the advice of their attorney Ronnie Crosby.

17. By way of background regarding value, in the Spring of 2015, Larry Rahn obtained a land and timber appraisal for the "Home Place Tract" and "Glover Place Tract" from Compass South Appraisals. I was not asked and did not contribute to the cost of the Compass South appraisal. This 2015 appraisal showed a significant reduction in land value from the previous 2007 appraisal from James L. Berry of D&B Appraisal Services, Inc. by approximately 54%. The cost of the 2007 appraisal was paid equally by Brantley Vernon Rahn, Barbara R. Smith, Loretta R. Harriett and Larry L. Rahn. In September of 2015, I had several phone conversations with Nancy Crosby where we both expressed concern about the discrepancy between the 2007 and 2015 appraisals. Nancy and I also expressed concern that the 2015 Compass South appraisal was performed by an apprentice appraiser named Philip Rizer. Nancy relayed that Larry had no explanation for the discrepancy between appraisals. In our conversations, Nancy often communicated the preferences, opinions and thoughts of Larry and Kenneth as well as her own.

18. During the negotiation of Settlement Agreement 2, the dollar amount that I would receive as my 1/3rd interest in the Home Place Tract was the only point discussed. The following three items were never discussed:

    a. The completion of the Survey and Deeds for Settlement Agreement 1 as a prerequisite or condition for Settlement Agreement 2;

    b. The "method" of funding the $312,000 was not specified or stipulated; and

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c. The cutting of timber on the "Home Place Tract," of which I am 1/3rd owner, without receiving any of the proceeds, was not specified as a prerequisite.

19. After the negotiations concluded for Settlement Agreement 2, all parties reconvened in the conference room. The mediator presented the drafts of Settlement Agreements 1 and 2 for review. The only changes to the drafts was correction of names. Settlement Agreement 2 included a twenty-four (24) month timeframe in which the $312,000 would be paid to me in exchange for my interest in the "Home Place Tract." This twenty-four (24) month timeframe was not discussed during the negotiations of Settlement Agreement 2 and I do not know from where this twenty-four (24) month timeframe originated. All parties signed and dated Settlement Agreement 1 and Settlement Agreement 2 on November 20, 2015, including Nancy Crosby who arrived at the office at the conclusion of the mediation.

20. Settlement Agreement 2 specifies a twenty-four (24) month timeframe for the payment of $312,000. It was my understanding that the start of this twenty-four (24) month period was the date of the agreement, November 20, 2015.

21. In my opinion, the twenty-four (24) months referenced in Settlement Agreement 2 commenced on November 20, 2015 and expired on November 20, 2017. During this twenty-four (24) month period, I was never contacted regarding payment of the $312,000 nor was I ever contacted with any request for extension of the twenty-four (24) month timeframe.

22. In the Fall of 2018, Larry Rahn, Kenneth Rahn, and Nancy R Crosby obtained timber bids through Timber Broker Todd Crosby per attorney Ronnie L. Crosby. I was contacted by Larry L. Rahn and then again by Nancy R Crosby to sign papers for the sale of timber on the "Home Place Tract" of which I am 1/3rd owner but not receive 1/3rd of the timber proceeds. The other owners (Larry L. Rahn, Kenneth Rahn and Nancy R. Crosby) expressed their desire to proceed with the expired Settlement Agreement 2, with funds of $312,000 coming from the sale of timber. It is their opinion that the twenty-four (24) month timeframe mentioned in Settlement Agreement 2 would commence after Settlement Agreement 1 had been executed, even though that idea or concept is not stated anywhere in the mediation agreements. Several times, I requested information about the timber bids but the other heirs refused my request.

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23. I believe the value of the "Home Place Tract" has increased and my interest is worth far more than the value agreed upon in Settlement Agreement 2. If I thought that my interest would not be purchased until after twenty-four (24) months from the signing date of November 20, 2015, I would have negotiated a different price or the requirement of an updated appraisal.

24. FURTHER DEPONENT SAYETH NOT.

Barbara L. Smith
Barbara Smith

SWORN TO before me this 25th
Day of July, 2019.

Notary Public for North Carolina
My Commission Expires: Sept. 21, 2021

HALEY E CRISP NOTARY PUBLIC HAYWOOD COUNTY, NC

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III
Circuit Court Judge

The Honorable Bentley D. Price
Circuit Court Judge

Consolidated Appellate Case No. 2020-00607

Larry Rahn, ……Respondent,

v.

Barbara Smith, ……...Appellant.

INITIAL BRIEF OF APPELLANT

THURMOND KIRCHNER & TIMBES, PA.

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INTRODUCTION

On November 20, 2015, the appellant Barbara Smith ("Smith") signed an agreement granting her brother, Larry Rahn ("Respondent"), an option to purchase her interest in a parcel of real property for $312,000.00. The agreement provided Respondent "[had] 24 months to deliver [the] funds." (R. __). Although the funds were never delivered, on March 21, 2019 (*i.e.*, 42 months after the option was given) Respondent brought this action for specific performance of the agreement. The primary dispute before the trial court was whether Respondent's right to purchase the property had expired. (R. __).

This consolidated appeal concerns two separate orders (from two separate judges). The first is a summary judgment order issued by Judge Perry M. Buckner on December 3, 2019, and finding Respondent was entitled to specific performance if he tendered payment on or before July 11, 2020—a date Smith asserts is contrary to the plain language of the 2015, agreement which provided for a 24-month option period. (R. __). Although Smith appealed, under Section 18-9-170 of the South Carolina Code, this appeal did not stay Judge Buckner's Order. Therefore, when the July 11, 2020, deadline passed without Respondent tendering payment (or seeking to enforce the Order under Rule 70, SCRCP) Smith filed a motion pursuant to Rule 60, SCRCP, (with leave of this Court) for relief from Judge Buckner's Order on the basis that it was expired. (R. __).

The second order on appeal stems from Smith's Rule 60 Motion and was issued by Judge Bentley Price on December 12, 2021 (as amended). (R. __). Although Judge Price determined Judge Buckner's previous Order had expired on July 11, 2020, rather than granting Smith's Rule 60 Motion, Judge Price *sua sponte* declared (nearly a year and a half after the fact) that this deadline for specific performance was "equitably tolled" until February 1, 2022—a completely arbitrary date. (R. __). Not only did Judge Price lack the authority to modify Judge Buckner's Order in this

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way, the *sua sponte* imposition of equitable tolling is without any factual basis or evidentiary support.

Ultimately, the question of whether Respondent's right to specific performance expired on July 11, 2020 (as found by Judge Buckner) or February 1, 2022 (as found by Judge Price) has become purely academic because both these dates have passed. Thus, under either of these orders, Respondent's right to specific performance has expired. Therefore, this matter is moot, and this Court should declare Respondent's right to specific performance—assuming this right ever existed—has expired.

ISSUES ON APPEAL

I. Because the underlying Orders have expired the matter is moot, and Respondent's right to specific performance, even if it existed, has expired, and this Court cannot extent the option period.

II. Did Judge Price err when he *sua sponte* extended the deadline for specific performance previously ordered by Judge Buckner under the doctrine of equitable tolling where the law prohibits one circuit judge from amending the ruling(s) of another circuit judge, and where the record is completely devoid of any evidence or factual findings to support the doctrine of equitable tolling?

III. Did Judge Buckner err in finding Respondent was entitled to specific performance on or before July 11, 2020, where the law and plain language of the agreement establish the option expired long before this date, and where the only basis for the Court's ruling is the in-court representations of Respondent's lawyer rather than any evidence?

STATEMENT OF THE CASE

This matter concerns two parcels of real property in Colleton County known as "Glover Place" and "Home Place." In 2006 Smith, Respondent and their two other siblings—Loretta Harriett and Brantley Rahn—each inherited a one-fourth (1/4) interest in these two parcels from their father.[1] Brantley died in 2011, and his 1/4 interest was split between his two children Kenneth

[1] Smith's father Marvin Rahn died in 1968 leaving these two parcels to his wife Myrtie Rahn for her life and then to his four children. The life estate ended when Myrtie died in 2006. (R. __).

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Rahn and Nancy Crosby (*i.e.*, 1/8th or 12.5% each).

In 2015, the five owners held a mediation in the hopes of consolidating ownership of the parcels it a more practical way. (R. __). From this it was agreed that Harriet would take 100% ownership of Glover Place (the smaller parcel) in exchange for relinquishing her interest in Home Place (the larger parcel) to the remaining owners pro-rata. This arrangement would leave Home Place owned by Smith (1/3); Respondent (1/3); Nancy (1/6); and Kenneth (1/6). (R. __). The pre-mediation and post-mediation interests are shown here for convenience:

Fig. 1 – Pre-Mediation Interests

Owner	Home Place	Glover Place
Smith	1/4 (25%)	1/4 (25%)
Respondent	1/4 (25%)	1/4 (25%)
Harriette	1/4 (25%)	1/4 (25%)
Kenneth	1/8 (12.5%)	1/8 (12.5%)
Nancy	1/8 (12.5%)	1/8 (12.5%)

Fig. 2 – Post-Mediation Interests

Owner	Home Place	Glover Place
Smith	1/3 (33.33%)	0%
Respondent	1/3 (33.33%)	0%
Harriette	0%	100%
Kenneth	1/6 (16.66%)	0%
Nancy	1/6 (16.66%)	0%

At the mediation it was separately agreed that Smith would give the owners of Home Place (*ie.,* Respondent, Nancy, and Kenneth) a 24-month option to purchase her (now increased) 1/3 interest in Home Place for $312,000.00.

