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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.: 2020-000607

Larry Rahn, ...Respondent,

v.

Barbara Smith, ...Appellant.

RECORD ON APPEAL

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Attorneys for Appellant

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Hampton, SC 29924
Attorneys for Respondent

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PART 1

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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:

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.

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 the terms of the Settlement Agreement 2 on or before

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



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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2019-CP-15-00218
COUNTY OF COLLETON	)	
	)	
LARRY RAHN,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO RECONSIDER
Plaintiff,	)	
vs.	)	
	)	
BARBARA SMITH,	)	
	)	
Defendant.	)	

This matter came before the Court on Defendant's Motion to Reconsider the Court's Order granting Plaintiff's motion for summary judgment, dated December 3, 2019. Defendant's Motion for Reconsideration was filed on December 13, 2020. However, pursuant to Rule 59(g), SCRPC, Defendant was required to provide a copy of the Motion to the judge within ten (10) days after the filing of the Motion to Reconsider. No such copy was provided within the ten (10) days.

As such, this Court respectfully denies Defendant's Motion to Reconsider.

IT IS SO ORDERED.

Walterboro, SC

Judge Perry M. Buckner, III



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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2019-CP-15-_____
LARRY RAHN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<u>SUMMONS</u>
	)	Specific Performance
	)	
BARBARA SMITH,	)	
	)	
Defendant.	)	

TO THE ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at P.O. Box 457, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____ s/Ronnie L. Crosby
Ronnie L. Crosby
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

March 20, 2019
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2019-CP-15-_____
LARRY RAHN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<u>COMPLAINT</u>
	)	Specific Performance
BARBARA SMITH,	)	
	)	
Defendant.	)	

The Plaintiff alleges as follows:

1. That he is a resident of Colleton County and one of the heirs of the Estate of Marvin Rahn.
2. That the Defendant is a resident of Ashville, North Carolina and is also an heir to The Estate of Marvin Rahn.
3. That the remaining heirs of the Estate of Marvin Rahn are Loretta Harriett and Brantley Vernon Rahn.
4. That Brantley Vernon Rahn is deceased and his Estate passed to Kenneth Rahn and Nancy Crosby.
5. That Marvin Rahn died testate leaving his Estate to be divided equally among his four children.
6. That at his death Marvin Rahn owned approximately 444 acres of real property in Colleton County.
7. That the heirs of Marvin Rahn could not agree on a division of the real property.
8. That a mediation was had wherein the mediator (Reaves McLeod) worked a

resolution of the property division. A copy of the signed mediation agreement is attached as Exhibit "A".

9. That a survey and deed have been prepared per the mediation agreement. A copy of the deed is attached as Exhibit "B".

10. That the Defendant has partially complied with the remainder of the mediation Agreement by signing the deed dividing the "Glover" tract but refuses to comply complete compliance of the agreement.

11. That all other parties are ready, willing and able to execute the deed.

12. The Plaintiff seeks to compel the Defendant to execute the deed in performance of the obligation she agreed to in the mediation agreement.

13. The Plaintiff seeks attorney's fees, costs and damages associated with Defendant's refusal to comply with the mediation agreement.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Ronnie L. Crosby
Ronnie L. Crosby
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

March 20, 2019
Hampton, South Carolina

The Estate Land of Marvin F. Rahn
Glover Place Tract +/- 132 Acres

SETTLEMENT AGREEMENT I

The tract of land in question, as depicted in the attached map, is deeded as follows: ¼ interest to Loretta R. Harriett, ¼ interest to Larry L. Rahn, ¼ interest to Barbara R. Smith, 1/8 interest to Kenneth Rahn and 1/8 interest to Nancy R. Crosby. Upon signing of this Settlement Agreement, the land shall be divided as follows:

1. Loretta R. Harriett, Larry L. Rahn, Barbara R. Smith, Kenneth F. Rahn and Nancy R. Crosby will deed their interest to this property from south side of established field road, on north end of tract, to current property line, as the field road outlined in blue depicts, to Kenneth F. Rahn.
2. Kenneth F. Rahn will deed his interest in the 7.1 acre tract, 1 acre tract and .4 acre along Varnadoe Road, labeled as "B" to Loretta R. Harriett.
3. Larry L. Rahn, Barbara R. Smith, Kenneth F. Rahn and Nancy R. Crosby will deed their interest in the "Glover Tract" labeled "A" to Loretta R. Harriett, in exchange for her relinquishment of her interest in the "Home Place Tract".
4. Kenneth F. Rahn will grant a permanent easement to Loretta R. Harriett running along the established field road, on the north end of the tract, as the outline in blue depicts.
5. Loretta R. Harriett, Larry L. Rahn, Barbara R. Smith, Kenneth F. Rahn, Nancy R. Crosby and Paula R. Reel all have ownership of a 1.9 acre tract, labeled "C", and will deed their interests to Loretta R. Harriett.
6. Each party is responsible for their own deed and plat preparation, as well as surveying cost or other cost necessary.

Loretta R. Harriett Date: 11-20-15
Loretta R. Harriett

Paula R. Reel

Larry L. Rahn Date: 11-20-15
Larry L. Rahn

J. Reaves McLeod, Mediator

Barbara R. Smith Date: 11/20/2015
Barbara R. Smith

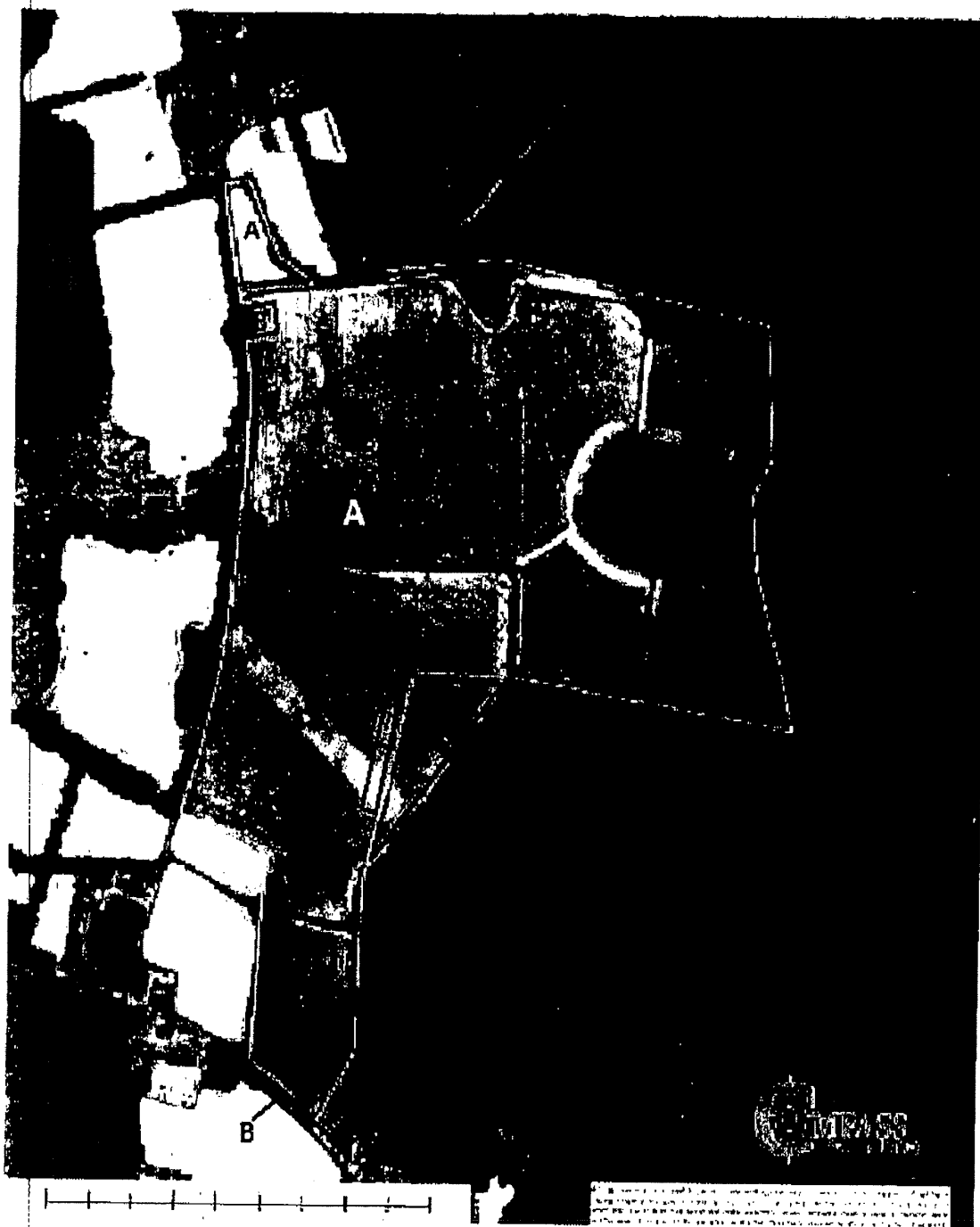
Kenneth Rahn Date: 11-20-15
Kenneth Rahn

Nancy R. Crosby Date: _____
Nancy R. Crosby



Glover Place Tract

Adnah Church Road Tract +/- 132 Acres



The Estate Land of Marvin F. Rahn
Home Place Tract +/- 296 Acres

SETTLEMENT AGREEMENT 2

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.
2. Each party is responsible for their own deed and plat preparation, as well as surveying cost or other cost necessary.

Larry L. Rahn Date: 11-20-15
Larry L. Rahn

Barbara R. Smith Date: Nov. 20, 2015
Barbara R. Smith

Kenneth F. Rahn Date: 11-20-15
Kenneth F. Rahn

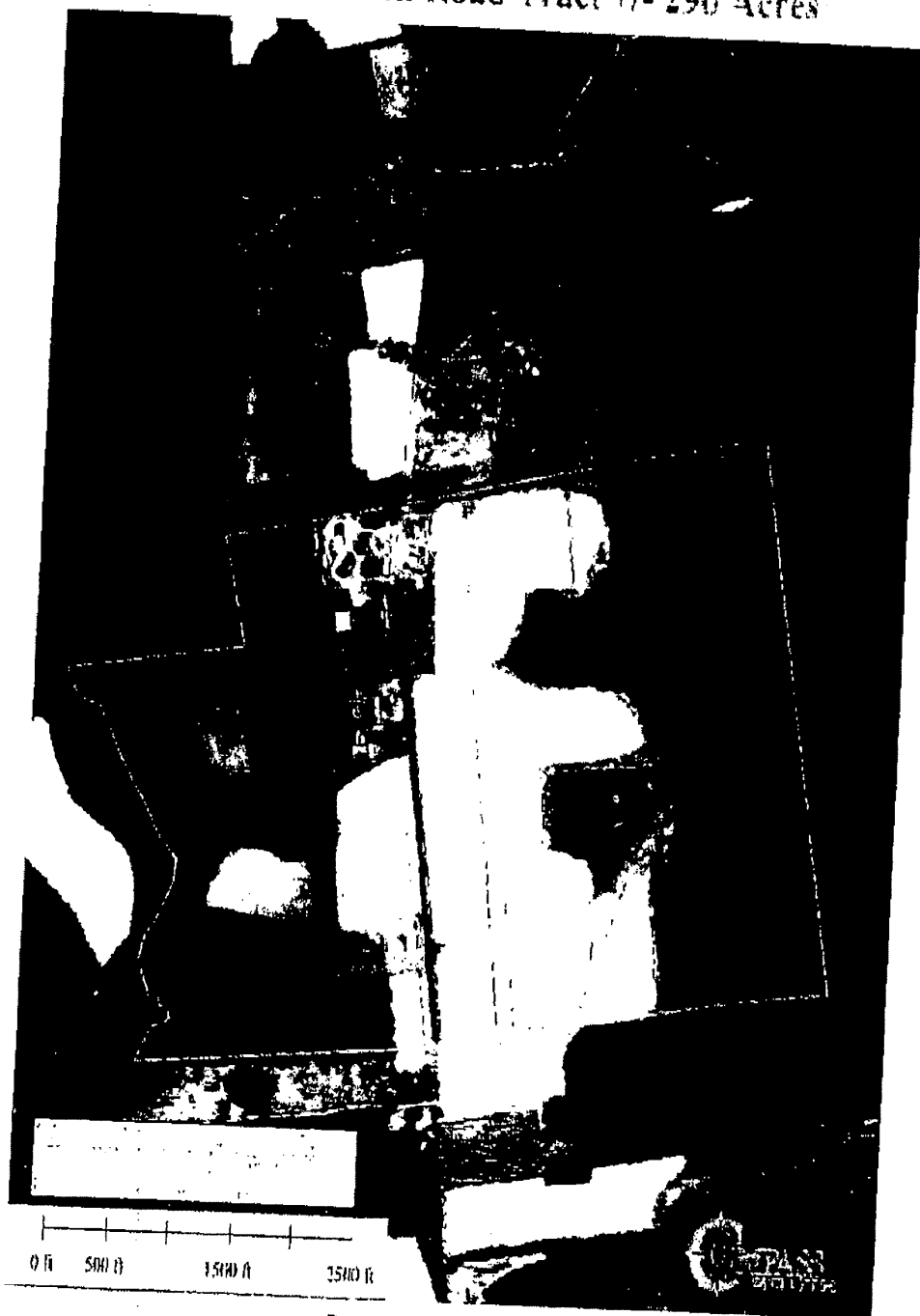
Nancy R. Crosby Date: 11-20-15
Nancy R. Crosby

F. Reaves McLeod Date: _____
F. Reaves McLeod, Mediator

Compass South Appraisals

Home Place Tract

Adnah Church Road Tract +/- 296 Acres



Compass South, Inc.

This Deed was prepared without benefit of title examination by:

Anderson & Brown, LLC
807 1st Street West
Hampton, SC 29924
803.943.2483
Our File # 16-11172

Grantee's Address: _____

Space above this line for recording information only

STATE OF SOUTH CAROLINA	)	
	)	TITLE TO REAL ESTATE
COUNTY OF COLLETON	)	(Quit-Claim Deed)

KNOW ALL MEN BY THESE PRESENTS, That **BARBARA R. SMITH, NANCY R. CROSBY, LARRY L. RAHN, and KENNETH F. RAHN**, hereinafter referred to as GRANTOR, in the State aforesaid, County aforesaid, in consideration of the sum of FIVE AND NO/100 (\$5.00) DOLLARS AND PARTITION OF PROPERTY, to him/her/them/it paid by **LORETTA R. HARRIETT**, hereinafter referred to as GRANTEE, in the State aforesaid, County aforesaid, (the receipt of which is hereby acknowledged), has remised, released and forever quit-claimed and by these presents does remise, release and forever quit-claim unto the GRANTEE, his/her/it/their heirs and assigns, in fee simple, all the right, title interest and claim which GRANTOR has or may have in and to the following described property:

All that certain piece, parcel or lot of land, situate, lying and being in Lodge School District, County of Colleton, State of South Carolina, containing 134.067 acres as shown on a plat prepared by Roy L. Green, PLS, dated 8-3-2007 and recorded 1-3-2014 in Plat Book 884 at Page 2 in the RMC Office for Colleton County. For a more complete description of said property as to courses, distances, metes and bounds, reference is craved to said plat of record.