To memorialize this, on November 20, 2015, the parties executed two written agreements entitled: "Settlement Agreement 1" and "Settlement Agreement 2," which are described below.

Settlement Agreement 1:

This agreement addressed Harriett's acquisition of Glover Place and relinquishment of Home Place and provides in relevant part that the "the land shall be divided as follows:"

> . . .
> Larry L. Rahn, Barbara R. Smith, Kenneth F. Rahn and Nancy R. Crosby will deed their interest in the 'Glover Tract' [] to Lorretta R. Harriett, in exchange for her relinquishment of her interest in the 'Home Place Tract'."

(R. __). (SA 1 Para 4).

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Settlement Agreement 2:

This agreement concerns the option to purchase Smith's interest in Home Place and is the agreement at issue in this appeal. It provides, in full:

> In light of mediation, Loretta R. Harriett has relinquished her interest in the Home Place Tract [of] property. Due to such, the current ownership of the Home Place Tract is 1/3 interest to Larry L. Rahn [Respondent], 1/3 interest to Barbara R. Smith [Appellant], 1/6 interest to Kenneth F. Rahn, and 1/6 interest to Nancy R. Crosby.
>
> 1. Barbara R. Smith [Appellant] will deed her interest in this property to Larry L. Rahn [Respondent], Kenneth F. Rahn, and Nancy R. Crosby for the sum of three hundred and twelve thousand and 00/100 ($312,000.00) [D]ollars. Larry L. Rahn [Respondent], Kenneth F. Rhan, and Nancy R. Crosby have 24 months to deliver funds to Barbara R. Smith [Appellant] in exchange for her interest in the land.
>
> 2. Each party is responsible for their own deed and plat preparation as well as surveying cost[s] or other cost[s] necessary.

(R. __). (SA 2).

There was apparently a delay in executing the deeds related to Glover Place under Settlement Agreement 1. As a result, on January 23, 2017—roughly 14 months after the agreement was executed—Respondent filed a lawsuit against Harriett for specific performance of Settlement Agreement 1 and seeking to compel Harriett to execute the necessary deeds. (Case No. 2017-CP-15-059). On May 4, 2018, the circuit court ordered Harriett to execute the deeds within fifteen days. (R. __). Although not in the record, Respondent claims Harriett executed the deed conveying here interest in Home Place on July 11, 2018. (Trans. p. ___) (R. __).

In the fall of 2018—roughly a year after the 24-month option period expired—Respondent approached Smith with a proposal to cut the timber on Home Place. (Smith Affidavit) (R. __). However, rather than pay Smith her 1/3 share of the proceeds from the Home Place timber, Respondent proposed to use Smith's share of the proceeds to purchase her interest in Home Place for the option price of $312,000.00. In essence, Respondent proposed to pay Smith with her own

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money. Smith declined this proposal, not only because it was a bad deal, but also because the option had long since expired. (R. __). Neither before nor since has Respondent (or any other owner) ever tendered (or attempted to tender) the required $312,000.00 option price. (R. __).

PROCEDURAL HISTORY

The procedural history of this matter is both confusing and troubling. On March 21, 2019, Respondent filed this lawsuit for specific performance of Settlement Agreement 2. The Complaint seeks to "compel [Smith] to execute the deed in performance of the obligation she agreed to in the mediation agreement." (R. __) (Comp. p. 3). The other owners of Home Place (*i.e*, Nancy and Kenneth) are not parties to this suit although they are parties to Settlement Agreement 2. Although Respondent's Complaint alleges that he was "ready, willing, and able to *execute the deed*," the complaint does not allege that Respondent was ready willing and able to *pay the purchase price* or that he had attempted to make such payment. (Comp. ¶ 11) (R. __). (emphasis added). This is important because a plaintiff's tender of performance is a necessary element to succeed on a claim for specific performance.[2] Smith answered the Complaint asserting the option period had expired. (R. __).

JUDGE BUCKNER'S SUMMARY JUDGMENT ORDER

On June 12, 2019 (just 18 days after Smith answered the complaint) Respondent filed a Motion for Summary Judgment. (R. __). This motion was filed before any discovery was

[2] In addition to "delivering" payment, Settlement Agreement 2 also requires Respondent to prepare the deed that Smith was to execute upon tender of payment. (R. __). Although Respondent claims, at paragraph 9 of the Complaint, that he has already prepared the required deed (which he purports to be Exhibit B to the Complaint), this is not correct. Exhibit B to the Complaint is a series of deeds all associated with Glover Place and which only relate to Respondent's previous suit against Harriett. To date Respondent has never presented the deed required by Settlement Agreement 2—which Respondent acknowledges he is required to prepare as a condition precedent to his option rights under the Settlement Agreement. *See* (Comp. para 9) (R. __) (stating the "deed ha[s] been prepared per the mediation agreement.").

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conducted. (R. __). The only evidence Respondent submitted in support of his motion was a copy of Settlement Agreement 2 which was also attached as an exhibit to his complaint. (R. __). The only written argument Respondent offered in support of his motion consisted of two conclusory sentences in the filed notice of motion: "Despite [Smith's] execution of the mediation agreement, she has refused to comply with its terms. [Respondent] prays for an order granting the relief sought in his complaint." (R. __).

In opposition to summary judgment, Smith filed a detailed affidavit establishing that neither Respondent nor any other owner, had ever delivered or attempted to deliver the purchase money. (R. __). Further, Smith argued the plain language of Settlement Agreement 2, established a 24-month option period, for which there were no conditions precedent, and which expired. (R._).

Judge Buckner heard Respondent's Motion for Summary Judgment on October 9, 2019. (R. __). Because Respondent submitted no evidence to support his motion, Respondent relied only on the representations of his counsel, Mr. Crosby, of Peters, Murdaugh, Parker, Eltzroth & Detrick. To substantiate the claim for specific performance, Respondent's counsel told Judge Buckner that Respondent stood "ready to pay [Smith] the $312,000 whether the timber had been cut or not." (R. __). (Trans. p. 32). However, there is/was no evidence to support this assertion. Moreover, there was no discussion for why that money had not, to date, been offered to Smith.

On December 3, 2019, Judge Buckner issued an Order finding that Loretta's execution of the deeds was a condition precedent, and therefore the 24-month period did not begin to run until July 11, 2018—when Loretta allegedly executed the deeds. Judge Buckner directed that "[Smith] is hereby ORDERED to transfer her interest in the Home Place **upon payment** of $312,000.00 . . . [and] the Parties are further ORDERED to fully comply with the terms of the Settlement

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Agreement 2 on or before July 11, 2020." (R. __) (Order p. 4-5) (emphasis added). Smith appealed, and this Court assigned the matter Appellate Case No. 2020-00607 (the "Initial Appeal").

SMITH'S RULE 60 MOTION AND JUDGE PRICE'S *SUA SPONTE* ORDER FOR EQUITABLE TOLLING

Because Judge Buckner's Order directed the conveyance of real property, pursuant to S.C. Code Ann. § 18-9-170 and Rule 241(b)(4), SCACR, this Order was not stayed by the initiation of an appeal. Moreover, Respondent did not take any action to enforce or stay Judge Buckners' Order. *See* Rule 70, SCRCP (providing the procedure for enforcing a court order which directs the conveyance of land with a specified time). Therefore, when Respondent failed to tender payment by July 11, 2020, it stood that Judge Buckner's Order, whether right or wrong, had expired. Because the Initial Appeal was pending, on October 2, 2020, Smith filed a motion with this Court seeking leave to file a Rule 60 Motion with the circuit court to obtain relief from Judge Buckner's expired Order. (R. __). This Court granted such leave, and on November 30, 2020, Smith filed the Rule 60 Motion with the circuit court, together with supporting affidavits. (R. __). Respondent offered no written memoranda or evidence in opposition to Smith's Rule 60 motion, and this motion was heard by Judge Price[3] on March 18, 2021. (R. __).

On April 5, 2021, Judge Price issued an Order confirming that Smith's "notice of appeal did not stay execution [of Judge Buckner's judgment]" or its July 11, 2020 expiration date. (R. __). However, Judge Price proceeded to declare, *sua sponte,* that "equity required" that this long-expired deadline be "tolled pending the appeal." (Order p. 2) (R. __). In response, Smith filed a motion pursuant to Rule 59(e), SCRCP, asserting this relief (which was never requested by Respondent) was improper and unsupported by any evidence support. (R. __).

[3] Judge Buckner retired before this motion was heard.

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Smith's Rule 59 Motion was heard on November 2, 2021. At the hearing Judge Price clarified his ruling by stating: "My finding is that Judge Buckner's order was the law of the land. It got stayed by myself beginning on that July[, 11, 2020] date, basically because of the appeal that was filed as to Judge Buckner's Order and the date and time came in July 11th. I simply said that it had been stayed from July 11, '20 until I made my April ruling." (Trans p. 30). The Court went on to explain: "I'm going to agree that his [*i.e.*, Judge Buckner's order] has expired, however, I tolled it and I'm giving it a new date three months from today's date for specific performance." (Tras. p. 31). This was reduced to a written order on December 14, 2021, in which Judge Price amended his prior order to provide the July 11, 2020, deadline would be equitably tolled until February 1, 2022. (R. __). Specifically, the court stated: "the Parties shall have until February 1, 2022 to complete performance under the contract after which the non-performing party(s) rights shall expire." (R. __). Smith timely filed notice of appeal from this order which was assigned appellate case No. 2021-1540 (herein the "Second Appeal").

Because this order (like Judge Buckner's Order before it) was not stayed by the Second Appeal, the court's additional finding that the parties would lose their rights under the contract on February 1, would ostensibly resolve the issues pending in the Initial Appeal. However, this was problematic because Smith could not perform until Respondent tendered the required $312,000 payment *and* prepared a deed for her execution, neither of which occurred as the February 1 deadline approached. *See* (R. __) (Settlement Agreement 2 requiring each party to be responsible for their own deed preparation) Therefore, to avoid losing her "rights" (whatever the court meant by "rights"), on January 27, 2022, Smith filed an Emergency Motion for Supersedeas, asking Judge Price to have the parties deposit their respective performance with the court or in escrow pending

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the appeal. (R. __). (Smith offering to place the executed deed (once prepared) in escrow and asked Judge Price to order Respondent to place the purchase money in escrow). (R. __).[4]

On February 1, 2022, Judge Price issued an order denying Smith's offer to place performance in escrow, but nonetheless stating "the Court finds it appropriate to impose supersedeas pending the outcome of the appeal." (R. __).[5]

APPELLATE PROCEDURE

On February 11, 2022, this Court issued an order consolidating the second appeal with the initial appeal from Judge Buckner's Order.

ARGUMENT PART ONE
Mootness

I. The Orders on appeal have expired and so too has Respondent's right to specific performance, and therefore, this matter is moot.

The core dispute in this case is when Respondent's option expired, and it cannot be overlooked that it was Respondent himself who advocated a July 11, 2020, expiration and Judge Buckner agreed. Similarly, Judge Price found Respondent's option expired on July 11, 2020, but *sua sponte* tolled it until February 1, 2022. While both these rulings are in error, the larger problem

[4] The record is devoid of any evidence that Respondent is now, or ever was, ready and able to pay the purchase price. Smith's contention has been that Respondent did not have the ability to pay and that this litigation is an effort to gain additional time to possibly accumulate the funds. Respondent's opposition to deposit the purchase money in escrow is consistent with Smith's contention. Smith's contention would also explain why Respondent allowed Judge Buckner's Order to expire without pursuing enforcement as provided for by, *inter alia,* Rule 70, SCRCP.

[5] The practical effect of this supersedeas is unclear and seems illogical. When the supersedeas was issued, the then-controlling order was "equitably tolling" the July 11, 2020, option deadline (*i.e.,* pausing the clock). Pursuant to Rule 241, SCACR, a supersedeas would operate as a stay of this order, thereby stopping the tolling (*i.e.*, restarting the clock). Because Judge Price found that Judge Buckner's Order had expired, the tolling was all that kept the court from granting Smith's Rule 60 Motion. By removing this tolling, Judge Price's supersedeas effectively nullifies his own order and seems to leave the case in a posture where Smith's Rule 60 Motion *must* be granted.

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is that both July 11, 2020, and February 1, 2022, have passed, and this court can neither practically nor legally roll back the clock. *Accord Ingram v. Kasey's Assocs.,* 340 S.C. 98, 106-08, 531 S.E.2d 287, 291-92 at n. 1 (2000) (the Supreme Court directing that because an optionee "must be able to perform at the **exact time** he requested specific performance, not some 'reasonable time' in the future" and a court cannot "expand the time for [an optionee] to tender the money.") (emphasis added); *Gordon v. Lancaster*, 425 S.C. 386, 389, 823 S.E.2d 173, 174 (2018) (the Supreme Court holding that a court cannot expand the life of a judgment past its expiration). Thus, Respondent's right to specific performance has expired under both Judge Buckner's Order and Judge Price's Order. This fact will remain regardless of whether this Court affirms or reverses these Orders on appeal.[6]

Here the mootness discussion begins with Section 18-9-170 of the Code as well as Rule 241(b)(4), SCACR, both of which provide that an order directing the conveyance of real property is not stayed by the initiation of an appeal. *See* S.C. Code Ann. § 18-9-170 ("If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgement shall not be stayed" by the filing of a notice of appeal); *see also* Rule 241(b)(4), SCACR (judgment directing the sale of real property not stayed on appeal). Moreover, it has long been recognized that the passage of time can render a matter moot during the pendency of an appeal. *See e.g., Strickland v. Chaplin*, 199 S.C. 203, 205, 18 S.E.2d 736, 737 (1942) ("[P]ending this action and appeal the question [on appeal] has become a moot one . . . by lapse of time.").

[6] At bottom, there are three alternatives; this Court agrees with Smith and finds the option expired on November 20, 2017, or it agrees with Judge Buckner and finds it expired on July 11, 2020, or third, it agrees with Judge Price and finds it expired on July 11, 2020, but was tolled until February 1, 2022. However, because each of these various deadlines have passed, Respondent's ability to demand specific performance has therefore expired under any (or all) of these scenarios.

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Thus, where an order directing the transfer of real property contains a specific deadline—as it did in this case—there is a possibility it could become moot while an appeal is pending. However, the law recognizes this risk and provides a means to accommodate for it in Rule 70, SCRCP which speaks directly to the situation and provides:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. **On application of the party entitled to performance**, the court may issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Rule 70, SCRCP (emphasis added)

Plainly Rule 70, SCRCP, provides a means of preventing an order from becoming moot. However, as the emphasized language above demonstrates, for a party to avail himself of Rule 70, he must be "entitled to performance" from the other party. That is important here, because under the terms of Settlement Agreement 2, and Judge Buckner's Order, Respondent did not become entitled to performance from Smith until Respondent delivered payment. Thus, the means of avoiding mootness, by availing himself of Rule 70, was always within Respondent's control, and the fact that Smith appealed did nothing to impede this. Moreover, because Respondent's tender of the purchase money was a necessary element of his claim for specific performance (*see* discussion *infra*) this payment requirement creates no additional burden on Respondent that he did not already assume by filing this action to begin with.

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Because Judge Buckner's Order was not automatically stayed, the enforceability of this Order was the same during the pendency of the Initial Appeal as it would have been if there had been no appeal. This is to say that the consequences for Respondent's failure to tender payment by July 11, 2020, must therefore be the same whether an appeal is pending or not. Consider, a scenario in which Smith did not appeal. In this hypothetical had Respondent failed to tender payment before July 11, 2020, it could not be disputed that his right to exercise his option (*i.e.*, by enforcing Judge Buckner's Order) would have expired. The same result must follow here because the Initial Appeal had no effect on the enforceability of Judge Buckner's Order. As such, Respondent's failure to timely tender payment leaves Judge Buckner's order expired and unenforceable, and therefore renders this matter moot.

To distract from this, Respondent attempts to excuse his failure to tender payment by claiming Smith's commencement of the Initial Appeal entitled him to believe that Smith would not accept the payment even if it were tendered. Not only is this assumption unsupported by evidence, but it also misses the point entirely. Delivery of the purchase money is not some favor; it is Respondent's legal obligation. Likewise, whether Smith would have accepted the money is wholly immaterial. Rule 70, SCRCP, makes this point clear. Had Respondent tendered the money and Smith refused to accept it, or refused to execute the deed on its delivery, Respondent could have availed himself of Rule 70, SCRCP, or other legal means to force Smith's performance. However, the fact remains Respondent did not do this.

In the same way that Smith cannot use the appeal to avoid enforcement of Judge Buckner's Order, Respondent surely cannot use the appeal to expand his rights under the same Order. *Accord,* S.C. Code Ann. § 18-9-170 (*supra*); *and Ingram*, 340 S.C. at 106 n.1, 531 S.E.2d at 291 (an appeal cannot "expand the time for [an optionee] to tender the money"). Because both July 11, 2020 (as

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determined by Judge Buckner) and February 1, 2022 (as determined by Judge Price) have passed, even if this Court were to affirm both orders, Respondent would still have no *present* right to purchase Smith's interest in Home Place. Thus, the question of whether these orders are erroneous has become purely academic—the quintessential hallmark of mootness. *See Croft v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) ("An appellate court will not pass on moot and academic questions . . . [and] A moot case exists where a judgment rendered by the court will have no practical legal effect") (internal citation omitted); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 31, 627 S.E.2d 749, 750 (Ct. App. 2006).

Therefore, this Court should declare Respondent's option has expired and dispose of this matter as moot. While the analysis properly ends here, for completeness, Smith addresses the merits of why the orders issued by both Judge Price and Judge Buckner must be reversed.

ARGUMENT PART 2
The orders issued by Judges Price and Buckner are erroneous

Judge Buckner's Order expired on July 11, 2020. Although Judge Price agreed, he decided to *sua sponte* toll this expiration.[7] As a result, any potential efficacy that Judge Buckner's Order may have turns on whether Judge Price erred in tolling its expiration. Therefore, Smith addresses the errors in Judge Price's Order first and Judge Buckner's Order second.

[7] Although Judge Price did not specifically state in his written orders that Judge Buckner's Order had expired, he explained on the record that was the reason for his ruling. (Trans. p. 31) (R. __). Moreover, a finding that Judge Buckner's Order was expired is inherent in the decision to impose equitable tolling because if it had not expired, there would be nothing to toll.

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II. Judge Price Committed Reversible Error in Denying Smith's Rule 60 Motion and *sua sponte* tolling the July 11, 2020, option deadline established by Judge Buckner.