LESS AND EXCEPTING: 8.787 acres shown as Parcel #2 on a plat by Wyman L. Maner, PLS# 29501 dated June 17-23, 2016 and recorded in Plat Book _____ page _____, office of the Register of Deeds for Colleton County, SC.

TMS#: 158-00-00-005



This is a portion of the property devised to Brantley Vernon Rahn, et al from the Estate of M.F. Rahn who died testate January 16, 1968 as evidenced by devise/descent filed in Book 30 at Page 23 in the Probate Court for Colleton County. Brantley Vernon Rahn died June 7, 2011 and devised his interest to Nancy R. Crosby and Kenneth F. Rahn as evidenced by Colleton County Probate File 2011-ES-15-0230 and Deed of Distribution recorded January 12, 2016 in Deed Book 2386 page 264, office of the register of Deeds for Colleton County, SC.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, his/her/it/their heirs and assigns, in fee simple, so that neither the said GRANTOR nor his/her/it/their heirs, nor any other person or persons claiming under his/her/it/their name shall at any time hereafter, by any way or means, have claim or demand any right or title to the aforesaid premises or appurtenances, or any part of parcel thereof, forever.

Any reference in this instrument to the singular shall include the plural, vice versa. Any reference to one gender shall include the others, including the neuter. Such words of inheritance shall be applicable as are required by the Gender of the Grantee, including the substitution of the term "Successors" for "Heirs" as appropriate, and vice-versa.

- REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK -

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 26th day of

July, 2017 In the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Elin M. Hagan

Barbara R. Smith
Barbara R. Smith

Clifton J. Pryce

NORTH CAROLINA
STATE OF SOUTH CAROLINA)
COUNTY OF BUNCOMBE)

ACKNOWLEDGMENT

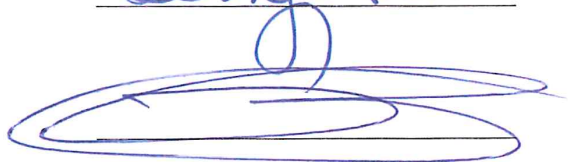
The foregoing instrument was acknowledged before me this 26 day of

July, 2017 by Barbara R. Smith.



William S. Presley
Notary Public of South Carolina
My Commission Expires: June 8, 2021

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of July in the Year of our Lord two thousand and seventeen.
SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

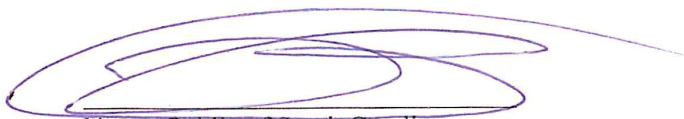
Serry Starnett


Nancy R Crosby
Nancy R. Crosby

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of July, 2017 by Nancy R. Crosby.


Notary Public of South Carolina
My Commission Expires: 10-20-24

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

[Signature]

[Signature]
Larry L. Rahn

[Signature]

STATE OF SOUTH CAROLINA)

COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of

July, 2017 by Larry L. Rahn



[Signature]
Notary Public of South Carolina
My Commission Expires: 10/20/26

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

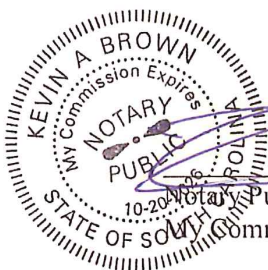
Larry Harriett

Kenneth F. Rahn
Kenneth F. Rahn

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of
July, 2017 by **Kenneth F. Rahn**.



This Deed was prepared without benefit of title examination by:

Anderson & Brown, LLC
807 1st Street West
Hampton, SC 29924
803.943.2483
Our File # 16-11172

Grantee's Address: _____

Space above this line for recording information only

STATE OF SOUTH CAROLINA	)	
	)	TITLE TO REAL ESTATE
COUNTY OF COLLETON	)	(Quit-Claim Deed)

KNOW ALL MEN BY THESE PRESENTS, That **BARBARA R. SMITH, NANCY R. CROSBY, LARRY L. RAHN, and LORETTA R. HARRIETT**, hereinafter referred to as GRANTOR, in the State aforesaid, County aforesaid, in consideration of the sum of FIVE AND NO/100 (\$5.00) DOLLARS AND PARTITION OF PROPERTY, to him/her/them/it paid by **KENNETH F. RAHN**, hereinafter referred to as GRANTEE, in the State aforesaid, County aforesaid, (the receipt of which is hereby acknowledged), has remised, released and forever quit-claimed and by these presents does remise, release and forever quit-claim unto the GRANTEE, his/her/it/their heirs and assigns, in fee simple, all the right, title interest and claim which GRANTOR has or may have in and to the following described property:

All those certain pieces, parcels or tracts of land, situate, lying and being in Lodge School District, County of Colleton, State of South Carolina, containing 8.787 acres shown as Parcel #2 on a plat by Wyman L. Maner, PLS# 29501 dated June 17-23, 2016 and recorded in Plat Book _____ page _____, office of the Register of Deeds for Colleton County, SC. This plat is incorporated into and made a part of this description by reference. For further description as to courses, distances, metes and bounds, reference is made to the plat.

Together with the right to use the existing road in its entirety across the parent tract in order to harvest timber from the Grantee's property, including the adjoining property of Grantee, and to remove the timber across the parent tract. Grantee will repair any damage to the parent tract and will restore the roads to as good a condition as they were in prior to their use by the Grantee. The

parent tract referenced herein is a tract containing 134.067 acres as shown on a plat prepared by Roy L. Green, PLS, dated 8-3-2007 and recorded 1-3-2014 in Plat Book 884 at Page 2 in the RMC Office for Colleton County. This easement shall run with the land as an appurtenant easement for the benefit of the property conveyed as well as for the benefit of the adjoining tract of the Grantee, and his heirs, successors and assigns.

TMS#: 158-00-00-005

This is a portion of the property devised to Brantley Vernon Rahn, et al from the Estate of M.F. Rahn who died testate January 16, 1968 as evidenced by devise/descent filed in Book 30 at Page 23 in the Probate Court for Colleton County. Brantley Vernon Rahn died June 7, 2011 and devised his interest to Nancy R. Crosby and Kenneth F. Rahn as evidenced by Colleton County Probate File 2011-ES-15-0230 and Deed of Distribution recorded January 12, 2016 in Deed Book 2386 page 264, office of the register of Deeds for Colleton County, SC.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, his/her/it/their heirs and assigns, in fee simple, so that neither the said GRANTOR nor his/her/it/their heirs, nor any other person or persons claiming under his/her/it/their name shall at any time hereafter, by any way or means, have claim or demand any right or title to the aforesaid premises or appurtenances, or any part of parcel thereof, forever.

Any reference in this instrument to the singular shall include the plural, vice versa. Any reference to one gender shall include the others, including the neuter. Such words of inheritance shall be applicable as are required by the Gender of the Grantee, including the substitution of the term "Successors" for "Heirs" as appropriate, and vice-versa.

- REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK -

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 26th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Erin M. Ryan

Christopher Ryan

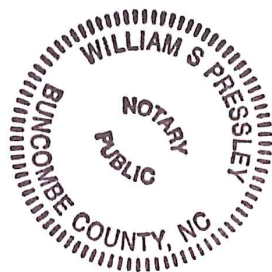
Barbara R. Smith
Barbara R. Smith

NORTH
STATE OF ~~SOUTH~~ CAROLINA)
COUNTY OF BUNCOMBE)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 26 day of

July, 2017 by Barbara R. Smith.



William S. Presley
Notary Public of ~~South~~ Carolina
My Commission Expires: June 8, 2021

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Jerry Hamnett

Nancy R. Crosby
Nancy R. Crosby

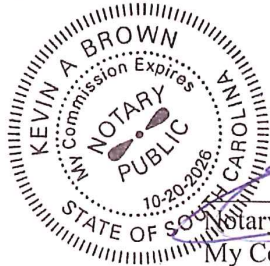
[Signature]

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of

July, 2017 by Nancy R. Crosby.

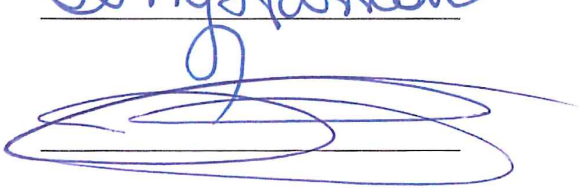


[Signature]
Notary Public of South Carolina
My Commission Expires: 10-20-26

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Jerry Harriott


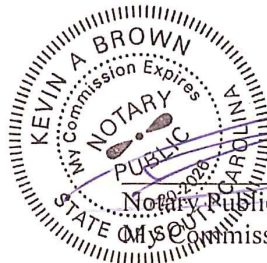
Larry L. Rahn
Larry L. Rahn

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of

July, 2017 by **Larry L. Rahn.**



Notary Public of South Carolina
My Commission Expires: 10/2026

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this ____ day of _____ in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Loretta R. Harriett

STATE OF SOUTH CAROLINA)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this ____ day of _____, 2017 by **Loretta R. Harriett**.

Notary Public of South Carolina
My Commission Expires: _____

This Deed was prepared without benefit of title examination by:

Anderson & Brown, LLC
807 1st Street West
Hampton, SC 29924
803.943.2483
Our File # 16-11172

Grantee's Address: _____

Space above this line for recording information only

STATE OF SOUTH CAROLINA	)	
	)	TITLE TO REAL ESTATE
COUNTY OF COLLETON	)	(Quit-Claim Deed)

KNOW ALL MEN BY THESE PRESENTS, That **BARBARA R. SMITH, NANCY R. CROSBY, PAULA R. REEL, LARRY L. RAHN, and KENNETH F. RAHN**, hereinafter referred to as GRANTOR, in the State aforesaid, County aforesaid, in consideration of the sum of FIVE AND NO/100 (\$5.00) DOLLARS AND PARTITION OF PROPERTY, to him/her/them/it paid by **LORETTA R. HARRIETT**, hereinafter referred to as GRANTEE, in the State aforesaid, County aforesaid, (the receipt of which is hereby acknowledged), has remised, released and forever quit-claimed and by these presents does remise, release and forever quit-claim unto the GRANTEE, his/her/it/their heirs and assigns, in fee simple, all the right, title interest and claim which GRANTOR has or may have in and to the following described property:

All that certain piece, parcel or lot of land, situate, lying and being three miles Southeast of Islandton, County of Colleton, State of South Carolina, containing 1.9 acres, more or less, as shown on a plat prepared by W. Gene Whetsell, RLS, dated 9-6-1978 and recorded in Plat Book 19 at Page 98 in the RMC Office for Colleton County. For a more complete description of said property as to courses, distances, metes, and bounds, references id craved to said plat for record.

This being the same property conveyed to B. Vernon Rahn aka Brantley Vernon Rahn, Larry L. Rahn, Loretta R. Harriett, Barbara Ann Smith and Myrtie S. Rahn by deed of Francis W. Varnadoe dated 5-8-1979 and recorded 5-15-1979 in Deed Book 200 at Page 656 in the RMC Office for Colleton County. Brantley Vernon Rahn died June 7, 2011 and devised his interest to Nancy R. Crosby and Kenneth F. Rahn as evidenced by Colleton County Probate File 2011-ES-

15-0230 and Deed of Distribution recorded April 10, 2013 in Deed Book 2109 page 6, office of the register of Deeds for Colleton County, SC. Myrtie S. Rahn died June 17, 2006 and devised her interest to Barbara R. Smith et al. as evidenced by Colleton County Probate File 2006-ES-15-00170 and Deed of Distribution recorded October 16, 2008 in Deed Book 1694 page 29, office of the Register of Deeds for Colleton County, SC.

TMS# 158-00-00-085

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, his/her/it/their heirs and assigns, in fee simple, so that neither the said GRANTOR nor his/her/it/their heirs, nor any other person or persons claiming under his/her/it/their name shall at any time hereafter, by any way or means, have claim or demand any right or title to the aforesaid premises or appurtenances, or any part of parcel thereof, forever.

Any reference in this instrument to the singular shall include the plural, vice versa. Any reference to one gender shall include the others, including the neuter. Such words of inheritance shall be applicable as are required by the Gender of the Grantee, including the substitution of the term "Successors" for "Heirs" as appropriate, and vice-versa.

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IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 26th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Tim M. Ryan

Barbara R. Smith
Barbara R. Smith

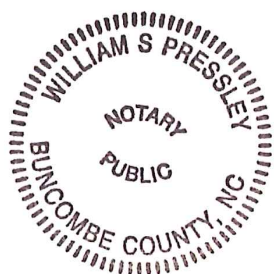
Clifford L. Ryan

STATE OF ^{NORTH} SOUTH CAROLINA)
COUNTY OF Buncombe)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 26 day of

July, 2017 by Barbara R. Smith.



William S. Presley
Notary Public of South Carolina
My Commission Expires: June 8, 2021

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

Sely in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Wong Hornett

Nancy R. Crosby
Nancy R. Crosby

[Signature]

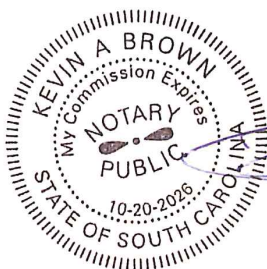
STATE OF SOUTH CAROLINA)

ACKNOWLEDGMENT

COUNTY OF Hydron)

The foregoing instrument was acknowledged before me this 17th day of

Sely, 2017 by Nancy R. Crosby.



[Signature]
Notary Public of South Carolina
My Commission Expires: 10-20-2026

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this ____ day of _____ in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Paula R. Reel

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this ____ day of _____, 2017 by Paula R. Reel.

Notary Public of South Carolina
My Commission Expires: _____

IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of July in the Year of our Lord two thousand and seventeen.
SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Larry L. Rahn
Larry L. Rahn

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of July, 2017 by Larry L. Rahn.



IN WITNESS whereof the Grantor has set his/her/its/their hand and seal this 17th day of

July in the Year of our Lord two thousand and seventeen.