A. Standard of Review Regarding the Appeal from a Rule 60 Motion.

This Court will reverse the denial of a Rule 60 motion where the trial court abused its discretion. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006) (*citing Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* (*citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

B. Judge Price's Improper Denial of Smith's Rule 60 Motion.

The question presented by Smith's Rule 60 Motion was whether Judge Buckner's Order had expired. Judge Price properly concluded that it had. However, without any factual support, the court *sua sponte* applied the doctrine of equitable tolling to extend the period for specific performance contained in Judge Buckner's Order. (R. __). This was error, and Judge Price's Order must be reversed for two reasons. First, this Order is legally defective because Judge Price lacked jurisdiction to amend Judge Buckner's Order, and further, to do so retroactively amounts to an improper *nunc pro tunc* order. Second, the *sua sponte* decision to apply equitable tolling is without any evidentiary support and contrary to the law. *See e.g., Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) ("It is well known that equity follows the law."); *C & S Nat'l Bank v. Modern Homes Constr. Co.*, 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966).

1. Judge Price's Order is legally defective because it was entered without jurisdiction and amounts to an illegal *nunc pro tunc* order.

The circuit court lacks jurisdiction to address the merits of an order that is pending on appeal. *See* Rule 225(a), SCACR (providing that on appeal, the circuit court only "retains jurisdiction over matters not affected by the appeal"). Further, it is settled that a circuit judge lacks

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authority to overrule the decision of another circuit court judge. *See Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding that one judge does not have the authority to overrule another judge's order regarding questions of law).

Therefore, for the purpose of Smith's Rule 60 Motion, Judge Buckner's findings (whether right or wrong) must be considered the law of the case. *See S.C. Dep't of Revenue v. Elliott*, 350 S.C. 404, 408 n.1, 566 S.E.2d 196, 198 (Ct. App. 2002) (recognizing that under Rule 60, "[w]hile a court may correct mistakes or clerical errors . . . it cannot change the scope of the judgment.") (*quoting Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994); *see also Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986) ("Except to correct such clerical errors, a trial judge loses jurisdiction to modify an order at the end of the term during which it is issued[,]" and "[t]hereafter, the order is no longer subject to any modification which involves the exercise of judgment or discretion on the merits of the action.").

Here, there is no way to view Judge Price's imposition of equitable tolling as doing anything other than affecting the merits of the order on appeal—*i.e.*, the duration of the option period as determined by Judge Buckner's Order. The precise issue before Judge Buckner was when Respondent's right to compel specific performance of his option would expire. In granting summary judgement, Judge Buckner determined, *as a matter of law*, that the option period created by Settlement Agreement 2 expired on July 11, 2020.[8] (emphasis added); *see e.g., Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) (the interpretation of a contract is a matter of law); *citing S.C. Dept. of Nat. Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001); *see also BMW of N. Am., LLC*

[8] For the purposes of this section it is assumed, but not conceded, that Judge Buckner correctly determined the option expired on July 11, 2020.

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v. Complete Auto Recon Servs., 399 S.C. 444, 450, 731 S.E.2d 902, 906 (Ct. App. 2012) (recognizing that summary judgment as to the interpretation of a contract is only proper where the moving party "is entitled to judgment *as a matter of law*") (emphasis added). Accordingly, the July 11, 2020, deadline is more than the expiration of Judge Buckner's Order. Instead, it represents Judge Buckner's final determination as to the merits of the controversy that was before him—and the very issue on appeal in the Initial Appeal. It is inescapable that by extending this deadline, Judge Price's Order expands Respondent's option right under Settlement Agreement 2.[9] Thus, Judge Price lacked the authority to issue this Order, and it must therefore be reversed. But there is more.

The Order tolling the July 11, 2020, deadline was entered in April of 2021, and amended in December of 2021—well after July 11, 2020—as if Respondent had timely requested this relief, or as if the circuit court had timely granted this relief. But neither of these things occurred. Such a retroactive order is an improper *nunc pro tunc* order. *See Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702-03 (2000) ("*Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. A prerequisite for a [valid] *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record." (italics original) (citation omitted)); *see also Black's Law Dictionary* 1174 (9th ed. 2009) (providing *nunc pro tunc* is Latin for "now for then" and that the phrase means having retroactive legal effect through a court's inherent power). Thus, Judge Price's Order is legally defective and must be reversed.

[9] That Judge Price's Order speaks to the merits of the parties' rights under Settlement Agreement 2 is equally apparent from the text of the amended Order itself which provides that Respondent would have until February 1, 2022, to "complete performance under the **contract**" as opposed to having until this date to enforce Judge Buckner's Order. (R. __). (emphasis added).

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2. Application of the doctrine of equitable tolling in this case is inconsistent with the law and unsupported by evidence.

Even if it were assumed, *arguendo,* that Judge Price had the authority to *sua sponte* order equitable tolling, it was error to do so.

As an initial matter, neither Respondent nor the circuit court cited any authority to support the proposition that the law would allow the doctrine of equitable tolling to extend the life of a judgment. To the contrary, the application of equitable tolling under the circumstances presented here seems wholly inconsistent with the Supreme Court's holding in *Gordon,* that the commencement of litigation would not extend the life of judgment. *Gordon*, 425 S.C.at 389, 823 S.E.2d at 174. Thus, this Court should find equitable tolling to be inapplicable here. But even if this Court finds otherwise, Judge Price still erred because the fact that Smith appealed does not support the invocation of this doctrine in this case.

It is well-established that a party seeking the benefit of equitable tolling "bears the burden of establishing sufficient facts to support it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) *citing Rodriguez v. Superior Court,* 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009). Here, Respondent never requested equitable tolling. Moreover, Respondent submitted no written memoranda or affidavits opposing Smith's Rule 60 Motion. To the contrary, Smith supported her Rule 60 Motion with uncontested affidavits establishing Respondent's failure to tender payment and creating the inference that Respondent had not practical ability or intent to pay. (R. __). Therefore, even if Respondent had requested equitable tolling (which he did not), there is no evidentiary support for this relief. The fact that Smith appealed does not change that.

This Court has held that "[e]quitable tolling is reserved for extraordinary circumstances" or where the party to benefit from the tolling has been actively misled by the conduct of the other

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party. *Am. Legion Post 15 v. Horry Cty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009); *citing Hooper,* 377 S.C. at 230, 659 S.E.2d at 219. It follows that because the law specifically addresses the effect an appeal will have on an order, there is nothing extraordinary or unfair about Smith taking an appeal.

For example, Section 18-9-170 specifically directs that an order of the nature presented here is not stayed by appeal. *See* S.C. Code Ann. § 18-9-170 (*supra*). Had the legislature believed it was unfair for an order to expire while on appeal, it would not have enacted this statute. *See e.g., Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). Moreover, to find that the mere commencement of an appeal is sufficient to invoke equitable tolling would permit equitable tolling in every case, effectively nullifying this statute and no longer limiting this relief to extraordinary circumstances. *Contra, Hooper,* at 230, 659 S.E.2d at 219 (equitable tolling is limited to extraordinary circumstances); *see also, Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) ("equity is to supplement the law, not to displace it") (*citing Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003).

Here, the circuit court's rationale appears to rest on the notion that by taking an appeal Smith somehow mislead Respondent, as if Smith's proper and legal appeal should somehow be considered nefarious conduct. The circuit court's *sua sponte* decision to impose equitable tolling rests on the conclusory assumption that Smith's appeal made Respondent's obligation to tender the purchase money by July 11, 2020, "futile and potentially damaging." (R. __) (concluding that "[Smith] said . . . through her filing of an appeal that she would not take" the money if offered). However, Rule 70, SCRCP, makes plain that the payment would not have been futile. As explained

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above, Smith's appeal did nothing whatsoever to impair Respondent's ability to enforce the judgment. Had Respondent timely made payment he could have availed himself of the relief afforded by Rule 70, and effectively forced Smith's performance. *See* (Brief at Section I *supra*) (explaining the effects of an appeal and the import of Rule 70, SCRCP). Although the circuit court made no finding of what "potential damage" Respondent would have suffered (nor is there any evidence of this), it remains that had Respondent sought to enforce Judge Buckner's Order, the court could have crafted means for mitigating this "potential damage," whatever it may have been. *See e.g.* Rule 241(c)(3), SCACR ("the granting of supersedeas . . . may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking as . . . may be deemed appropriate"). The problem invariably comes back to the fact that Respondent elected not to tender payment.

If a judgment debtor in Respondent's position were entitled to simply sit back and allow an order, like Judge Buckner's, to expire, then there would be no reason for Rule 70, SCRCP, to exist. Yet that is precisely what Respondent did. Ultimately, equity simply does not favor the imposition of tolling here to save Respondent from the consequences of his own knowing inaction. *See Nutt Corp.,* 396 S.C. at 329, 721 S.E.2d at 450 (stating equitable relief is not proper "where no pursuit has been made of available contractual remedies because equity aids the vigilant and not those who slumber on their rights"); *and* ("equity is [] only available when a party is without an adequate remedy at law"); *see also, Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012) ("Equity aids the vigilant, not those who slumber on their rights.") (citations omitted).

III. Judge Buckner committed reversible error in finding the Option period extended until July 11, 2020.

Even if Judge Price did not err (which he did), it remains that Judge Buckner's Order must be reversed because the law and plain language of Settlement Agreement 2 demonstrate that

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Respondent's right to specific performance expired 24 months after the agreement was executed—*i.e.*, November 20, 2017.

A. Standard of Review regarding review of Judge Buckner's Order.

An action for specific performance is one in equity, and on appeal "this court may find facts based on its own view of the preponderance of the evidence." *Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) *quoting Greer v. Spartanburg Technical College,* 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). Meanwhile, "[a]n action to construe a contract is an action at law," which when presented in an equity case receives review as any other question of law, which "may be decided [by this Court] with no particular deference to the trial court." *Clardy*, 383 S.C. at 424-25, 679 S.E.2d at 530; *citing S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC,* 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008); *see Sloan v. Greenville County,* 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003) ("A legal question in an equity case receives review as in law.").

B. Judge Buckner erred in granting Respondent Summary Judgment.

Settlement Agreement 2 expressly states that Respondent would "have 24 months to deliver funds to [] Smith, in exchange for her interest in the land." (R. __). Smith argued this 24-month period ran from the execution of the agreement on November 20, 2015. However, Judge Buckner found the period did not begin to run until Harriett issued a deed conveying her 1/4 interest in Home Place to the remaining owners. Because this purported condition precedent did not occur until July 11, 2018, the trial court determined the option to purchase extended until July 11, 2020, and therefore granted Respondent's request for summary judgment on specific performance. This was reversible error for two reasons. First, the determination that Harriette's execution of a deed was a condition precedent to starting the option period is inconsistent with the

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plain language of the agreement and contrary to the law. Second, the circuit court's decision to grant specific performance was without *any* evidentiary support.

1. The circuit court erred in finding that Harriet's execution of the deed was a condition precedent to the commencement of the option period.

In finding Harriett's execution of the deed to be a condition precedent to the commencement of the option period, the circuit court's reasoning was two-fold. First, the court opined that the agreement "required [Smith] to deed a 1/3 interest in Home Place[] to [Respondent]." Second, the circuit court reasoned that because Smith's ownership of the property did not increase from 1/4 to 1/3 until Harriette executed the deed on July 11, 2018, "it was [therefore] impossible for any of the parties to successfully perform under the terms of Settlement Agreement 2 until that date." (R. __). However, this reasoning is flawed on both fronts. The agreement contemplates Smith conveying "her interest," it does not specifically require her to convey a precise 1/3 interest. (R. __). But even if it did, the law plainly allows for Smith to convey this future interest. Thus, the circuit court's assumption that Smith could not perform prior to Harriette issuing the deed is simply wrong.

a. The circuit court's interpretation of the Agreement is inconsistent with its plain language.

"The primary concern of the court interpreting a contract is to give effect to the intent of the parties[, and] the best evidence of [] intent is the contract's plain language." *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014). "A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear," however, where the "language is unambiguous, the plain language will determine the contract's force and effect." *N. Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240-41 (2015) *citing Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) and *Lee*, 407 S.C. at 517-18, 757 S.E.2d at 397.

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"It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee." *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717-18 (1976); *citing Southern Silica Mining & Manufacturing Company v. Hoefer*, 215 S.C. 480, 497, 56 S.E. (2d) 321, 328 (1949). Thus, interpretation of Settlement Agreement 2 begins with the premise that it must be interpreted in favor of Smith. The fact that the agreement is silent as to when the 24-month option period begins must be construed against Respondent and in favor of Smith. But Judge Buckner improperly took the opposite view. *See* (Trans p. 22 ln. 15-19) (regarding Smith's contention that the option "would run 24 months from the date the agreement was signed," Judge Buckner countered, stating "there is no explicit language in the agreement to that effect.")

When viewed in Smith's favor, as the law requires, there is no basis to support the circuit court's assumption that Smith is specifically obligated to convey a precise 1/3 interest in Home Place. Instead, Smith's obligation under the contract is to convey "her interest." (R. __). Further, when strictly construed, nothing in the plain language of the agreement requires Harriette to issue a deed to consummate the relinquishment of her interest in Home Place as contemplated by the agreement. To the contrary, the language of the agreement suggests that for the purposes of Settlement Agreement 2, whatever act was required for Harriette to relinquish her interest in Home Place had already occurred. *See* (R. __). (Settlement Agreement 2 stating: "[i]n light of mediation, Loretta Harriett **has relinquished** her interest in the Home Place[, and] Due to such, **the current ownership** [is] . . . 1/3 interest to Barbara Smith.") (emphasis added). In other words, at the time Smith executed the option, the parties intended it to be assumed that Smith currently possessed the requisite interest for the option period to commence even if the deed from Harriette may not have technically been issued. This interpretation is perfectly consistent with the law that permits the

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transfer of a future interest in real property and dovetails into the second reason why the circuit court erred.

b. The circuits court's conclusion that Smith could not perform prior to the deed from Harriette is wrong because the law permits the transfer of a future interest in property.

When Harriette executed Settlement Agreement 1, agreeing to relinquish her interest in Home Place, Smith obtained a future interest in her pro-rata share of Harriette's 1/4 interest in Home Place. Thus, when Smith executed Settlement Agreement 2, her 1/3 interest in Home Place consisted of a 1/4 (25%) present possessory interest, *plus* a 1/12 (8.333%) future interest that would vest when Harriette executed the deed transferring her interest to the other owners.

The premise of the circuit court's ruling is that Smith could not deed her future interest in Home Place to Respondent. *See* (Order p. 3-4) (finding prior to the deed Smith was not "entitled [] to the consideration" from Respondent and concluding the parties "were [therefore] prohibited from complying with" the option created by Settlement Agreement 2). However, this is simply wrong.

It has long been the law of South Carolina that a party is free to sell or transfer her future or contingent interest in property. Even if it were assumed that at the time Smith executed Settlement Agreement 2, a portion of her 1/3 interest in Home Place was contingent upon a future event (like Harriette executing additional documents) such a contingent future interest is still alienable. More than a century ago the Supreme Court explained "these contingent remainders were transmissible by devise or assignment." *Rembert v. Evans*, 86 S.C. 445, 451, 68 S.E. 659, 661 (1910); (*citing Roundtree v. Rountree,* 26 S.C. 450, 2 S.E. 474 (1887); *and Peoples Loan & Exchg Bank v. Garlington,*54 S.C. 413, 32 S.E. 513 (1899); and *Earle v. Maxwell,* 86 S.C. 1, 67 S.E. 962 (1910)).

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Rembert is instructive. There, the court determined that a brother (named Marshall) properly acquired his siblings' interests in land even though he bought it from them before they actually inherited it. *See Rembert*, 86 S.C. at 451, 68 S.E. at 661. ("Therefore, it did not affect the validity of the title of J. Q. Marshall that he acquired the interest of his brothers and sisters by devise and conveyance before the death of Mrs. Fair; having acquired all these contingent interests, upon the death of Mrs. Fair the legal title became complete in him."). Simply put, the absence of a deed issued by Harriette does not impair Respondent's ability to acquire Smith's future interest, or Smith's ability to convey that interest. Respondent could have exercised his option and obtained Smith's interest in the property, and once Harriette executed the deed, the future interest which would have otherwise gone to Smith, simply would have vested in Respondent instead.

Therefore, the circuit court erred in finding the issuance of a deed by Harriette was a condition precedent to the option created by Settlement Agreement 2.

2. Judge Buckner erred in awarding specific performance of the option because there was no evidence that Respondent was ready willing and able to perform.

This Court has recently explained:

> Our supreme court has established defined requirements a court must find to order a party to specifically perform a contract. In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Miller v. Dillon, 432 S.C. 197, 213, 851 S.E.2d 462, 471 (Ct. App. 2020) *citing Ingram*, 340 S.C. 98, 531 S.E.2d 287.

The law requires that in order for a party to be entitled to specific performance, it must be that he "has performed . . . [or] remains able and willing to perform his or her part of the contract." *Ingram,* 340 S.C. at 106, 531 S.E.2d at 291. In the context of an option to purchase land, specific

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performance requires delivery of payment. *Id.* "Generally, actual payment is essential to the acceptance of an option contract when payment is made a condition precedent to the exercise of the option." *Id.* at 108, 531 S.E.2d at 292 *citing* 91 C.J.S. *Vendor and Purchaser* § 10 (1951) *and* 77 Am. Jur. 2d *Vendor and Purchaser* § 53 (1997).

Here, the plain language of the option created by Settlement Agreement 2 requires that Respondent is to "have 24 months **to deliver funds to Barbara R. Smith**, in exchange for her interest in the land." (R. __) (emphasis added). Thus, to exercise the option under Settlement Agreement 2, Respondent was required to tender funds by delivering this money to Smith. *Id.*

As the plaintiff, and the party seeking summary judgment, Respondent had the burden of proving he was entitled to specific performance. *Id. at* 106, 531 S.E.2d at 291; *see also Ben. Fin. I, Inc. v. Windham*, 431 S.C. 256, 267, 847 S.E.2d 793, 799 (Ct. App. 2020) ("On a motion for summary judgment, the moving party carries the burden of proof even when the nonmoving party does not submit any evidence in opposition."); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) ("A party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact.").

Here, Respondent neither claimed nor submitted any evidence that he had offered (or could offer) payment.[10] The only evidence Respondent submitted in support of summary judgment was a copy of Settlement Agreement 2. Respondent submitted no affidavits or other evidence tending

[10] Although the circuit court stated Respondent "has alleged that he and the other heirs stand ready, willing, and able to comply with the terms of Settlement Agreement 2," this is incorrect. (Order p. 4) (R. __). In his Complaint, Respondent did not allege that he tendered payment or that he was able to tender payment. Instead, he alleged he was prepared to execute the deed. (R. __). However, his execution of a deed does not satisfy his performance obligation nor is this a requirement for specific performance.