SIGNED, SEALED & DELIVERED
IN THE PRESENCE OF:

Jerry Harriott

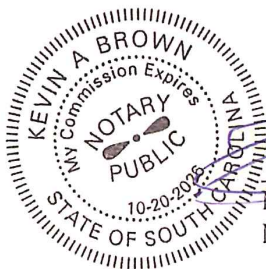
Kenneth F. Rahn
Kenneth F. Rahn

STATE OF SOUTH CAROLINA)
COUNTY OF Hampton)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 17th day of

July, 2017 by Kenneth F. Rahn.



[Signature]
Notary Public of South Carolina
My Commission Expires: 10-20-2026

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

Defendant Barbara Smith respectfully answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE
(General and Specific Denials)

1. Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. Defendant admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9.
3. Defendant admits the allegations contained in Paragraph 10 to the extent that she signed the deed dividing the "Glover" tract but denies the remaining allegations contained in Paragraph 10 and demands strict proof thereof.
4. Defendant is without sufficient information to admit or deny the allegations in paragraph 11.
5. Defendant denies the allegations in Paragraph 12 and asserts that she has fully performed the enforceable obligations she agreed to in the mediation agreement.
6. Defendant denies the allegations in Paragraph 13 and demands strict proof thereof.

FOR A SECOND DEFENSE
(Failure to Perform/Pay Consideration)

7. Defendant adopts the allegations contained hereinabove, where relevant, as fully as if repeated herein verbatim.

8. In the mediated agreement attached as “Exhibit A” to Plaintiff’s Complaint, Defendant agreed to convey her interest in the “Home Place Tract” to Plaintiff, Kenneth F. Rahn, and Nancy R. Crosby, in exchange for Three Hundred and Twelve Thousand and 00/100 (\$312,000.00) Dollars to be paid within twenty four (24) months of the mediated agreement.
9. The mediated agreement was executed on November 20, 2015.
10. The twenty-four (24) month time period expired on or about November 20, 2017.
11. Plaintiff, Kenneth F. Rahn, and Nancy R. Crosby failed to timely pay the agreed upon Three Hundred and Twelve Thousand and 00/100 (\$312,000.00) Dollars.
12. Defendant’s agreement to convey her interest in real property was contingent upon receipt of the Three Hundred and Twelve Thousand and 00/100 (\$312,000.00) Dollars.
13. Therefore, the mediated agreement (identified as “Settlement Agreement 2”) is no longer enforceable.

FOR A THIRD DEFENSE
(Statute of Limitations)

14. Defendant adopts the allegations contained hereinabove, where relevant, as fully as if repeated herein verbatim.
15. The mediated agreement was executed on November 20, 2015.
16. Plaintiff’s Complaint was filed on March 20, 2019.
17. Plaintiff’s claims are barred by the applicable statute of limitations.

FOR A FOURTH DEFENSE
(Equitable Defenses: Waiver, Estoppel, Ratification, Laches)

18. Plaintiff’s claims are barred by the equitable doctrines of waiver, estoppel, ratification, and laches.

FOR A FIFTH DEFENSE AND FIRST COUNTERCLAIM

19. Defendant requests the payment of attorney's fees by Plaintiff for having to defend this action.

WHEREFORE, Defendant prays the Complaint be dismissed and for such further relief as the court finds just and proper.

LAW OFFICE OF JERRY REARDON

By: s/Gregory E. Parker, Jr.
Gregory E. Parker, Jr.
Law Office of Jerry Reardon
1722 Main St, Ste. 302
P.O. Box 7464
Columbia, SC 29202
803-602-5242
Greg@jerryreardonlaw.com

May 27, 2019
Columbia, South Carolina

ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2019-CP-15-00218
LARRY RAHN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NOTICE OF MOTION
	)	AND
	)	MOTION FOR SUMMARY JUDGMENT
BARBARA SMITH,	)	
	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move, at a date and time set by the Court, for an order granting judgment in their favor. Pursuant to Rule 56 SCRPC the Plaintiff is entitled to judgment as a matter of law as there is no genuine issue of fact. This motion is based on the mediation agreement signed by the Plaintiff and Defendant which is attached hereto. Despite the Defendant's execution of the mediation agreement she has refused to comply with its terms. Plaintiff prays for an order granting the relief sought in his complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Ronnie L. Crosby
Ronnie L. Crosby
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

June 14, 2019
Hampton, South Carolina

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.

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.

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), SCRPC. “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

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), SCRPC.

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

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.

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).

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]

Respectfully submitted,

s/Gregory E. Parker, Jr.
GREGORY E. PARKER, JR.
SC Bar No. 101328
Law Office of Jerry Reardon
1722 Main Street, Ste 302
P.O. Box 7464
Columbia, South Carolina 29202
(803) 602-5242 | (803) 602-5243

Columbia, South Carolina
October 8, 2019

Attorney for Defendant

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

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, Ronnic 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 Ronnic 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

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 Decds 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

- 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.

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



State of South Carolina)
County of Colleton)

In Circuit Court of the
Ninth Judicial Circuit
2019-CP-15-00218

Larry Rahn,)

Plaintiff,)

vs.)

Barbara Smith,)

Defendant.)

Transcript of Record

Colleton, South Carolina
October 9, 2019

B E F O R E:

The Honorable Perry M. Buckner

A P P E A R A N C E S:

Mr. Gregory E. Parker, Jr., Esquire
Attorney for Plaintiff

Mr. Ronnie Crosby, Esquire
Attorney for Defendant

Becky Hill
Circuit Court Reporter

Transcribed by:
Lisa S. Carter

I N D E X

WITNESSESPAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(NO EXHIBITS INTRODUCED DURING HEARING)

1 THE COURT: This is 2019 at 00218 in Colleton.
2 Larry Rahn versus Barbara Smith. This is Mr. Crosby's
3 motion for summary judgment. That's not something I get
4 very often. I can't remember the last time Mr. Crosby made
5 a motion for a summary judgment, he's usually opposing
6 them. Present before me this morning is Mr. Ronnie Crosby
7 for the plaintiff and I had a little problem with your
8 copies Mr. Crosby because your motions based on a blue
9 line. And if you'll look at how the copies came out of
10 your exhibit it's impossible for me to tell where the blue
11 line is. I'm showing you. I don't know if that's gonna
12 become a ---

13 MR. CROSBY: It's not ---

14 THE COURT: --- a problem for this motion but I
15 couldn't tell. Present for the defendant is Gregory E.
16 Parker, Jr. This is Mr. Parker's, I mean, Mr. Crosby's
17 motion for summary judgment dated June 14, 2019 which was
18 on my Common Pleas motions roster for Colleton County last
19 Thursday which I continued at Mr. Parker's request because
20 he was in probate court and Mr. Crosby did not want to
21 consent to this. I can tell you that. In fact, when I had
22 my law clerk call Mr. Crosby he wanted to go forward on
23 this hearing and I insisted that we let - to accommodate
24 your schedule and because I knew my court was breaking down
25 this week - that I would reschedule it for this week which

1 was the only reason I believe Mr. Crosby consented because
2 he thinks there's some urgency to this motion.

3 All right, Mr. Crosby, you've got the floor. I'm
4 happy to hear from you but I can't understand because of
5 the way it copied I can't understand -- I read the written
6 mediation or, excuse me, it says Settlement Agreement but I
7 think it was a result of mediation. I read that. But when
8 I tried to put that together with what is called Glover
9 Place Tract, the Home Place Tract, I had difficulty because
10 of the way it's described and the wording of the Settlement
11 Agreement. Do you understand?

12 MR. CROSBY: I do, Your Honor. And that's not going
13 to be pertinent to this morning so.

14 THE COURT: All right.

15 MR. CROSBY: I apologize for any confusion. Your
16 Honor, this has been an ongoing matter throughout my legal
17 career. For 13 years I have been dealing with the division
18 of the Estate of Marvin Rahn. In 2015 ---

19 THE COURT: Why don't you give me a little
20 background because I don't think I've -- have I -- I don't
21 think I've heard anything ---

22 MR. CROSBY: You almost did.

23 THE COURT: I heard a road closing case but that
24 didn't involve the Rahn's. It involved a lady from
25 Islandton who was, later passed away. Do you know what I'm

1 talking about?

2 MR. CROSBY: I think that was maybe Ms. Godley.

3 THE COURT: Ms. Godley. Alina (sic) Godley?

4 MR. CROSBY: Yes.

5 THE COURT: Yeah. I have that but I don't remember
6 anything involving Mr. Rahn.

7 MR. CROSBY: So, Your Honor, Mr. Marvin Rahn died in
8 about 1969, late 60's.

9 THE COURT: According to the Settlement Agreement
10 he died in 1968.

11 MR. CROSBY: '68.

12 THE COURT: You wouldn't dispute that?

13 MR. CROSBY: No. And the family farmed all over
14 Colleton County - well, the two sons. They have four
15 children, Barbara and Loretta, Larry and Vernon. Vernon is
16 now deceased and he has the two children that survive him.
17 Well, Mr. Marvin Rahn died testate ---

18 THE COURT: Well, let's ---

19 MR. CROSBY: Well, actually his estate was never
20 probated. There was a life estate to I believe to Ms.
21 Myrtie Rahn, the widower. But we can jump forward from
22 there. They farm. Ms. Myrtie died about in 2006. And ---

23 THE COURT: She was the widow of ---

24 MR. CROSBY: Marvin and the mother of the four kids.
25 And, anyway, since that time the four kids have attempted

1 to divide the property. It was delayed somewhat because of
2 some judgments from the failed, ultimate failure of the
3 farm operation that the Rahn's ran. They ran into, you
4 know, troubles in the early 2000's and ended up going out
5 of business and there was some maybe judgments on some
6 supplies or something. They all realized that they were
7 better off to wait and let the judgment expire. Nobody
8 ever tried to execute on them. And then they got back into
9 trying to divide the property.

10 THE COURT: All right. Before you go any further,
11 now, I want you to tell me what you believe is what's
12 reflected because the Settlement Agreement attached to your
13 motion is dated 2015 and we're in 2019.

14 MR. CROSBY: That's correct.

15 THE COURT: Tell me what you believe is the current
16 status of the title to the land to the Estate of Marvin
17 Rahn because it's divided into the Glover Place Tract ---

18 MR. CROSBY: Right.

19 THE COURT: --- and it's also the Home Place Tract.

20 MR. CROSBY: There's two tracts of land. The Glover
21 Place Tract is - they're both own Adnah Church Road. The
22 Glover Place is ---

23 THE COURT: Hold on, I bet, Becky, do you know how
24 to spell that?

25 COURT REPORTER: I have that, yeah.

1 THE COURT: All right.

2 MR. CROSBY: The Glover Place is really adjacent to
3 Adnah Church. It's open land. It's really good farmland.
4 And that's reflected in that map. It's about 132 acres
5 there and then another half a mile down the road is the
6 Home Place. So it's all right there together, these two
7 tracts of land that we had to divide. There some timber on
8 the Glover Place, not much. I mean, there's timber on the
9 Home Place. And so they never could work out how to divide
10 the property. We finally sat down with Reeves McLeod and
11 did an mediation where everybody came. We sat down and
12 Reeves did a really good job of getting these folks,
13 although, it was very contentious and had been. I'm
14 talking even like where, you know, altercation, not
15 physical but very verbal altercations in the past over this
16 property. But, anyway, Reeves got it worked out where
17 Loretta got the Glover Place.

18 THE COURT: All right. Now, before you get to that
19 my question was what do you contend is what is reflected in
20 the Settlement Agreement where you contend to be the
21 present status of the property as to who has what share?

22 MR. CROSBY: Mmmm ---

23 THE COURT: It begins with one fourth interest of
24 Loretta Harriett. One fourth interest to Larry Rahn.
25 Quarter interest to Barbara Smith. Eighth interest to

1 Kenneth Rahn. Eighth interest to Nancy Crosby as to, and
2 I'm referring to the Glover Tract.

3 MR. CROSBY: That was at the time that this
4 agreement was entered.

5 THE COURT: All right.

6 MR. CROSBY: So let me give you just a little bit
7 more history. As part of this mediation and a part of them
8 trying to get this divided up we had an appraisal done by
9 Travis Avant's outfit and it came up with an appraised
10 value of approximately \$1.2 million per land and timber.
11 So we had that at the mediation. So we mediated and Reeves
12 got it. Everyone agreed that everybody would deed their
13 interest in the Glover Place to Loretta. And we had some
14 easements stuff and had to deal with that. So that was
15 dealing with the first piece. And then the other part was,
16 was pretty easy. Ms. Barbara ---

17 THE COURT: And you're referring to the Home Place?

18 MR. CROSBY: The Home Place was easy. Barbara
19 wanted money. She didn't land. And so she agreed to take
20 \$312,000. I think maybe it was more than one fourth of the
21 appraised value but they agreed to pay her more and then
22 there was a 24 month provision ---

23 THE COURT: All right. Now, you using those
24 pronouns on me again ---

25 MR. CROSBY: I'm sorry. That's ---

1 THE COURT: When you say we agreed ---

2 MR. CROSBY: That's ---

3 THE COURT: --- that they agreed. I'm not sure
4 because you've told me what's in this agreement isn't what
5 you contend to be the status today so bring me up-to-date.

6 MR. CROSBY: Okay. Larry, Kenny, and Nancy agreed
7 to pay her, to take title to the land of the Home Place and
8 that is set forth in that second page of the agreement and
9 that they would pay her \$312,000. So that's where we left
10 in 2000, November of 2015, November 20, 2015.

11 THE COURT: All right. So what you're telling me
12 is Larry, Kenneth, and Nancy were gonna receive Barbara's
13 interest in the Home Place?

14 MR. CROSBY: Right. And they were getting ---

15 THE COURT: For the sum of \$312,000?

16 MR. CROSBY: They were getting the land and she'd
17 get the money.

18 THE COURT: She got money.

19 MR. CROSBY: That's right.

20 THE COURT: And they got the land, the Home Place
21 land.

22 MR. CROSBY: Right.

23 THE COURT: Which you had an appraisal for?

24 MR. CROSBY: Had an appraisal.

25 THE COURT: And then you're saying that the

1 appraisal that the amount she was receiving was in excess
2 of ---

3 MR. CROSBY: Of one fourth.

4 THE COURT: --- of -- and at that point in time,
5 Mr. Crosby, when you say that I'm assuming that you're
6 saying that there were four interest in the Home Place?

7 MR. CROSBY: No. One fourth when the appraisal was
8 for the Glover Place and the ---

9 THE COURT: Oh, so the \$1.2 million included both
10 tracts?

11 MR. CROSBY: Right. So ---

12 THE COURT: All right. Well, what I'm asking now,
13 how many people had an interest in the Glover Place since
14 only three people are deeding or receiving from Barbara
15 Smith?