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to support this necessary element of the claim. Instead, the only information relative to Respondent's ability to pay the purchase money came by way of argument from Respondent's counsel, during the summary judgment hearing. *See* (Trans p. 17 ln. 10-12) (R. __) (Mr. Crosby arguing "They stood ready, willing, and able and still can, you know, I'm getting calls regularly from the timber people. . ."). After some confusion about whether Respondent could pay without first cutting Smith's timber from the land the court clarified:

> THE COURT: are you telling me that within the two years after the recordation of the deeds in which she got her one-third interest, the other parties involved in the Home Place were ready to pay her the $312,000 whether the timber had been cut or not?
>
> MR. CROSBY: Right. . . .

(Trans pp. 31 ln. 24 – 32 ln. 4).[11]

This in-court argument does not satisfy Respondent's burden of proof. Statements of counsel cannot take the place of evidence. "This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered" and are not evidence. *See McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."); *Cobb v. Benjamin*, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) ("Where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the

[11] Although it is somewhat unclear, it appears that Respondent took the position that the sale of timber from Home Place was a condition precedent to Respondent's obligation to tender of the purchase price. However, the sale of timber is not contemplated by the plain language of Settlement Agreement 2. Further, Judge Buckner did not find the sale of timber to be a condition precedent. That is now the law of the case.

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record.") *accord Trivelas v. S.C. DOT*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (Howard, J. concurring) ("Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment.").

Thus, there is no evidence to support the assumption that Respondent was ready, willing, and able to deliver the purchase price. To the contrary the only evidence before the Court at the summary judgment stage was Smith's comprehensive affidavit which detailed the fact that Respondent had not offered payment. (R. __). This is fatal to Respondent's claim for specific performance, and because the circuit court's grant of summary judgment is wholly unsupported by evidence, it must therefore be reversed.

CONCLUSION

For the reasons stated above, this Court should find this matter is moot because Respondent's rights under the Settlement Agreement 2 have expired. Alternatively, for the reasons stated herein, this Court should reverse either or both of Judge Price's denial of Smith's Rule 60 Motion or Judge Buckner's Order Granting Respondent specific performance.

Respectfully submitted,

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Attorneys for Appellant

EXHIBIT 3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Common Pleas Court Case No. 2019-CP-15-00218
Appellate Case No. 2020-00607

Larry Rahn.....Respondent

vs.

Barbara Smith .....Appellant

APPELLANT'S MOTION FOR LEAVE TO FILE MOTION PURSUANT TO RULE 60(b)(5), SCRCP
AND
TO HOLD BRIEFING IN ABEYANCE

COMES NOW the Appellant, Barbara Smith, pursuant to Rule 240, SCACR, and Rule 60, SCRCP, and who hereby requests: (1) leave of this Court to file a Motion Pursuant to Rule 60(b)(5), SCRCP, in the Circuit Court regarding the expiration of the order now pending on appeal; and (2) that briefing in this appeal be held in abeyance pending the Circuit Court's ruling on such motion. In support of this motion the Appellant asserts as follows:

1. This appeal arises from an Order of the Circuit Court issued on December 3, 2019, (the "Order") the same being attached hereto as Exhibit A and incorporated herein by reference.

2. The Order granted summary judgment in favor of the respondent's claim for specific performance of a contract for the sale of real property owned by the appellant upon

EXHIBIT 4

payment of $312,000.00 by respondent on or before July 11, 2020, and found no conditions precedent to the respondent's payment.

3. It was a necessary element of the respondent's claim for declaratory judgment, and a necessary finding of the trial court Order that the respondent stood ready willing and able to perform at the time specific performance is sought. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) (setting out the necessary elements of specific performance on a contract for the sale of real property); *see also* (Exhibit A – Order p. 4).

4. However, the respondent has not appealed the trial court's ruling as to the time in which the payment is required and this time has now passed without tender of payment and there have been no intervening orders staying or otherwise granting supersedeas that would extend this deadline.

5. The appellant contents the Order has expired rendering the issues moot or otherwise not justiciable.

6. Rule 60(b)(5), SCRCP provides that a party may seek relief from a judgment which "has been satisfied, released, or discharged" or when "it is no longer equitable that the judgment should have prospective application."

7. Additionally, Rule 60(b)(5), SCRCP provides that "[d]uring the pendency of an appeal, leave to make th[is] motion must be obtained from the appellate court."

8. Because it effects the substance and merits of the issue(s) pending appeal to this Court, the appellant requests leave to file a motion pursuant to Rule 60(b)(5), SCRCP, the same being attached as Exhibit B and incorporate by reference, and being for the purpose of raising this matter to the Circuit Court, preserving those matters presently pending before this Court, and serving judicial economy by avoiding the need to bring a separate action to set aside the judgment.

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See Rule 60, SCRCP (1990 Editor's Note stating that section (5) was provided for "avoiding the necessity of bringing a nee action to set aside the judgment").

9. Further, and to give the Circuit Court and the parties the full and fair ability to address this issue, the appellant hereby request that briefing in this matter stayed or otherwise be held in abeyance pending resolution of the aforementioned motion by the Circuit Court, and the parties will notify this Court when Court upon such resolution. Appellant hereby requests an additional thirty (30) days to finish her Initial Brief for filing.

THEREFORE IT IS PRAYED that this Court: (1) issue an order granting unto the appellant leave to file the aforementioned motion pursuant to Rule 60, SCRCP, and (2) issue an order holding the briefing schedule for this appeal in abeyance pending the trial court's ruling on the aforementioned motion.

THURMOND KIRCHNER & TIMBES, P.A.

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Attorneys for Appellant

EXHIBIT 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2019-CP-15-00218
LARRY RAHN,	)	
	)	
Plaintiff,	)	
	)	***ORDER***
v.	)	
	)	
BARBARA SMITH,	)	
	)	
Defendant.	)	

This matter came before the Court on a Motion for Summary Judgment filed by the Plaintiff seeking specific performance with the terms of a mediation agreement signed on November 20, 2015. A hearing was held at the Colleton County Courthouse on October 9, 2019, attorney Ronnie Crosby was present for the Plaintiff, and attorney Gregory Parker was present for the Defendant. The Court Reporter for the hearing was Rebecca Hill.

The mediation agreement concerns the division of real property bequeathed by Marvin F. Rahn to his wife, Myrtie S. Rahn, with a remainder interest to their four children, including Plaintiff and Defendant. Following Myrtie S. Rahn's passing, the four children, including Plaintiff and Defendant, attempted numerous times to come to an agreement regarding the division of the property, to no avail. Finally, on November 20, 2015, the parties signed two settlement agreements with the purpose of finalizing the division of the subject property.

The mediation was conducted by attorney Reeves McLeod who drafted the Agreements. The first agreement, "Settlement Agreement 1," memorialized the transfer of all interests in a real property known as the Glover Place tract to Loretta Harriet in exchange for the relinquishment of her interest in another tract of land known as the Home Place tract to the remaining heirs of Marvin Rahn.

In this action, Plaintiff seeks to compel Defendant to comply with the second agreement, "Settlement Agreement 2." The pertinent language of Settlement Agreement 2 is set forth below:

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> In light of mediation, Loretta R. Harriett has relinquished her interest in the "Home Place Tract" property. Due to such, the current ownership of the "Home Place Tract" is 1/3 interest to Larry L. Rahn, 1/3 interest to Barbara R. Smith, 1/6 interest to Kenneth F. Rahn and 1/6 interest to Nancy R. Crosby.
>
> 1. Barbara R. Smith will deed her interest in this property to Larry L. Rahn, Kenneth F. Rahn, and Nancy R. Crosby for the sum of three hundred and twelve thousand and 00/100 ($312,000.00) dollars. Larry L. Rahn, Kenneth F. Rahn, and Nancy R. Crosby have 24 months to deliver funds to Barbara R. Smith, in exchange for her interest in the land.

The agreement was signed by all parties on November 20, 2015.

Subsequent to the parties entering the settlement agreements, the relevant parties deeded their interest in the Glover Tract to Loretta Harriet in July of 2017. In particular, Defendant deeded her interest to Ms. Harriet on July 26, 2017. Loretta Harriet did not deed her interest in the Home Place Tract to the other parties until July 11, 2018, over two and a half years after the signing of the original settlement agreements. Thus, performance under Settlement Agreement 1 was not completed until this date. The deeds were not recorded until October 1, 2018.

To date, Defendant has refused to comply with the terms of Settlement Agreement 2. Defendant contends that she is not obligated to comply with Settlement Agreement 2, as over 24 months have passed since the two settlement agreements were entered, and she did not receive payment before the expiration of the deadline. Plaintiff contends that when reading the two settlement agreements in concert, it is clear that the 24-month deadline for payment was not intended to commence until Ms. Harriett's interest in the Home Place Tract was completely relinquished to the other parties.

In determining this matter, the Court is required to interpret the language of the settlement agreements in order to give legal effect to the parties' intentions. *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571, 574 (2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). In South Carolina, settlement agreements are viewed as contracts. *Kinghorn v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 749 (Ct. App.