16 MR. CROSBY: Well, all of them -- all four siblings
17 and here it makes five people because Vernon's dead so
18 Kenney and Nancy - Kenneth and Nancy are his children. So
19 initially when we sat down there were four shares in it.
20 So in dividing the estate it was agreed that Loretta's
21 interest in the entire estate would be taken title to the
22 Glover Place. And then Barbara Rahn would get \$312,000 and
23 then title to the Home Place would be in the names of
24 Kenneth, Nancy, and Larry. And so they would get the dirt
25 and, basically, she would get the money. Well, after we

1 commenced to following through on these agreements such as
2 in Exhibit A it calls, you know, you talking about the blue
3 line, we had to do survey work to get all that done on the
4 ground. Loretta decided that she wasn't going to comply
5 with this mediation agreement. So, ultimately, I file suit
6 against her for specific performance just like action is.
7 She, ultimately on the eve of the hearing, she was
8 represented by Casey Campbell agreed to go through with
9 what she had agreed to in November of 2015. So following
10 that -- and we did notice it wasn't until the deeds have
11 been prepared by Kevin Brown. So, ultimately ---

12 THE COURT: Yeah, that suit was based on ---

13 MR. CROSBY: Exhibit A.

14 THE COURT: Yeah. But, I mean, Loretta would not,
15 she was to receive the Glover Tract, is that right?

16 MR. CROSBY: That's right. And then decided to ---

17 THE COURT: Which has been done now?

18 MR. CROSBY: It has been done after a lawsuit. So
19 -- and so in July of 2017 Kenneth, Larry, and Nancy and
20 Barbara Ann, and I have the deeds here, they deeded by
21 Quitclaim Deeds their interest in these properties that are
22 set forth in Exhibit A to Loretta. I finally got it done
23 after I had to file a lawsuit. And as part of that Kenneth
24 gave up interest in land that wasn't part of the estate as
25 well. There was a 7 acre tract that was in the middle of a

1 field. How it got out there? I don't know. But he owned
2 7 acres that was in the middle of the Glover Tract. So he
3 -- that was part of the agreement, okay, we're gonna give
4 you - give this to Loretta. So he, something that wasn't
5 part of the estate, but to get things worked out that was
6 done. So in July all of these deeds were executed. And so
7 the title of the Glover Place is now solely in Loretta
8 Harriett's name. From that point forward ---

9 THE COURT: I'm assuming that Barbara signed that
10 deed?

11 MR. CROSBY: She signed it. Larry signed it.
12 Everybody signed it. So everybody is going along with the
13 agreement. The plan was to once, you know, once this was
14 done to cut timber so they could give Barbara Ann the money
15 for her portion of the property which she now says that
16 wasn't a part of the deal but it was always that because
17 she knew Larry -- of course, she never made a demand for
18 the money. But she made -- she did this in July and then
19 once we started getting that process going she would not
20 cooperate whatsoever. We had good prices on the timber and
21 she just decided that she wanted more money than what she
22 had agreed to. And then she brought up the, if you look at
23 Exhibit B there is a 24 months indication there to deliver
24 the funds. And so she says, well y'all didn't deliver
25 within the 24 months so, therefore, I'm not going forward

1 with this agreement.

2 THE COURT: And where is the 24 months ---

3 MR. CROSBY: If you look at the settlement for the
4 Home Place.

5 THE COURT: Hold on. But I thought we ---

6 MR. CROSBY: And Loretta deeded her interest over to
7 them and her interest for the Home Place. So the Home
8 Place now is all we need to talk about ---

9 THE COURT: You're talking about paragraph number
10 one of the Home Place Settlement Agreement?

11 MR. CROSBY: Right. But once in July, that's part
12 of these deeds, Loretta deeded her interest to Kenneth,
13 Nancy, Larry, and Barbara. So now they own the Home Place
14 without any interest from Loretta. So the three interest
15 now are Kenny, Nancy, Larry, and Barbara in the Home Place.
16 And so as it says there in the first paragraph, "in light
17 of mediation, Loretta Harriett has relinquished her
18 interest". Well, Loretta Harriett did not relinquish her
19 interest until July of 2017. And, you know, -- and so the
20 way I read this and interpret this agreement is in the past
21 tense. So the 24 month period wouldn't've started running
22 until the deeds were executed until Loretta had relinquished
23 her interest because it didn't occur until July.
24 And once we set about to do this then Barbara Ann wouldn't
25 sign any contracts to cut timber and immediately went into

1 a different phase, I'm not doing that. I think it's worth
2 more money now. And so, ultimately, we filed this action
3 for specific performance to make her comply with what she
4 agreed to do back in November of 2015. We couldn't -- we
5 couldn't move forward with anything until Loretta had
6 deeded her interest that was contemplated in paragraph one.
7 Because it says. "in light of the mediation she has" but,
8 obviously, she didn't until July of 2017. And what this
9 action and what this motion is just to make her do what she
10 agreed to do because she had absolutely thwarted things by
11 her refusal to participate and sign, you know, giving
12 permission, you know, because she had an interest in it to
13 cut timber. And if she -- it's our position that if she
14 believes that the property has increased in value which,
15 you know, based on the information and Mr. Parker is
16 familiar with it that Todd Crosby was handling the timber
17 on it and he sent a letter saying he had ultimate, offered
18 timber prices that he had locked in which now they're gone
19 and the markets has gone down. But if she does have
20 remedy, if it is worth more now her remedy would be against
21 her sister for holding this up and causing that
22 fluctuation. But certainly we believe that we're entitled
23 to an order of a specific performance for her to comply
24 with this to what she agreed to in this mediation agreement
25 and to allow us to move forward in finishing up this

1 division of the property to get her her money. And that's
2 really what this is about is her asking her to do what she
3 agreed to do. And she's takes the technical position that,
4 well, you had until November of 2015 and essentially, our
5 interpretation to this is that this 24 month would not have
6 begun to run until Loretta signed those deeds and then we
7 did take action right after that. And then, you know, here
8 we are two years later still fighting about this because
9 she just absolutely decided that she wasn't going to
10 cooperate or not communicate with us at all once we started
11 getting this process going because I guess she's under the
12 belief that, that this thing had expired. Which really the
13 interpretation of that, although, not that artfully crafted
14 by Reeves but he wasn't contemplating this because
15 everybody was in such an agreement on this side of things
16 at that time, you know, he probably could have been more
17 specific about some things but, um, ---

18 THE COURT: Is it your position that Larry, Kenny
19 and Nancy stood ready to deed or receive and pay Barbara
20 Smith the \$312,000 as contemplated by the Settlement
21 Agreement within two years of November 15th or November 20,
22 2015?

23 MR. CROSBY: If -- if -- if the condition precedent
24 would have been met ---

25 THE COURT: Which was?

1 MR. CROSBY: Loretta deeding her interest over so
2 that that could move forward. Until Loretta deeded her
3 interest in July of 2017 this couldn't move forward because
4 it's predicated on Loretta doing that. And, unfortunately,
5 she caused us to have to file a lawsuit against her to get
6 her to do what she supposed to do, what she had agreed to
7 do. So it's our position that within the two years of July
8 of 2017 they certainly stood ready, willing, and able. And
9 it's a little bit more, Your Honor, because now they have
10 to their detriment sign these deeds over to Loretta, these
11 deeds in July of 2017 including a tract of land ---

12 THE COURT: You're referring to the Home Place?

13 MR. CROSBY: Well, no, I'm referring now back to the
14 Glover Place.

15 THE COURT: All right.

16 MR. CROSBY: You know, in reliance upon this, I
17 mean, they've already given up their interest in the Glover
18 Place including a 7 acre tract that wasn't a part of the
19 estate that Kenneth owned outright that he's giving up all
20 in reliance on Barbara's signatures as to being a party to
21 these deeds giving Loretta her fourth interest in the
22 estate which ended up being just being the Glover Place.
23 So, you know, all this was to work together. We know, one,
24 we've got to get Loretta out of it and get her interest out
25 of the Home Place which we did. We've got stacks of deeds

1 where that was all done. And then once that was done in
2 July of 2017, you know, that's our position when the clock
3 starts ticking. It doesn't say that they have 24 months to
4 deliver the funds to Barbara Mixon (sic) from the date of
5 November of 2015. It says -- it starts off "in light of
6 mediation where Loretta Harriett has relinquished" so until
7 that happened that 24 months couldn't start moving. And
8 certainly during this time, I mean, this could've all been
9 long over with if she would've just gone along with it.
10 They stood ready, willing, and able and still can, you
11 know, I'm getting calls regularly from the timber people
12 wanting to know the status of this because there ready to
13 fund but they're not gonna fund it, you know, they're not
14 gonna advance some money which they could tomorrow if she
15 would sign off on the timber, you know, allowing them to
16 cut timber, you know, the money is right there. It's just
17 -- and they have the advance ready to come but without her
18 signature nobody, no timber guys gonna unless you got all
19 the ownership, you know, I mean ---

20 THE COURT: How long was your quote good for?

21 MR. CROSBY: Oh that's expired now. I mean, they've
22 all lost money, you know, because of the prices, you know,
23 they're just going to have to cut more timber to pay her.
24 The prices ---

25 THE COURT: Was an order ever filed in the action

1 involving Loretta by the court or was it a settlement?

2 MR. CROSBY: It was pretty much just a settlement
3 because she agreed and I think there's an order dismissing
4 it. I don't think there's any -- I don't remember the
5 language of the order but it -- it -- I think it was more
6 that she precented to moving forward with it. It never was
7 heard from Stuart Casey, you know, looked at it and he got
8 her to agree finally at the eve of the hearing.

9 And so it's our position that once those deeds that
10 are, that are, that I have here have been recorded in June,
11 were signed in July of, July 17, 2017 that that's when this
12 24 month period would begin because that's when Loretta had
13 deeded her interest in the Home Place and they could
14 actually move forward with trying to do the second part of
15 the agreement which was dividing, you know, dividing the
16 Home Place. The Glover Place is gone. It's done. And,
17 you know, they given up their interest there. And now, you
18 know, we're pretty much back at the same spot and we're
19 trying, trying to get it completed. Somebody else in this
20 family has, you know, decided to fight them for a while and
21 they - all of them were in their 70's, probably close to
22 their 80's, been fighting about this, you know, last 13
23 years about how they're going to divide some property.
24 And, you know, that's our position on it, Your Honor. I
25 believe were entitled to an order ---

1 THE COURT: Thank you very much. Mr. Jacobs, let
2 me hear from you. If you'll come to my -- bring your file
3 if you want to, Ronnie try to stand between the two
4 microphones but I put the -- is it on Gerald?

5 (Whereupon, the bailiff answered yes, sir)

6 THE COURT: He's got it on for you. Bring your
7 file, set it up here so you don't have to carry it around.
8 Tape and pull the microphone over to you.

9 (Whereupon, the judge is trying to get the microphone
10 straight)

11 THE COURT: Happy to hear from you.

12 MR. PARKER: Thank you, judge. May it please, the
13 court? Greg Parker here for Barbara Smith. And, Your
14 Honor, I do have a memo and I did want to get this to you
15 ahead of time. If I may approach?

16 THE COURT: You may.

17 MR. PARKER: And I've attached to that is ---

18 THE COURT: Let the record reflect that I been
19 handed which I have not read a memorandum and opposition to
20 plaintiff's motion for summary judgment apparently prepared
21 by Mr. Jacobs and dated October 8, 2019.

22 MR. PARKER: Yes, Your Honor. And significantly
23 attached to that is an affidavit from my client which was
24 previously filed and anticipation for our motion for
25 summary judgment back in July. And so, obviously, it's

1 been given at least two days prior to this hearing. But,
2 you know, I don't know that -- I prefer to focus on the
3 contract itself. And, you know, contract law as you look
4 at the document and it speaks for itself and we shouldn't
5 take into account extrinsic evidence. I appreciate the
6 background that Mr. Crosby has provided but my client has a
7 different story about what was contemplated at mediation.
8 I really think we should be focusing on the contract
9 itself. When I first came on this I understood there to be
10 two separate contracts. Contract one, being the Settlement
11 Agreement 1. Contract two, being Settlement Agreement 2.
12 Different parties signed. Different things were going on.
13 If they were -- if they were all one big contract it
14 probably should have been on one document signed by all the
15 parties. It's my client's position ---

16 THE COURT: Well, we're talking about the heirs of
17 Marvin Rahn, are we not?

18 MR. PARKER: Yes, sir.

19 THE COURT: Regardless of whether you will -- I
20 understand that there is a Glover Tract and there's a Home
21 Place Tract but we're still talking about the people who
22 are the heirs of Marvin Rahn although that has changed a
23 little bit over the years according to Mr. Crosby so tell
24 me your position.

25 MR. PARKER: Yes, Your Honor, I believe looking at

1 the language on Settlement Agreement 2 which is what we're
2 here to talk about, my client was in a position to deed or
3 transfer title to her interest in the Home Place Tract in
4 exchange for \$312,000 as long as that took place within 24
5 months of this signed agreement. That's a plain reading of
6 the ---

7 THE COURT: It does not say within the signing of
8 the agreement, does it?

9 MR. PARKER: It does not, Your Honor. It's silent
10 on ---

11 THE COURT: That's your client's interpretation of
12 it and that's your argument to me but that's not what the
13 document says and you agree we're all bound by this
14 document?

15 MR. PARKER: Yes, Your Honor.

16 THE COURT: Okay. Go ahead.

17 MR. PARKER: Although, you know, my client's
18 position now is that it's no longer enforceable because
19 there was no consideration exchanged within the time period
20 it was struck. But I understand what you're saying. It
21 does not specifically say whether this 24 months runs from
22 the day of the agreement or runs from the date of ---

23 THE COURT: And Mr. Crosby argues that the document
24 began, you say it's separate, it does entitle itself
25 Settlement Agreement 2 but it involves all the same parties

1 ---

2 MR. PARKER: It does. Although, there's other ---

3 THE COURT: It starts with "in light of mediation
4 Loretta R. Harriett has relinquished her interest in the
5 Home Place property" which Mr. Crosby argues as the
6 condition precedent to Barbara Smith receiving the \$312,000
7 because they're all exchanging, some wanted land, some
8 wanted money, and some wanted one portion of the land, some
9 wanted farmland, some wanted the Home Place. I could see
10 that this was obviously quite a different interest in a
11 family about how to divide their father's property.
12 Wouldn't you agree with that, Mr. Parker?

13 MR. PARKER: Yes, Your Honor.

14 THE COURT: All right. So tell me now your defense
15 is predicated on the basis that this court would find that
16 this agreement would run 24 months from the date the
17 agreement was signed even though there is no explicit
18 language in that agreement to that effect. That is the way
19 your client interprets the agreement, is that correct?