EXHIBIT 4

2019) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "An action to construe a contract is an action at law." *Kinghorn*, 426 S.C. at 151 (quoting *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012)). [1]

"Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." *Bolt v. Ligon*, 144 S.C. 218, 142 S.E. 504 (1928). A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 161 S.E.2d 179 (1968). "Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). On the other hand, a contract is unambiguous when its meaning is clear and susceptible to only one reasonable interpretation. *See United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. *Id.* The purport of the written agreement is to be gleaned from the contents of the whole instrument. *Id.*

Here, the language of the two settlement agreements, as reflected by the settlement documents, is clear and unambiguous. Settlement Agreement 2 obviously contemplated the completion of Settlement Agreement 1 before its terms were to become effective: "In light of mediation, Loretta R. Harriett **has relinquished** her interest in the 'Home Place Tract' property." It plainly requires Defendant to deed a 1/3 interest in the Home Place Tract to Plaintiff and the other heirs of Marvin Rahn, in light of Ms. Harriett's relinquishing of her interest in the tract. Plaintiff and the other heirs were to have 24 months to deliver funds to Defendant in exchange for her 1/3 interest in the land. Since Ms. Harriett did not relinquish her interest in the tract until

[1] A separate lawsuit was filed against Harriett seeking to compel her compliance with Agreement 1. See *Rahn v. Harriett*. This suit was settled with Harriett agreeing to comply.

July 11, 2018, it was impossible for any of the parties to successfully perform under the terms of Settlement Agreement 2 until that date.

Prior to July 11, 2018, Defendant did not possess a "current ownership" consisting of the 1/3 interest in the land that would have entitled her to the consideration offered by Plaintiff. Thus, the parties were prohibited from complying with the terms of the agreement until July 11. Under the plain and ordinary meaning of the language of Settlement Agreement 2, the 24-month deadline could not have begun to run until Defendant possessed a 1/3 interest in the tract she could exchange. The Plaintiff has alleged that he and the other heirs stand ready, willing and able to comply with the terms of Settlement Agreement 2. That they attempted to do so was confirmed by the affidavit of Barbara Smith wherein she confirmed that the Plaintiff and other heirs reached out to her in the fall of 2018 in an attempt to fulfill the Settlement Agreement 2.

The language of the settlement agreements cannot be fairly and reasonably understood under Defendant's interpretation. This would have the effect of bestowing upon Ms. Harriett the ability to effectively nullify Settlement Agreement 2, to which she was not a party. Under Defendant's interpretation of the agreements, by unilaterally refusing to relinquish her interest in the Home Place Tract until after the 24-month deadline passed, Ms. Harriett would have the power to frustrate the entire purpose and intent of the second agreement via an unlawful act. Even in a light most favorable to Defendant, interpreting the language of Settlement Agreement 2 in such a manner would be unreasonable, as the sole purpose of the second agreement was to effectuate a legal transfer of property between Plaintiff and Defendant, and not Ms. Harriett.

Based on the foregoing, it is ORDERED that the Plaintiff's Motion for Summary Judgment is granted. The Defendant is hereby ORDERED to transfer her interest in the Home Place upon payment of $312,000.00 per the terms of the Settlement Agreement 2. The Parties are further ORDERED to fully comply with he terms of the Settlement Agreement 2 on or before

EXHIBIT 4

July 11, 2020 which is two years after the transfer from Harriett of her interest in the Home Place.

IT IS SO ORDERED.

_____
Perry M. Buckner, III
Chief Administrative Judge

_____, 2019

_____, South Carolina

EXHIBIT 4

Colleton Common Pleas

Case Caption: Larry Rahn VS Barbara Smith

Case Number: 2019CP1500218

Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

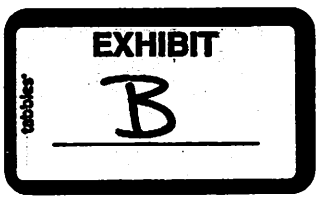
END OF

EXHIBIT 4

EXHIBIT 4

EXHIBIT B
Appellant's Motion for Leave and To Hold in Abeyance

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Civil Action No.: 2019-CP-15-00218
COUNTY OF COLLETON	)	Appellate Case No.: 2020-00607
	)	
Larry Rahn,	)	
	)	
Plaintiff,	)	**Motion for Relief from Judgment Rule 60(b), SCRCP**
	)	
vs.	)	
	)	
Barbara Smith,	)	
	)	
	)	
Defendant.	)	



COMES NOW the Defendant ("Smith") with leave granted by an order of the South Carolina Court of Appeals, and pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure and upon the affidavits, memoranda and other materials that have been, or may hereafter be, submitted to this Honorable Court:

1. By Order dated December 3, 2019, (the "Order") this Court granted summary judgment in favor of Plaintiff's claim for specific performance and directing the sale of certain real property owned by Smith "upon the payment of $312,000.00" by Plaintiff on or before July 11, 2020.

2. Smith appealed the Order, and that appeal remains pending before the South Carolina Court of Appeals bearing Case No.: 2020-00607.

3. However, during the pendency of the appeal the Order was rendered moot by the expiration of the deadline imposed therein. Asserting this matter is no longer justiciable, Smith requested leave from the Court of Appeals to bring this motion, which was granted by the order of the Court of Appeals attached hereto as **Exhibit 1**.

4. Pursuant to Rule 60(b), SCRCP, and without waiver of any claim, right or argument on appeal, Smith asserts this Court should grant relief from the Order which has expired.

EXHIBIT 4

BACKGROUND

This matter arose from Plaintiff's claim for specific performance of a settlement agreement that provided Plaintiff the option to purchase Smith's interest in real property by delivery of $312,000.00. The controversy centered on Smith's claim that the option expired, while the Plaintiff asserted he had until July 11, 2020, to deliver payment and compel the transfer of the real property. Based on Plaintiff's representation that he was "ready willing and able" to perform, this Court accepted Plaintiff's argument and ordered that Smith transfer the property "upon payment of $312,000.00" which was required "on or before July 11, 2020." (Order p. 4); *see also* (**Exhibit 4** – Transcript of Hearing, Oct. 9, 2019, p. 17). However, the court-ordered time for performance—i.e., "on or before July 11, 2020"—has now passed without Plaintiff delivering payment. *See* (**Exhibit 2** - Affidavit of Smith); (**Exhibit 3** - Affidavit of Parker, Esq.). For this reason, Smith requests relief from the Order pursuant to Rule 60(b)(5), SCRCP.[1]

ARGUMENT

Rule 60(b)(5) provides for relief from a "judgment, order, or proceeding" when it "has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if it is no longer equitable that the judgement should have prospective application." Rule 60(b)(5), SCRCP. The Supreme Court has recognized that Rule 60(b)(5) provides an avenue for relief from judgments that have become moot. *See e.g., Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013) (affirming the granting of relief from potions of a judgment affecting the rights of parties under a contract—in a declaratory judgment action—that had become moot). A judgment can become moot during the pendency of

[1] Although Smith has challenged the Order on appeal, for the purposes of this Motion it is assumed, without waiver, that the Court was correct in granting summary judgment on Plaintiff's claim for specific performance.

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an appeal where certain "intervening events," such as the passage of time, "render a case nonjusticiable" or otherwise make it impossible to grant relief because "there remains no actual controversy." *Sloan v. Greenville Cty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003); *see Reid v. Reid,* 280 S.C. 367, 372, 312 S.E.2d 724, 726 (Ct. App. 1984) (recognizing the general premise that the "passage of time" during the pendency of an appeal may render a ruling of the trial court moot).

The law requires that in order for a party to be entitled to specific performance, it must be that he "has performed . . . [or] remains able and willing to perform his or her part of the contract." *Ingram v. Kasey's Assocs.,* 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). In the context of an option to purchase land, specific performance requires delivery of payment. *Id.* At the time of the hearing Plaintiff had not performed, and although Plaintiff represented he was ready, willing, and able to do so; Plaintiff also suggested his obligation to deliver payment was contingent upon an agreement to harvest timber from the property. (**Exhibit 4**. pp. 29-31). However, this Court found no such condition precedent to Plaintiff's payment obligation. (Order p. 4). Instead, the Court ordered payment must be made on or before July 11, 2020, and that "upon payment" Defendant was to transfer her interest. (Order p. 4). Plaintiff did not appeal this ruling, and therefore, it is the law of the case that there was no condition precedent to the delivery of $312,000.00 on or before July 11, 2020. *See e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed findings are the law of the case and may not be changed).

Therefore, with nothing to justify a delay of payment, Plaintiff's ability to compel specific performance, and thus the effectiveness of the Order depends, on the Court's finding that Plaintiff stands "ready, willing and able to comply with the terms" and make payment. (Order at p. 4); *see Ingram,* 340 S.C. at 106, 531 S.E.2d at 291 (granting specific performance of an option to purchase

EXHIBIT 4

land requires the plaintiff has or stands ready to deliver payment). Plaintiff's failure to make payment on or before July 11, 2020, is a failure of a necessary element of the Order and cannot be excused nor extended.

The South Carolina Supreme Court has recognized that an appellate court cannot "expand the time for [an option holder] to tender the money." *Id.*, at n. 1. Instead, a plaintiff "must be able to perform at the exact time he requested specific performance, not some 'reasonable time' in the future." *Id.* (emphasis added). Thus, initiation of an appeal had no impact on the effectiveness of the judgment, and the obligations of the parties remained just as if there had been no appeal.[2] *See* S.C. Code Ann. § 18-9-170 ("If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgement shall not be stayed" by the filing of a notice of appeal); S.C. Code Ann. § 18-9-130(A) ("A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment."); *see also* Rule 241(b)(4), SCACR (judgment directing the sale of real property not stayed on appeal); Rule 241(b)(1), SCACR (judgments directing the payment of money are not stayed on appeal). Here the validity of the Order ceased on July 11, 2020, despite the pending appeal.

It is a well-recognized policy of this state that continued litigation will not extent the validity of a judgment or court order. *See Gordon v. Lancaster,* 425 S.C. 386, 389, 823 S.E.2d 173, 174 (2018) (finding that there was bright light rule that a judgment would become ineffective upon its statutory expiration even if there were ongoing and active litigation regarding its enforcement); *see also Ingram,* 340 S.C. at 106, 531 S.E.2d at 291 (finding the time for a party to pay under on

[2] For context, it could hardly be argued that if Plaintiff had waited until July 12, 2020, to commence his action having never tendered the funds, he could not prevail on a claim for specific performance. The point is that the filing of an appeal does not operate to suspend Plaintiff's obligation under this Court's interpretation of the settlement agreement. When the clock struck midnight on July 11, 2020, Plaintiff's performance was due, as a result Smith's was not.

EXHIBIT 4

an option to purchase real property could not be extended despite ongoing and continued litigation). Likewise, simply because an appeal has been perfected, does not mean a party is relieved from its duty to take action to preserve the justiciability of a case. The Supreme Court's ruling in *Utley v. S. W. Wilson & Sons*, 205 S.C. 469, 471 (1944) is instructive here. There, the issue on appeal was whether an option to purchase real property was valid; however, the option holder did not appeal a portion of the final order that directed the property to be sold to someone else. *Id.* As a result, the unappealed portion of Order, coupled with the passage of time, operated to render the issue moot because the option holder failed to fully protect his claim. *Id.*

Even if the Court of Appeals were to affirm this Court's finding that Plaintiff had until July 11, 2020, to deliver payment, because that date has come and gone the issue is now purely academic. In other words, it is impossible for Plaintiff to perform, therefore it is impossible to compel specific performance. Moreover, it is of no consequence why Plaintiff did not pay before July 11, 2020, because the analysis would not change. First, Plaintiff's non-payment cannot be blamed on a failure of a condition precedent because Plaintiff did not appeal the Order which finds no condition precedent. Second, Plaintiff's failure to pay must not be for lack of ability because that would mean specific performance was improper to begin with. *See Ingram,* 340 S.C. at 106, 531 S.E.2d at 291 (*supra*). Third, Plaintiff's failure to pay cannot be because the matter was appealed because the judgment was not stayed by the appeal. *See* S.C. Code Ann. § 18-9-170; S.C. Code Ann. § 18-9-130(A). Thus, it can only be that the failure to pay was voluntary, and it is axiomatic that voluntary non-performance justifies the granting this motion. *See* Rule 60(b)(5) (providing for relief where judgment has been released or discharged).

Regardless, and even if there were a basis for this non-payment, the law provides a party that might be prejudiced by the passage of time during an appeal with various forms of redress to

EXHIBIT 4

preserve their rights and the justiciability of a case to prevent it from becoming moot. For example, a party can petition for a supersedeas order "to prevent a contested issue from becoming moot." Rule 241(c)(1), SCACR; *see also Berry v. Ianuario*, 281 S.C. 21, 314 S.E.2d 308 (1983) (ordering writ of supersedeas because it was necessary in order to prevent the appeal from becoming moot). Alternatively, where a judgment directs the payment of money or the sale of real property, neither of which are stayed on appeal, a party may seek a stay. *See* Rule 241(b)(1) &(b)(4). Another option would permit a party, such as Plaintiff, to timely tender performance and attempt to execute its judgment, thereby forcing Smith to seek a stay. *See* S.C. Code Ann. §18-9-160 or §18-9-170. Yet another option would permit Plaintiff to timely tender performance and then pursue a contempt order against Smith. *See* S.C. Code § 15-35-180. However, Plaintiff exercised none of these remedies and once the case became moot on July 12, 2020, those avenues were closed.

Having failed to tender the funds within the time required the issue is no longer justiciable because, as the saying goes, Plaintiff has no skin in the game. Whether or not Plaintiff's payment was required on or before July 11, 2020—or some earlier date as Defendant claims—has now become a purely academic question. Moreover, it would simply be inequitable to allow the Order to afford Plaintiff additional time to pay when the relief requested and obtained—i.e., specific performance—required he stand ready willing and able to perform as was represented to the Court. *See* Rule 65(b)(5), SCRCP (permitting relief from judgement where it would "no longer be equitable that [it] have prospective application"). Therefore, this Court should grant Defendant's motion and find the Order is now expired and of no effect.

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Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By: s/ TJ Rode

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Phone: 843-937-8000
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Email: thomas@tktlawyers.com
Attorneys for Plaintiff

Charleston, South Carolina

End of

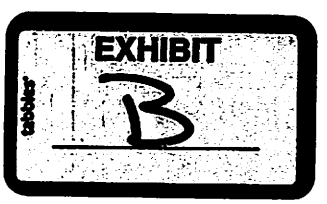

EXHIBIT 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Civil Action No.: 2019-CP-15-00218
COUNTY OF COLLETON	)	Appellate Case No.: 2020-00607
	)	
Larry Rahn,	)	
	)	
Plaintiff,	)	**Affidavit of Barbara Smith**
	)	
vs.	)	
	)	
Barbara Smith,	)	
	)	
	)	
Defendant.	)	

UPON being duly sworn, and under penalty of perjury, I, Barbara Smith, herein state as follows:

1. I am over the age of eighteen and competent to understand the oath I have taken and make this affidavit knowing it will be submitted to a court in the above-captioned matter, and unless stated to be upon information and belief, I have personal knowledge of those things stated herein.
2. I am the Defendant in the above-captioned matter.
3. Pursuant to the Court's Order of December 3, 2019, I was to convey my property upon the payment of $312,000.00; however I have not received that payment.

END AFFIDAVIT

By: Barbara R. Smith
Barbara R. Smith, ~~Esq.~~ BRS

Sworn to and subscribed before me,
This 1 day of October, 2020.

Ashley W McMahon
Notary Public
For the State of NC

My commission expires: May 19, 2025

ASHLEY W McMAHON NOTARY PUBLIC BUNCOMBE COUNTY, NC

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Civil Action No.: 2019-CP-15-00218
COUNTY OF COLLETON	)	Appellate Case No.: 2020-00607
	)	
Larry Rahn,	)	
	)	
Plaintiff,	)	**Affidavit of**
	)	**Gregory E. Parker, Jr., Esq.**
vs.	)	
	)	
Barbara Smith,	)	
	)	
Defendant.	)	

UPON being duly sworn, and under penalty of perjury, I, Gregory E. Parker, Jr., herein state as follows:

1. I am over the age of eighteen and competent to understand the oath I have taken and make this affidavit knowing it will be submitted to a court in the above-captioned matter, and unless stated to be upon information and belief, I have personal knowledge of those things stated herein.

2. I am an attorney, in good standing, and licensed to practice law in the state of South Carolina, and I represented and continue to represent the Defendant in the above-captioned matter.

3. The Court's December 3, 2019 Order directed that Plaintiff was to deliver $312.000.00 to Defendant on or before July 11, 2020; however, that payment has not been delivered to me nor my client.

4. As of this date I have not received any notice that this payment was deposited with the Court or other escrow agent, nor have I received notice that Plaintiff has sought a stay of the Court's December 3, 2019 Oder, nor have I received notice of the filing of any application or writ of supersedeas.

END AFFIDAVIT

By: _____
Gregory E. Parker, Jr., Esq.

Sworn to and subscribed before me.
This 2 day of October, 2020.

Sara Nicole Chapman
Notary Public
For the state of South Carolina

My commission expires: 10-22-25

EXHIBIT 4

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Common Pleas Court Case No. 2019-CP-15-00218
Appellate Case No. 2020-00607

Larry Rahn.....Respondent

vs.

Barbara Smith .....Appellant

PROOF OF SERVICE

I, hereby certify that the enclosed was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on this day and properly posted for delivery to the following addresses:

Ronnie L. Crosby
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924

and

Gregory E. Parker
609 Sims Avenue
Columbia, SC 29205

THURMOND KIRCHNER & TIMBES, P.A.

Adam Smith
Paralegal to Thomas J. Rode
Charleston, South Carolina
Dated: September 3, 2020

EXHIBIT 4

THURMOND KIRCHNER
& TIMBES, P.A.

www.TKTLawyers.com

October 2, 2020

VIA US MAIL, FAX, AND EMAIL
Jenny Abbott Kitchings, Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211
(F) 803-734-1839
ctappfilings@sccourts.org

Re: Larry Rahn v. Barbara Smith
Appellate Case No. 2020-000607

Dear Honorable Kitchings:

Enclosed please find Appellant's Motion for Leave to File Motion Pursuant to Rule 60(b)(5) and Motion for Relief from Judgment Rule 60(b) for filing in the above-referenced matter. In addition, I have enclosed a check (#21453) for $50.00 for the filing fee.

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.

Adam Smith
Paralegal to Thomas J. Rode

/ags
Enc. As Stated

CC: Ronnie Crosby and Gregory Parker

EXHIBIT 4

RECEIVED
Nov 07 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III
Circuit Court Judge

The Honorable Bentley D. Price
Circuit Court Judge

Consolidated Appellate Case No. 2020-00607

Larry Rahn, ……Respondent,

v.

Barbara Smith, ……...Appellant.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Appellant's Return to Respondent's Motion to Dismiss** to all counsel of record on November 7, 2022, by mailing a copy of the same, electronically or with proper postage affixed thereto, as follows:

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