20 MR. PARKER: Correct, Your Honor. It's silent on
21 either end whether it's Mr. Crosby's position that it
22 starts 24 months from the date of performance under
23 contract one, the 24 months under the date of the
24 agreement. My client's understanding was 24 months ---

25 THE COURT: Mr. Crosby argues that until Loretta

1 Harriett relinquished her interest in the Home Place
2 property, okay, then there wouldn't be in a position to
3 complete Settlement Agreement Number 2 because the second
4 sentence says, "due to such" meaning a conveyance by
5 Loretta of her interest in the Home Place property, then
6 the Home Place Tract would be a one-third interest to Larry
7 Rahn, one-third interest to Barbara Smith, one-sixth to
8 Kenneth Ron and one-sixth to Nancy Crosby which would then
9 set up the agreement reached at mediation that Barbara
10 Smith would deed her interest which has previously been
11 delineated as the one-third interest she couldn't have a
12 one-third interest until Loretta relinquished her interest
13 in the Home Place property. And in order for her to have
14 that one-third interest and receive the \$312,000 it was
15 contended to me, Mr. Parker, that she had the first, have
16 the one-third interest and apparently this is a family that
17 has frequent disagreements according to Mr. Crosby and Ms.
18 Loretta Harriett decided to disagree and refuse to convey
19 or relinquish her interest in the Home Place Tract which
20 set up the problem of being able to complete the remainder
21 of the mediation agreement. You understand that argument?

22 MR. PARKER: I do understand the argument.

23 THE COURT: All right. Then tell me then -- I
24 understand your argument that you want me to write-in that
25 it takes place from the day that he signed the agreement

1 but that's not what it says. I have to take it on its
2 face, do I not?

3 MR. PARKER: Well, judge, I believe Barbara could
4 have conveyed her interest at any point following this and
5 then sign her interest that ---

6 THE COURT: But she wouldn't of had a one-third
7 interest until Loretta Harriett relinquished her interest.
8 There would've been a different interest, would there not?

9 MR. PARKER: There would have been, Your Honor.
10 That's what I was getting to.

11 THE COURT: There's no way for her to be able to
12 say she should receive \$312,000 because she could not
13 convey a one-third interest until Loretta R. Harriett
14 relinquished her interest in the Home Place, isn't that
15 true?

16 MR. PARKER: Yes, Your Honor.

17 THE COURT: All right.

18 MR. PARKER: I don't want to speak out of turn,
19 judge. I said I don't want to speak out of turn.

20 THE COURT: You not at all.

21 MR. PARKER: Okay.

22 THE COURT: You go right -- I'm listening, Mr.
23 Parker.

24 MR. PARKER: Sure. All right. Thank you, judge.

25 THE COURT: But, you, just speak up for me.

1 MR. PARKER: Yes, sir.

2 THE COURT: I want you to know I've got two brand-
3 new - Becky doesn't even know this, my court reporter, two
4 brand-new hearing aids - which Becky you're gonna love
5 this, Mr. Parker - I can now actually go to my phone when
6 you speak and listen to this now and on my phone I can hit
7 and I, just so you know if I don't think you're speaking
8 clearly enough I'll wait for a second and it comes up and
9 then I can push buttons to make you clearer.

10 MR. PARKER: So it's a voice detected -- it's
11 basically transcribing as I ---

12 THE COURT: Yeah, it's all done by the telephone.

13 MR. CROSBY: You can control your hearing aids ---

14 THE COURT: Now, I want you to understand nothing
15 is perfect in this world, okay. You have to have your
16 Bluetooth enabled to do it.

17 (Whereupon, the judge takes a moment to get his hearing
18 aids straight)

19 THE COURT: All right. I'm ready for you.

20 MR. PARKER: Okay. Thank you, judge. And the other
21 piece of this is Mr. Crosby's contention is his clients
22 have been ready and willing to deliver the \$312,000 to my
23 client which she has never been offered cash. What she has
24 been offered is her consenting to them clearing timber of
25 which she's the one-third owner. They essentially pay her

1 back ---

2 THE COURT: She wasn't a one-third owner until July
3 of 2017. Neither side could complete this transaction
4 until as it says - I assume Mr. Reeves McLeod drew this
5 agreement, is that right? Were you there?

6 MR. PARKER: I was not present. My client was pro
7 se.

8 THE COURT: Mr. Crosby, were you present at
9 mediation?

10 MR. CROSBY: I was. But Mr. McLeod drew this, he
11 did draw that.

12 THE COURT: He drew it?

13 MR. CROSBY: He did.

14 THE COURT: My point being that until Loretta
15 Harriett relinquished her interest in the Home Place your
16 client couldn't convey any one-third interest in anything.
17 She didn't own it. Her interest would've been what prior to
18 Loretta Hyattt, Loretta Harriett?

19 MR. CROSBY: It would have been one-fourth interest,
20 Your Honor.

21 THE COURT: One-fourth.

22 MR. PARKER: Yes, Your Honor.

23 THE COURT: So she didn't have the ability to
24 complete the transaction anymore than they did. Both sides
25 were unable to complete the transaction because the

1 lawsuit, apparently, according to Mr. Crosby that you
2 weren't -- well, I don't know if you were a part of it or
3 not, ---

4 MR. PARKER: No, Your Honor.

5 THE COURT: --- you weren't?

6 MR. PARKER: No, Your Honor.

7 THE COURT: The lawsuit started involving Loretta
8 Harriett's refusal to relinquish her interest in the Home
9 Place property. So until such time that that's completed I
10 understand she -- you're telling me she's gonna say, well,
11 nobody offered me \$312,000. What she doesn't say is, well
12 I could't convey a one-third interest if they had offered
13 me \$312,000 until Loretta Harriett relinquished her
14 interest to me.

15 MR. PARKER: That's correct. And if we do take the
16 July 27th day, 17th day and that's the same, same month
17 that my client signed those deeds in compliance with the
18 agreement number one. They've had over two years to
19 present \$312,000 which has not been this case. And so to
20 now try to compel ---

21 THE COURT: Well, now the two years hadn't run from
22 July of 2017, well, it has a little bit.

23 MR. PARKER: Yeah.

24 THE COURT: But you tell me that she's refused at
25 this point to accept \$312,000?

1 MR. PARKER: Correct, Your Honor. She believes ---

2 THE COURT: Why?

3 MR. PARKER: She believes her interest in the
4 property is worth more than \$312,000.

5 THE COURT: Now, did she not sign this agreement
6 saying she'd do it for \$312,000?

7 MR. PARKER: With the understanding that it was
8 going to be completed in 24 months of November of 2015. If
9 she had -- if she had anticipated that this could go on
10 forever, what if Loretta had never signed over her interest
11 essentially she stuck holding this property getting nothing
12 in return for the foreseeable future until the writ decides
13 to act. So she's putting quite the bond in that -- her
14 mind at this point, her intention is 24 months, \$312 should
15 be reasonable within that time period.

16 THE COURT: What kind of communication is there
17 between your client and these other people that had an
18 interest in this Home Place Tract, if any?

19 MR. PARKER: They don't ---

20 THE COURT: Do they talk? Do they speak?

21 MR. PARKER: I think they ---

22 THE COURT: I know they are related but ---

23 MR. PARKER: Yes, Your Honor. In her affidavit I
24 think she says in the fall of 2018 Larry and, I'm losing
25 the name- hold on ---

1 MR. CROSBY: Kenneth.

2 MR. PARKER: --- Larry, Kenneth, Nancy, two out of
3 the three contacted her about the anticipated sale of
4 timber. And part of that conversation was they wanted
5 Barbara to sign over her interest to consent to the
6 clearing of timber, on the sale of timber so that they
7 could then pay her the \$312,000. So that's the only
8 communication that I know of. The other communication is
9 coming from Mr. Crosby to my client prior to my
10 involvement.

11 THE COURT: All right. I've seen her affidavit
12 about what occurred at the mediation. Anything else you
13 want to tell me, Mr. Parker, or do you think you've covered
14 it?

15 MR. PARKER: The only other thing I'd like to add,
16 judge, if you do think that this contract is gonna, if it's
17 capable of having multiple interpretations then there are
18 clearly genuine issues and material facts so that this, my
19 clients position would survive summary judgment for
20 purposes of a trial by having testimony from both sides as
21 to what did they actually intend to agree to at mediation.

22 THE COURT: Thank you very much.

23 MR. PARKER: Yes, Your Honor.

24 THE COURT: Mr. Crosby, in reply I don't see
25 anything in the agreement about the cutting of timber. Was

1 there anything in writing about the cutting of timber?

2 MR. CROSBY: No, Your Honor, there was not. It was
3 a given.

4 THE COURT: She says in her affidavit that they
5 actually agreed to cut timber long before they entered into
6 this mediation but the time for that agreement expired
7 because they were judgments on the property and she agreed
8 to wait until the judgments have expired. They must've
9 been old judgments?

10 MR. CROSBY: They -- they were. And that did occur.
11 And I think the same people who, some of the same people
12 who are looking at the timber now are the same people back
13 then and were the same people that they used in the
14 appraisal that Mr. Avant did. And so there's been this
15 continual and it's not written there. There was an
16 implicit in this and discussed. That part of her affidavit
17 is not accurate. That was never discussed because that was
18 the whole purpose of the 24 months to give time to get bids
19 on timber and get it done because weather can affect the
20 cutting of timber. But even without that, Your Honor, her
21 own affidavit never says that she had the capacity or the
22 ability to deed the one-third interest as contemplated by
23 this agreement as set forth there. As the court accurately
24 pointed out "due to such" which is meaning Loretta deeding
25 her interest so that Barbara Ann could have a one-third

1 interest. She didn't have that really until July of 2017
2 with those deeds because there were some delay in getting
3 some final signatures weren't recorded until October 1,
4 2018. And in her affidavit she makes reference to the fall
5 of 2018. So immediately upon having those deeds recorded
6 which the timber folks would, nobody would ever move
7 forward until the deed is actually recorded. I think
8 there's maybe somebody living out in Missouri or somewhere,
9 the Kreel girl, Larry's daughter that had to sign and so it
10 took him around sometime to get actually all the
11 signatures. And once they were recorded in October
12 immediately, as she even admits in her affidavit, they were
13 moving forward and they could have paid, the money would
14 have been there. And they certainly whether it was, the
15 timber was actually cut by then but certainly within this
16 time period they attempted to move forward and she
17 immediately says, no, we're not doing that this agreement
18 has expired. So she prohibited and got us to where we are
19 today. I had to file, obviously, this lawsuit and it took
20 some to percolate up. This matter was for a hearing
21 sometime this summer and I had a mediation and I think Mr.
22 Parker had just gotten in it and gotten it continued. But,
23 Your Honor ---

24 THE COURT: Are you telling me that within the two
25 years after the recordation of the deeds in which she got

1 her one-third interest, the other parties involved in the
2 Home Place were ready to pay her the \$312,000 whether the
3 timber had been cut or not?

4 MR. CROSBY: Right. If she said, no, I'm not gonna
5 cut it but what she said is, I'm not taking \$312,000
6 because it expired. You know, if she says ---

7 THE COURT: And that's her -- that's the argument
8 Mr. Parker and she are making that I'm to find that this
9 agreement is contingent upon the date of the signing of the
10 agreement even though there is no language to that effect
11 which Mr. Parker has to concede and I'm bound by the
12 agreement.

13 MR. CROSBY: It's our -- Your Honor, is an
14 interpretation as Mr. Parker said either you find that this
15 is ambiguous or it's that the acts under the Settlement
16 Agreement 2 were conditioned and couldn't, there was an
17 impossibility that these could be performed as it's right
18 there. Anybody can look at this, until Barbara Ann had a
19 one-third interest she couldn't perform and therefore, you
20 know, that time wouldn't kick in there, that 24 months
21 until she had the capacity to do that. She never had the
22 capacity. Under the law none of the parties could have
23 done that. They would not have given her \$312,000 without
24 her actually owning one-third interest in it. And so even
25 though there's not many words there I think what Mr. McLeod

1 wrote is actually pretty clear. I don't think is
2 ambiguous. But that's really, it's a matter of law for the
3 court in interpreting this. If you find that it is not
4 ambiguous then I think we're entitled to specific
5 performance. If you find that it's not clear that is what
6 Mr. Parker argues, I agree with him we would have to, I
7 guessm continue it to some further litigation and I don't
8 know where that is, I guess.

9 THE COURT: Thank you very much. All right. Take
10 notes, counsel. I'm going to ask you both to submit orders
11 to me. Please submit them to me at Pbucknerj@sccourts.org
12 by email. Please send my law clerk a working copy of your
13 proposed orders at Pbucknerlc@sccourts.org. Please copy
14 opposing counsel on any transmittal to the court whether by
15 email, United States mail or facsimile, any communication
16 to the court you must copy opposing counsel. I would expect
17 your proposed orders within seven days of today. Any
18 questions about the proposed order procedure from counsel
19 from the moving party, Mr. Crosby?

20 MR. CROSBY: No, Your Honor.

21 THE COURT: Any questions about the proposed order
22 procedure from counsel for the responding party, Mr.
23 Parker?

24 MR. PARKER: No, Your Honor.

25 THE COURT: All right. So you know what I have.

1 I've a copy of your motion. I have copies of the
2 settlement agreement, 1 and 2. As Mr. Parker wants to
3 point out that there are two of them but they all involve
4 the family property. I have a copy of the summons and
5 complaint. And have a copy of the answer of the defendant.
6 I was handed during this argument this hearing memorandum
7 and opposition to plaintiff's motion for summary judgment
8 which contains the affidavit of Barbara Smith. That
9 affidavit is dated October, excuse me, July 25, 2019. I
10 assume you have a copy, Mr. Parker, I mean, Mr. Crosby?

11 MR. CROSBY: I do, Your Honor. He gave me a copy.

12 THE COURT: Very well. The record is now closed in
13 connection with this. I look forward to getting your
14 proposed orders. Thank you both for being on time and
15 prompt and prepared.

16 MR. CROSBY: Yes, sir. Thank you.

17 THE COURT: Thank you.

18 (CONCLUSION OF THE HEARING HELD ON OCTOBER 9, 2019)
19
20
21
22
23
24
25

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Circuit Court of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Ninth Circuit Court for Colleton County, South Carolina, on the 9th day of October, 2019 in which the court reporter was Becky Hill.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/ Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

July 7, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	Case No.: 2019-CP-15-00218
LARRY RAHN,	)	
Plaintiff.	)	DEFENDANT'S MOTION FOR
	)	RECONSIDERATION
vs.	)	
	)	
BARBARA SMITH,	)	
Defendant.	)	

TO: RONNIE CROSBY, ESQ., ATTORNEY FOR THE PLAINTIFF:

Defendant Barbara Smith (hereinafter referred to as "Defendant") moves pursuant to Rules 52 and 59, SCRCP, for the Court to reconsider its ruling and grant a new trial or to alter or amend its ruling in this matter as reflected in the Order granting Plaintiff's Motion for Summary Judgment, filed December 3, 2019. The grounds for this motion are as follows:

1. Defendant asks the Court to reconsider its finding that the language of the two settlement agreements is clear and unambiguous. Specifically, Defendant asks the Court to reconsider the following language in Settlement Agreement 2:

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.

The Court found that the above quoted language made it obvious that Settlement Agreement 1 must be completed before the terms of Settlement Agreement 2 were to be effective. However, Defendant was not represented at mediation and did not interpret the above quoted language as creating a condition precedent to the terms of Settlement Agreement 2. Defendant notes that tense of the language matters. When Plaintiff's counsel and the mediator were drafting the agreements, they could have used future tense language, such as "Loretta R. Harriett will relinquish....." and "Due to such, the ownership will be

....” if they expected action to be required prior to the terms of Settlement Agreement 2 beginning. Further, Settlement Agreement 2 never references Settlement Agreement 1.

2. Similarly, Defendant asks the Court to reconsider its finding that the terms of Settlement Agreement 2 are to be completed by July 11, 2020. Defendant emphasizes, as she did at the hearing and in her memorandum (which is incorporated herein), that the deadline for Settlement Agreement 2 was twenty-four (24) months from the date Settlement Agreement 2 was signed (November 20, 2015). As such, the deadline for Plaintiff to perform and offer payment was November 20, 2017. The Court found that Defendant’s position was unreasonable because it would allow Loretta Harriett the ability to effectively nullify Settlement Agreement 2 by delaying performance under Settlement Agreement 1. Defendant argued previously and asks the Court to consider again that Plaintiff could pursue an action against Ms. Harriett for damages if Plaintiff believed that Ms. Harriett caused Settlement Agreement 2 to expire. Various causes of action are available for Plaintiff to assert if a third party interferes with a contract. Defendant’s position has consistently been that she accepted the offer for \$312,000.00 because she believed that it would be paid by November 20, 2017. If Defendant believed the payment outlined in Settlement Agreement 2 would not be made by Plaintiff until some unknown time in the future, Defendant would have negotiated a different contract price or different terms to consider the change in market value from the date of contract until the date of performance.
3. Defendant asks the Court to reconsider the issue of payment of the \$312,000.00 under Settlement Agreement 2. The Court found that the Plaintiff has stood ready, willing, and able to comply with the terms of Settlement Agreement 2. The Court further found that Defendant confirmed Plaintiff’s position in Defendant’s Affidavit. Defendant asks the

Court to reconsider its findings regarding Plaintiff's ability to perform under the contract. In Defendant's Affidavit, she expressly stated that Plaintiff contacted Defendant in the Fall of 2018 requesting that Defendant consent to the sale of timber. Plaintiff has informed Defendant that the only way he can come up with \$312,000.00 is by selling timber, including Defendant's 1/3 interest in the timber. (See attached letter from Ronnie Crosby, dated January 2, 2019). Settlement Agreement 2 does not require Defendant to consent to the sale of timber so that Plaintiff can use the proceeds from Defendant's share of the timber to pay Defendant. Defendant asks the Court to address the issue of the sale of the timber.

Defendant asks the Court to reconsider its Order granting Plaintiff's Motion for Summary Judgment. This Motion is based on the issues raised above, the pleadings, papers, records, and files in this action, together with applicable statutory and case law. Defendant Barbara Smith respectfully requests that the Court grant this motion, reconsider its decision, deny Plaintiff's Motion for Summary Judgment, and schedule this matter for trial.

Respectfully submitted,

LAW OFFICE OF JERRY REARDON

By: s/Gregory E. Parker, Jr.
 Gregory E. Parker, Jr. (SC Bar No. 101328)
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BARBARA SMITH

Columbia, South Carolina
 December 13, 2019

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK

PROFESSIONAL ASSOCIATION

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 LEAGUE B. CREECH
 STEVEN D. MURDAUGH
 WILLIAM F. BARNES, III
 AUSTIN H. CROSBY
 NEIL E. ALGER

RANDOLPH MURDAUGH, SR.
 (1887-1940)
 RANDOLPH MURDAUGH, JR.
 (1915-1998)
 J. ROBERT PETERS, JR.
 (1927-2008)
 J. PAUL DETRICK
 (1948-2016)
 CLYDE A. ELTZROTH, JR. - RET

Ronnie L. Crosby
 Direct Dial: (803) 914-2005
 E-mail: rcrosby@pmped.com

January 2, 2019

Barbara Ann Smith
 15 Winnifred Street
 Asheville, NC 28806

Re: Rahn Estate

Dear Barbara:

I spoke to Larry recently concerning the status of completing the needed documents to bring the division of your father's estate to an end. I recently provided you with the letter from Todd Crosby concerning the timber sale that will need to take place in order to pay you the money you are owed under the agreement. Larry indicated that you were not cooperative in signing the necessary documents to move forward with the timber sale.

Under the settlement agreement Larry, Kenny and Nancy collectively are required to pay you \$312,000.00. You are in turn required to relinquish your rights in the home place. **The only way for Larry, Kenny and Nancy to pay you the money that is due to you is to cut timber.** This was contemplated at the mediation. If you recall during the settlement negotiations, you negotiated for a dollar amount that was higher than the ¼ of the appraisal value for the land and timber.

If there is some concern you have about getting things finished up I would appreciate it if you would call me so I could help answer any questions. We need to get this done. It is unfortunate that Loretta's refusal to comply with the agreement had to result in litigation. Now that she has signed off on what she needed to do we are in a position to move forward and get this finished up. I certainly hope we can do this without further litigation so please call me with any concerns. I have told Larry that if you continue to refuse to comply with the settlement agreement that the only avenue is to file yet another lawsuit arising out of this. I would really

January 2, 2019

Page 2

like to help ya'll get this finished up so that your father's estate can at last be settled. Please call me upon receipt of this so that we can discuss. For your convenience I have enclosed another copy of the settlement agreements.

With kind regards, I am

Sincerely,

A handwritten signature in black ink, appearing to be "RLC", written over a horizontal line.

Ronnie L. Crosby

RLC/fgb
Enclosure

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

This matter came before the Court on Defendant's Motion pursuant to Rule 60(b)(5) SCRPC for relief from a judgment entered December 3, 2019 by Judge Perry M. Buckner. The Order granted specific performance and ordered the parties to complete a conveyance of real property on or before July 11, 2020.

On December 13, 2019, Defendant filed a Motion to Reconsider which was denied on March 18, 2020. Defendant filed a Notice of Appeal on April 14, 2020. Defendant then filed motions for additional time to file her initial appellant briefs on July 31, 2020 and on September 8, 2020. On October 2, 2020, a Motion for Leave to File Motion Pursuant to Rule 60(b)(5) SCRPC and to Hold Briefing in Abeyance was filed by Defendant. The Court of Appeals granted the motion and Defendant filed the instant motion on November 30, 2020.

The Rule 60(b)(5) Motion filed by Defendant seeks to be relieved from the Order on appeal because the deadline for the parties to complete the transaction at issue in Judge Buckner's December 3, 2019 Order (July 11, 2020) passed during the pendency of the appeal. The Defendant claims that it would be inequitable to hold it to the terms of the Order because Plaintiff did not tender \$315,000.00 on or before July 11, 2020. There is no evidence or

contention that Plaintiff did not remain ready willing and able to do so but for the fact that an appeal of the Order was pending¹.

In this motion Defendant is seeking to gain relief from an Order because the Plaintiff did not give her the money that she had clearly said in the trial court and through her filing of an appeal that she would not take. An act that this Court finds would have been futile and potentially damaging to Plaintiff had he simply delivered \$315,000.00 to Defendant when it was clear she had no intent of conveying the property. This form over substance would result in an inequity to Plaintiff. See Peppertree Resorts v. Cabana Ltd. Partnership, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993) (Equity regards substance over form.) Here equity requires that the parties remain in the position they were in on the date the appeal was filed and as such the Court Orders that both Parties' obligations under the Order on appeal should be tolled pending the appeal to prevent an injustice to either party.

Based on the foregoing the Defendant's Motion for Relief from Judge Buckner's Order is DENIED.

Bentley Price
Chief Administrative Judge
14th Judicial Circuit

¹ Neither party sought to execute on the judgment at issue in the appeal. While the notice of appeal did not stay execution under the statutes and rules cited by the Defendant these authorities do not mandate that a party execute on a judgment.



Colleton Common Pleas

Case Caption: Larry Rahn VS Barbara Smith

Case Number: 2019CP1500218

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2021-04-05 14:02:45 page 3 of 3

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

This matter came before the Court on Defendant's Motion for Reconsideration. After hearing from counsel and reviewing the long record in this ongoing dispute the Court finds that its prior finding of equitable tolling was well founded as there is no evidence that Plaintiff was not ready willing and able to perform on the date set by Judge Buckner's prior Order granting specific performance.

The Court finds that the Parties shall have until February 1, 2022 to complete performance under the contract after which the non-performing party(s) rights shall expire.

Bentley Price
Chief Administrative Judge
14th Judicial Circuit



Colleton Common Pleas

Case Caption: Larry Rahn VS Barbara Smith

Case Number: 2019CP1500218

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A No.: 2019-CP-15-00218
COUNTY OF COLLETON	)	Appellate Case No.: 2021-01540
	)	
Larry Rahn,	)	
	)	
Plaintiff,	)	ORDER GRANTING/IMPOSING
	)	SUPERSEDEAS
vs.	)	
	)	
Barbara Smith,	)	
	)	
Defendant.	)	

This matter is before the Court on Defendant's motion for supersedeas pursuant to Rule 241(c)(1), SCACR. A telephone hearing¹ was conducted on January 28, 2022, with the parties' counsel. The Court hereby grants supersedeas as follows.

On April 5, 2021, this Court entered an order denying Defendant's Rule 60 motion for relief from judgment entered in this matter on December 3, 2019. Defendant subsequently moved to alter or amend pursuant to Rule 59(e), SCRCRCP. In response, the Court issued an amended Order on December 14, 2021, providing the parties until February 1, 2022, to perform the agreement that is in dispute in this action. Defendant has since appealed the denial of her Rule 60 Motion and as amended (i.e., Appellate Case No. 2021-01540). Upon good cause shown this Court finds it appropriate to impose a supersedeas pending the outcome of the aforementioned appeal. Further, Defendant's additional request for the Court to require the parties to place the purchase money and executed deeds into escrow pending the outcome of the appeal is denied. IT IS SO ORDERED!

The Hon. Bentley D. Price
Circuit Judge

¹ All counsel waived the use of a court reporter for the telephonic hearing.



Colleton Common Pleas

Case Caption: Larry Rahn VS Barbara Smith

Case Number: 2019CP1500218

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2022-02-01 10:20:05 page 2 of 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,	)	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.

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 portions 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.

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

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.

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

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.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By: s/ *TJ Rode*

THOMAS J. RODE
SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
Phone: 843-937-8000
Fax: 843-937-4200
Email: thomas@tktlawyers.com
Attorneys for Plaintiff

Charleston, South Carolina

The South Carolina Court of Appeals

Larry Rahn, Respondent,

v.

Barbara Smith, Appellant.

Appellate Case No. 2020-000607

ORDER

Appellant's motion for leave to file a Rule 60, SCRCP, motion with the circuit court is granted. This appeal will be held in abeyance pending the circuit court's resolution of the motion. Appellant shall provide this court with a status update in thirty days and every thirty days thereafter.


FOR THE COURT

Columbia, South Carolina

cc:
Ronnie Lanier Crosby, Esquire
Gregory E. Parker, Jr., Esquire
Thomas J. Rode, Esquire

FILED
Nov 20 2020

Exhibit 1
Defendant's Rule 60 Motion

**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

RECEIVED
Oct 02 2020
SC Court of Appeals

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 1
Defendant's Rule 60 Motion

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), SCRPC 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), SCRPC 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), SCRPC, 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.

Exhibit 1
Defendant's Rule 60 Motion

See Rule 60, SCRCP (1990 Editor's Note stating that section (5) was provided for "avoiding the necessity of bringing a new 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.~~



THOMAS J. RODE, Bar No. 77480

15 Middle Atlantic Wharf

Charleston, South Carolina 29401

Phone: 843-937-8000

Fax: 843-937-4200

Email: thomas@tktlawyers.com

Attorneys for Appellant

Exhibit 1
Defendant's Rule 60 Motion

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Oct 02 2020

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

SC Court of Appeals

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 2
Defendant's Rule 60 Motion

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. *RRS*

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

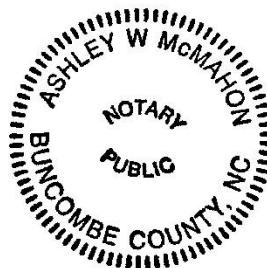


Exhibit 3
Defendant's Rule 60 Motion

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 Order, nor have I received notice of the filing of any application or writ of supersedeas.

END AFFIDAVIT

Exhibit 3
Defendant's Rule 60 Motion

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

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


Notary Public
For the state of South Carolina

My commission expires: 10.22.25

ELECTRONICALLY FILED - 2020 Nov 30 3:43 PM - COLLETON - COMMON PLEAS - CASE#2019CP1500218

Duplicative Material Omitted
See ROA pp. 52-86

P R O C E E D I N G S

* * * * *

THE COURT: All right, who's motion? It's Ms. Smith's motion.

MR. RODE: That's right, Your Honor.

THE COURT: All right.

MR. RODE: Thomas Rode with Thurmond Kirchner & Timbes for Ms. Smith. This is a Rule 60 motion, Rule 60(b) motion for relief from a judgment. That judgment was issued by Judge Buckner back in 2019 and granted specific performance on the sale of the real property in exchange for the delivery of some money on or before July 11th, 2020.

THE COURT: Okay.

MR. RODE: This matter is actually -- you probably have noticed from the -- from the Court's website is pending on appeal; but this being an order to compel the transfer of real property which is not stayed by an appeal. When that deadline of July 11th came and went, the Court of Appeals issued an order for us to file this Rule 60 motion with the Court now. So that's, essentially, why we are having this Rule 60 motion, although the Court's website is going to reflect that it's pending on appeal, which is -- which is correct. And, Your

1 Honor, as I mention that, obviously, an order
2 directing that sale of the real property by statute,
3 again, not stayed by an appeal, so the deadline --
4 the July 11th deadline was still the July 11th
5 deadline, as that process continued -- as the
6 appellate process continued. To provide a little
7 bit of background here, the -- the Plaintiff filed
8 this action back, I think, in 2018, 2000 -- I mean
9 2018 or 2019, seeking specific performance on what
10 was, essentially, an option contract to buy some
11 real property. That was an option contract to buy
12 it at a fixed price of \$312,000 on or before -- or
13 within 24 months, I think, is what -- is what the
14 option contract provided, which is a -- a settlement
15 con -- settlement agreement is how it was styled.
16 The dispute in -- in the case that, ultimately, came
17 in front of Judge Buckner was whether or not that 24
18 months had ran, right? Whether or not the option
19 had expired. Our position -- the Defendant's
20 position was that option had expired. The
21 Plaintiff's position was that option would not
22 expire until July 11th, 2020. Judge Buckner agreed
23 with the Plaintiff, issued an order, saying at page
24 two of the order the Plaintiff -- I'm sorry, page
25 four of the order the Plaintiff shall deliver

1 \$312,000. The Defendant shall deliver the property
2 on or before July 11th, 2020. The issue here is not
3 whether or not, obviously, Judge Buckner was right
4 or wrong, we're going to assume that Judge Buckner's
5 order saying the option was valid until July 11th of
6 2020 is correct, obviously, for the purposes of
7 today, and for the purposes of this argument. But
8 it, essentially, puts us in a position that it has
9 expired, and win, lose or draw, the Court of Appeals
10 -- all the Court of Appeals can say is, Judge
11 Buckner was correct, Plaintiff, you have until July
12 11th, 2020, to deliver the money, which didn't
13 happen. So in the -- in the memo that we filed,
14 which was a memo that was submitted to the Court of
15 Appeals, and we were given leave to file that
16 specific memo with this Court, there are a couple
17 exhibits, one of those exhibits is the Court of
18 Appeals order that directed us to file the motion
19 here. Exhibits 2 and 3 are affidavits of my client,
20 affidavits of my client's trial counsel, Mr. Rode,
21 both just representing that payment, as of, I
22 believe, October/November some time, no payment has
23 been delivered. No attempts to deliver payment have
24 been made. And then Exhibit Number 4 to that motion
25 is the transcript of the final hearing in front of

1 Judge Buckner, in which, you know, the Plaintiff's
2 represented two things. One, we believe we have
3 until July 11th, 2020, and we were ready, willing
4 and able to perform. All right, the ready, willing
5 and able to perform is a significant aspect of that,
6 because it's a necessary element of the specific
7 performance. As it relates to an option on real
8 estate, payment is also required by the day, right?
9 So by the day that payment is required in the
10 option, payment has to be delivered. All right, and
11 the -- the Ingram case that we've cited in our memo,
12 it's 340 S.C. 98, this is a case out of the Supreme
13 Court in 2000, that was really the issue. The
14 option holder didn't pay by the date. The Court of
15 Appeals said, "Well, you get a reasonable time after
16 that if you exercise the option," and the Supreme
17 Court said, "No. You have an option that has a
18 specific day and specific price, you have to deliver
19 the money by that day; or at the very least present
20 evidence that you attempted to deliver the money.
21 And that's where we are now is that day came and
22 went, the money wasn't delivered. There's no
23 evidence that an attempt was made to deliver the
24 money, so in --

25 THE COURT: What's your position?

1 MR. RODE: The order is expired.

2 THE COURT: So you're just saying invalidate the
3 -- the agreement?

4 MR. RODE: Yeah.

5 THE COURT: Okay. All right.

6 MR. RODE: Well, not the agreement, and I don't
7 want to say invalidate the order, it's an order that
8 directed a specific performance. That order has
9 expired.

10 THE COURT: All right.

11 MR. RODE: So we would just ask for relief from
12 that order to say the party's right -- the party's
13 rights under that order have expired.

14 THE COURT: All right. All right, yes, sir.

15 MR. CROSBY: Good morning, Your Honor, Ronnie
16 Crosby on behalf of the Plaintiff. Your Honor, Mr.
17 Rode is artfully using the term option over and over
18 in his argument and equating it to the Ingram case,
19 which did involve an option. This case does not
20 involve an option at all. I'll take you back on a
21 little bit of history. This case started in about
22 2008 with the passing of Ms. Myrtie Rahn, and her --
23 the land that was in the estate passed to four kids.
24 Well, those four kids have been fighting since that
25 time. One of them is deceased, and it took years,

1 and we finally got to a mediation to where it would
2 outlive, you know, where they fought back and forth,
3 and, finally, we sat down and mediated the case with
4 Mr. -- Attorney Reaves McLeod here. There was an
5 appraisal involved, and it involves about 400 acres
6 of farmland and timber land, open land and timber
7 land. We reached a -- a resolution with all of the
8 parties there with Mr. McLeod where one -- a tract
9 of land would go to one sister, Loretta Harriet.
10 And in order for that to -- to be done, everyone
11 would have to deed their interest, because everybody
12 had a one-fourth undivided interest. And so it took
13 a lawsuit to make that happen, and, finally, we got
14 that done. And then what was to happen once
15 everybody had given their interest and she'd given
16 her interest in this other tract, there's two
17 separate tracts, the agreement was that Larry, Ron
18 and his brother's children would take the real
19 property, and they would pay \$312,000 to the
20 Defendant here, Ms. Smith, for her interest in that
21 property. So these things had -- it -- and then it
22 -- it took that -- once we had that agreement and
23 those deeds executed with Loretta Harriet, then Ms.
24 Smith refused, so it -- it took another lawsuit.
25 And Judge Buckner, what he did was interpreted the

1 mediation agreements, and -- and he interpreted such
2 that -- well, there was no way for the one that's at
3 issue in this suit, there's two separate agreements,
4 Your Honor, that were done at the same time. Until
5 Loretta Harriet, the other sister had -- had
6 divested herself of her interest in this second
7 tract of land. And he ordered that -- granted our
8 request for the specific performance. They filed a
9 motion to reconsider, which was denied. Then they
10 filed an appeal, I think, in March of last year.
11 And what you're being asked to do here -- and -- and
12 all of this is sounding in equity, and I'll just
13 tell you that 312,000 was more than one-fourth of
14 the appraised value of the land and timber there, so
15 she had negotiated for a better deal at that
16 mediation. Judge Buckner ordered that -- that --
17 granted our request for a specific performance.
18 They appealed, and the appeal is ongoing, and in
19 September of last year they moved to stay the appeal
20 and allow to file the present motion. So, in
21 essence, the Judge ordered -- granted our relief,
22 and then they said by notice of appeal, "We're not
23 doing that, we're going to appeal Judge Buckner's
24 interpretation of this order. We don't think he's
25 right, we think that he got it wrong, and we're

1 going to as the Appellate Court to review it,"
2 which, by nature, us paying them \$312,000, when
3 they've got an appeal saying they're not going to
4 comply with it, because we don't believe Judge
5 Buckner was correct in ordering the specific
6 performance. What they're doing is saying, well, by
7 nature of the fact that we filed an appeal, that now
8 -- and the time has passed that we don't have to do
9 what Judge Buckner ordered, and we don't even have
10 to go any further with an appeal. The way I read
11 the statutes that are cited on not staying an
12 appeal, which is -- or the payment of money, neither
13 one of -- of those would have been -- would have
14 been stayed if somebody moved to execute them. For
15 example, if they had moved to execute on a judgment
16 and for us to pay, we could have raised the statute,
17 which would have required them to put up a bond; or
18 if we moved to execute on Judge Buckner's order, the
19 statute would have required us to put up a surety
20 bond of two times the value of the property.
21 Neither party did that. They filed an appeal, and
22 they did not put up a bond, which is really required
23 by nature of them filing an appeal. So no one did
24 that because it would have been futile and -- and
25 expensive, you know, to say the least of the -- to

1 have required it. I read those statutes as if we
2 had sought to execute, they could have invoked the
3 statutory for debt -- if they had sought to execute
4 on that, we could have, but it didn't require --
5 almost every jury verdict, the judgement's not
6 stayed by -- by the filing of an appeal, just in
7 practice, people don't require you to put up a bond
8 in order to file an appeal, and that's really where
9 we are here. And when we're talking about this
10 being inequity, which this whole action is equitable
11 in nature, and the relief that they're seeking here
12 is equitable in nature, I think the Court's got to
13 look and see if anybody's been prejudiced, if
14 there's anybody in a bad/worse position than they
15 would have been. That -- that's not anywhere in
16 their motion or in their argument, because they're
17 in the exact same spot, and they still have their
18 right to have appellate review; but what -- what
19 they're doing is -- is sort of seeking to do a
20 gotcha, and -- and get what they want by what
21 they're calling to be a technicality. I don't read
22 the statutes the same way that they read them. You
23 know, if this was an option that we were seeking to
24 enforce, you know, it may -- it -- what they're
25 citing out of Ingram would be accurate. But this

1 isn't an option, this is a -- not anything about an
2 option, this is an interpretation of a contract. In
3 essence, this mediation agreement that Judge Buckner
4 interpreted the contract one way, and he puts -- and
5 they disagree with that, and they appealed it. So
6 if Judge Buckner was wrong and they prevail on that,
7 then, you know, we wouldn't be required to pay the
8 money, and -- and they wouldn't be required to
9 accept it, and vice versa, they wouldn't have to
10 transfer the property as -- as he ordered. So I
11 would -- I would ask the Court to deny the relief
12 they seek. They haven't shown any prejudice to seek
13 relief in equity, and, you know, that Ingram case
14 that they cite to, you know, has some language in it
15 that one who's seeking -- seeking equity must do
16 equity. And, you know, here they've come to the
17 Court just absolutely after not following the
18 agreement that they agreed to that Judge Buckner has
19 -- and then to have them -- the Court order them to
20 comply with the agreement they agreed to in the
21 mediation; and now attempting to take advantage of
22 the passing of one deadline in a -- in -- in a -- in
23 an order, that would have been impossibility. Judge
24 Buckner noted that Plaintiff was ready, willing and
25 able to make the payment, that's still the case

1 today, but there's -- there's no way to make that
2 payment, because they're saying that the day's gone,
3 and that the payment shouldn't be made, and we
4 shouldn't have to transfer that. So I would just
5 ask the Court to deny that. If they want to
6 continue with their appeal, they're in the same
7 place they were, they've suffered no prejudice
8 whatsoever to -- by way of that money not -- some
9 formality, basically. They're -- they're wanting to
10 say, "Well, you didn't call us up and say you had
11 the money ready to pay, and now we get the -- can
12 get out of this." I mean it's just -- to me, it's
13 -- if that's the law, that that is how the Courts
14 expect litigants to operate over such technicalities
15 when it's putting much more form over substance, you
16 know, then I would say that the law is, you know,
17 got it wrong in that instance, if that indeed is --
18 is the law, which I don't believe it to be. I
19 understand the law and options, but that's just not
20 what we have here, and I'd ask the Court to deny
21 their motion.

22 THE COURT: All right, Mr. Rode, explain to me
23 what you indicated earlier how the Court of Appeals
24 instructed you to file this motion back in September
25 of 2020?

1 MR. PARKER: Yes. So there -- there was an or-
2 -- well, this -- this motion is filed pursuant to an
3 order of the South Carolina Court of Appeals, which
4 granted leave to ask this question to this Court,
5 right? So, in essence, the -- what the Court of
6 Appeals is looking at, as -- as we've discussed,
7 there's an order from Judge Buckner that says they
8 must do something by this date. That date has now
9 passed. So we -- we are in a situation where, even
10 if Judge Buckner's order is affirmed, it is
11 impossible to comply with the order. And so our
12 position is, again, understanding that --

13 THE COURT: Well, it's not impossible for you to
14 comply with his order, you transfer the property,
15 they're gonna give you \$312,000, that's the order.
16 And -- but your argument is that the date for that
17 to come and go has passed; but what his argument is,
18 is it came and went because you appealed it.

19 MR. PARKER: In -- in some way. Judge -- Judge
20 Buckner's order is specific, right, so it -- it's
21 not --

22 THE COURT: Right, but -- but the argument that
23 you're making is that if the time has come and
24 passed -- the time has come and passed because of
25 y'all, not because of him. Y'all appealed it.

1 MR. RODE: Well, the -- the time has come and
2 passed, because the time had passed, we did appeal
3 it, that's correct.

4 THE COURT: Well, that's correct, and they're
5 not gonna do something, if -- if they're later gonna
6 have to undo it, meaning they could be required to
7 give you 312,000, and then later on down the road
8 the Court of Appeals says he's wrong, now you've got
9 yourself into a huge mess because now you've got to
10 figure out how to transfer all the property back,
11 and hope that the person that gave -- got the
12 312,000 still has 312,000.

13 MR. RODE: Right, and --

14 THE COURT: But I --

15 MR. RODE: -- and --

16 THE COURT: -- I wouldn't be willing to give that
17 money over with that -- with that order being
18 appealed, I certainly wouldn't give somebody my
19 money.

20 MR. RODE: And, candidly, Judge, they have -
21 - they have the power and the right and the
22 obligation to put me or my client as the losing
23 party in that pickle. They can deliver that money
24 to the Court. They can deliver that money into
25 escrow. They can simply --

1 THE COURT: What does your client believe? That
2 they don't have the money, they're not gonna go
3 through with the -- with the deal?

4 MR. RODE: I don't -- I -- I can't represent to
5 the Court what my client believes in any form on
6 that because I haven't had -- I haven't asked her
7 that question.

8 THE COURT: Okay.

9 MR. RODE: But -- but the -- the -- the point
10 here is -- is a very simple one. There is a reason
11 why an order to compel the transfer of real property
12 is not stayed on appeal. And we can debate whether
13 we agree with those reasons or not, but that's the
14 law in South Carolina. It is in this case a unique
15 scenario, because the order compelled it on a
16 specific day.

17 THE COURT: Oh, I agree, it's -- it's definitely
18 very unique in that sense, but what indication did
19 y'all give to them that y'all were ready to go
20 forward with the deal on that date and time?

21 MR. RODE: We didn't seek to stay the appeal --
22 I mean to -- to stay the enforcement of the
23 judgment. I mean that --

24 THE COURT: Right, and now he -- he's saying
25 that you didn't do that because you know you had to

1 post a big bond, twice the amount.

2 MR. RODE: Well, if -- there would be a bond
3 requirement, but the bond requirement would also be
4 placed upon us if they showed up ready to -- ready
5 to pay. They -- they would have to force me to do
6 something. They -- they have a right -- they have a
7 right that Judge Buckner said existed until a
8 specific day. And -- and that's -- that's
9 essentially where we are now, and to say that this,
10 you know, this is not an option contract, I think
11 you can call it whatever you want, this was a
12 contract to transfer an interest in real property
13 for a specific price, at a specific time, if that
14 money was delivered. I mean it's that simple,
15 that's exactly the -- the language of that is on
16 page two of Judge Buckner's order.

17 THE COURT: Well, I agree with Mr. Crosby in the
18 sense that it's y'all -- it was a conscious decision
19 that your client made to appeal the order as opposed
20 to just letting the -- the -- the time expire
21 because you're argument would be 100 percent correct
22 at the time if the -- if the appeal had never been
23 effectuated and the time would have come and gone,
24 you're right, it's gone, it's over; but your client
25 chose to appeal it, and so I -- in my opinion, I may

1 be wrong, I -- I know it doesn't toll it, but it
2 definitely makes this very unique in the sense that
3 I assume Mr. Crosby's client doesn't trust your
4 client, and so they're not gonna -- that's probably
5 an understatement I would assume, and so he's not
6 gonna -- he or she is not gonna get themselves
7 wrapped up into some scenario with your client,
8 because, again, they chose the option of appealing
9 as opposed to waiting for the time to come and
10 expire, and then you could have made a -- a motion
11 to say, well, it's gone, it's over, it's -- at -- I
12 mean the option's off the table, or if that's what
13 you want to call the option, but I don't think
14 that's what happened here. What's gonna -- so I'm
15 gonna deny your motion, but what happens next? So
16 it goes back and y'all just continue with your
17 appeal?

18 MR. RODE: Well, candidly, Your Honor, I'm gonna
19 appeal your order.

20 THE COURT: So then it'll just go on to that?

21 MR. RODE: Yes.

22 THE COURT: All right. Mr. Crosby, just prepare
23 me an order and let me take a look at it, and we'll
24 just let him do that, too.

25 MR. CROSBY: I will, Your Honor, and I -- and I

1 will say the Court of Appeals didn't direct this, it
2 was a request made to the Court --

3 MR. RODE: It --

4 MR. CROSBY: -- of Appeals and --

5 THE COURT: Okay, because that's where I got
6 confused.

7 MR. RODE: If -- if -- if I said it incorrectly,
8 I apologize. What -- what I'm saying is the Court
9 of Appeals directed me, "If you want an answer to
10 this question, go get it from the Circuit Court."

11 THE COURT: Oh, okay, that makes more sense.

12 MR. RODE: You -- if -- if --

13 THE COURT: Because I was getting -- because I
14 was like, how -- how does that happen?

15 MR. RODE: Yeah, because I -- I can't ask this
16 -- I couldn't ask this question to the Court of
17 Appeals, 'cause it's not an issue that was in front
18 of Judge Buckner.

19 THE COURT: I got you, okay, that makes more
20 sense. That's where my confusion came in.

21 MR. RODE: Sorry about that.

22 THE COURT: All right.

23 MR. CROSBY: Thank you, Your Honor.

24 THE COURT: All right, thank you so very much.
25 All right, I think that's it for the week.

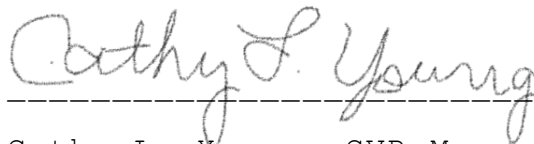
(Whereupon, the hearing was concluded.)

* * * * *

CERTIFICATE OF REPORTER

I, Cathy L. Young, CVR-M, for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appear, in the Circuit Court for Charleston County, South Carolina, on the 18th day of March, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party herein.



Cathy L. Young, CVR-M

Court Reporter and Notary

Public in and for South Carolina

My Commission expires: 3-28-2029

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 to Alter or Amend
	)	and/or
vs.	)	For Clarification
	)	
Barbara Smith,	)	(Rule 59(e), SCRPC)
	)	
	)	
Defendant.	)	

COMES NOW the Defendant (“Smith”), and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and who herein moves the Court to alter or amend its Order denying Defendant’s Motion for Relief from Judgment which was issued on April 5, 2021, and this motion being timely made within ten (10) days thereof. In support of this motion, Smith states as follows:

BACKGROUND

On December 3, 2019, *via* summary judgment, this Court ordered that Plaintiff was entitled to specific performance of a settlement agreement; *to wit* that provided Plaintiff deliver \$312,000 to Smith on or before July 11, 2020, that Smith was to deed certain real property to Plaintiff. Although Smith appealed, the July 11, 2020 deadline passed without Plaintiff tendering the money as required by the order, or otherwise seeking a stay or supersedes. Therefore, Smith filed the subject Rule 60(b) Motion (with leave of the Court of Appeals) seeking relief from the expired judgment, which was supported by a written memorandum and two affidavits establishing that Plaintiff did not tender (or attempt or offer to tender), the funds prior to the deadline, to which Plaintiff submitted no competing memo or affidavits in response.

On April 5, 2021, this Court issued a written Order in which it specifically found the December 3, 2019 Order was not stayed and that Plaintiff made no effort to enforce the judgment.

[Order p. 2 at n. 1]. Inconsistently however, this Court denied Smith relief from the expired judgment and found—although never requested—that equity required the December 3, 2019 Order be “tolled pending the appeal.” [Order p. 2].

ARGUMENT

I. It is unclear whether the Court’s *sua sponte* grant of equitable tolling was intended to amend the December 3, 2019 Order, or whether some other result was intended.

Although the issue was not before it, this Court found that “equity requires . . . the [December 3] Order should be tolled pending the appeal to prevent an injustice to either party.” [Order at p. 2]. First, this Court should grant the instant motion to alter or amend because Plaintiff never requested this relief. *See e.g., Fryer v. S.C. Law Enft Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (“A post-trial motion must be made when the trial court either grants relief not requested or rules on an issue not raised at trial.”) (*citing Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993)).

Second, it is unclear whether this Court intended to amend the July 11, 2020 deadline contained in the December 3 Order, or whether the Court intended its finding to operate as a stay of the December 3 Order. However, in either case, this relief is unsupported by the law or the facts.

A. To the extent the Court intended to amend the December 3, 2019 Order, it lacks jurisdiction to do so.

Pursuant to Rule 225, SCACR, after the filing of a notice of appeal the circuit court only “retains jurisdiction over matters not affected by the appeal, including the authority to **enforce** those matters not stayed by the appeal.” Rule 225(a), SCACR (emphasis added). Here the Court specifically found (and Plaintiff concedes) the Order was not stayed by the appeal and that Plaintiff took no action to execute—i.e., “enforce” the December 3 Order. *See* [Order p. 2 at n. 1]. Thus, by its own finding this Court is without jurisdiction to alter the December 3 Order. The time for which

Plaintiff had to perform under the settlement agreement was one of the primary issues in dispute at trial and now on appeal. This Court, therefore, has no jurisdiction to affect the merits of the appeal. *See id.*

Moreover, under Rule 60, “[w]hile a court may correct mistakes or clerical errors . . . it cannot change the scope of the judgment.” *S.C. Dep’t of Revenue v. Elliott*, 350 S.C. 404, 408 n.1, 566 S.E.2d 196, 198 (Ct. App. 2002) (quoting *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994)). “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.” *Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986) (citations omitted).

Here, the December 3 Order interpreted (albeit incorrectly) that the parties intended Plaintiff’s right to purchase the property to extend to July 11, 2020. By granting equitable tolling this Court altered that interpretation of the parties’ intent without evidence. The Court likewise failed to explain how long such tolling should continue. If the appeal were dismissed today how long did the parties intend Plaintiff would have to tender payment? This question demonstrates why the Court’s ruling is improper and misapprehends the law and evidence.

B. To the extent the Court intended its grant of equitable tolling to operate as a stay, this is improper because equity must follow the law.

The Court made no factual findings, and the Plaintiff submitted no evidence, of the “injustice,” “potential damage[]” or “inequity to Plaintiff” that purports to support equitable tolling. *See* [Order p. 2]. Finding that Plaintiff’s tender of payment would be futile, the Court simply recites the equitable maxim that equity regards “substance over form.” [Id.]. First, this misapprehends that courts are to employ “equitable maxims only as offers of guidance,” and more

importantly, that “equity follows the law.” *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011).

Even if Plaintiff had requested equitable tolling and presented evidence to support it (neither of which occurred), it remains that the law does not support the Court’s finding that Plaintiff’s tender of payment would have been futile, because had this occurred Plaintiff could have compelled Smith’s compliance. This includes, among other remedies at law, those provided under Rule 70, SCRCP, which 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; *see also* S.C. Code Ann. § 18-9-170 (setting forth the statutory requirements for obtaining a stay of judgment directing the sale or delivery of real property); S.C. Code Ann. § 18-9-160 (setting forth the statutory requirements for obtaining a stay of judgment directing the execution of conveyance); *see also* Rule 241(c), SCACR (setting forth means by which a party in Plaintiff’s position may file a request for supersedeas as to avoid an issue becoming moot during the pendency of an appeal). All that stood between the Plaintiff and these remedies was timely compliance with the December 3 Order.

Therefore, even if there were evidence to support the Court's equitable findings—which there is not—it remains that equity cannot trump the law. Instead, “the court's equitable powers must yield in the face of an unambiguously worded statute.” *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); see *Regions Bank*, 394 S.C. at 254, 715 S.E.2d at 355 (“When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.”) (citing *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 1298 (1996) (“the fact that the [request] has been called an ‘equitable’ remedy [] does not authorize a court to ignore [the] body of statutes, rules, and precedents.”)). Therefore, equity does not compel the Court's finding. *Accord Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (reaffirming the “the ancient maxim that equity aids the vigilant and diligent”).

C. The Court's grant of equitable tolling is an improper *nunc pro tunc* order.

This Court's *sua sponte* order for equitable tolling was granted only *after* the December 3 Order had expired. It is improper to retroactively avoid the expiration of the December 3 Order as if Plaintiff had timely requested that relief or as if this Court had timely granted that relief, when neither actually happened. As a result, this Court's order has the effect of an improper *nunc pro tunc* order and amounts to reversible error. 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).

II. The Court has overlooked that its findings are unsupported by and/or contrary to the evidence.

This Court found that there was no evidence or contention by Smith that Plaintiff did not remain ready, willing, and able to tender payment. [Order pp. 1-2]. However, the Court has overlooked that Smith did make this contention in her written memorandum. *See* [Smith Memo at p. 4] (stating that Plaintiff's ability to perform was a necessary element of specific performance and arguing there has been a "failure of [this] necessary element."). Smith also submitted the affidavits of Parker and Smith, both establishing that Plaintiff made no attempt to tender payment or otherwise gave notice of any intent to do so. *See* [Exhibits to Memo]. On the other hand, Plaintiff submitted no evidence whatsoever to refute this contention or to suggest he has/had the present ability to perform. The only evidence before the Court, and the only inference possible is that Plaintiff failed this necessary element.

CONCLUSION

For the reasons above, this Court should alter its Order denying Smith's Rule 60 Motion so as to grant the relief requested therein and find the December 3, 2019, Order has expired.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By: s/ *TJ Rode*
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Attorneys for Defendant

Charleston, South Carolina

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,	)	Certificate of Service
	)	
vs.	)	
	)	
Barbara Smith,	)	
	)	
Defendant.	)	

I, hereby certify that the enclosed was served on all other parties to this matter by depositing a copy of same via email and via 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

THURMOND KIRCHNER & TIMBES, P.A.

By: s/ 70 Rode
 Thomas J. Rode

This, 14^h day of April 2021.

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF COLLETON

4 Larry Rahn,

5 Plaintiff,

6 vs.

Transcript of Record
2019-CP-15-00218

7 Barbara Smith,

8 Defendant.
9

10
11
12 November 2, 2021
13 Walterboro, South Carolina

14 B E F O R E:

15 The HONORABLE BENTLEY PRICE

16 A P P E A R A N C E S:

17 Ronnie Crosby, Representing the Plaintiff

18 Thomas J. Rode, Representing the Defendant
19
20
21
22

23 SHARON G. HARDOON, CSR
24 Official Circuit Court Reporter, III
25

1 THE COURT: All right. I was just
2 reviewing your motion, Mr. Rode. All right. I'll
3 be happy to hear from you.

4 MR. RODE: Thank you, Your Honor, and
5 I'll try to be quick.

6 We're here today on a Rule 59 motion to
7 reconsider. This was -- sort of to retread a
8 little and bring us back to where we are. This
9 was an order that Judge Buckner issued on a
10 declaratory judgment action that essentially
11 interpreted -- it was an action for specific
12 performance of a settlement agreement. In that
13 order, Judge Buckner said the parties had -- the
14 Plaintiff had until July 11, 2020 to deliver
15 \$312,000. We were supposed to deliver property in
16 exchange for that.

17 The issue in front of Judge Buckner was,
18 how long was that period supposed to survive. We
19 had argued to Judge Buckner it had expired. His
20 order was it was through July 11, 2020. We
21 appealed that order.

22 During the pendency of that, July 11 came
23 and passed, which brought us to the Rule 60 motion
24 that we were in front of Your Honor back in
25 April-ish.

1 In your order, you issued -- I think it
2 was April 5th. You denied our Rule 60 motion for
3 relief. In doing so, Your Honor equitably tolled
4 the July 11, 2020 deadline that Judge Buckner had
5 in his order.

6 The basis of our Rule 59 motion today
7 primarily concerns the tolling of that deadline,
8 particularly the equitable tolling of that
9 deadline. I think what -- the fact that
10 Your Honor addressed that issue said, this order
11 is not stayed by the appeal, but, nonetheless, I'm
12 going to toll it is precisely the rub that we've
13 got here. It recognizes that that right has
14 technically expired. The problem is that nobody
15 moved to toll that deadline.

16 Your Honor's order was nearly a year
17 after that deadline had expired. To find that it
18 must be equitably tolled would have required some
19 action from the plaintiff to either file a motion
20 to stay, which they didn't file a motion for
21 equitable tolling, which they didn't. It was
22 just, sort of, sua sponte granted --

23 THE COURT: Well, all right. Well, let
24 me try to clarify some of my confusion then,
25 because where my head was at was that

1 Judge Buckner had ruled that the July 11th was
2 basically the drop dead date, correct?

3 MR. RODE: Yes.

4 THE COURT: But then you all appealed.

5 MR. RODE: That's correct.

6 THE COURT: So in every appeal the
7 plaintiff would be forced to -- I'm asking --
8 would be forced then to say, okay, since you have
9 appealed the judge's order, I now need to make a
10 motion to stay the entire case pending the appeal.
11 I thought that was automatic.

12 MR. RODE: It's not.

13 THE COURT: Because you appealed it.

14 MR. RODE: It's not, Your Honor. There
15 are certain categories of cases that are stayed
16 automatically. There are certain categories of
17 cases that are not stayed automatically.

18 THE COURT: All right.

19 MR. RODE: Under the statute -- this
20 being an order affecting the interest in real
21 property, under the statute it is not stayed.

22 THE COURT: Okay.

23 MR. RODE: And Your Honor specifically
24 found that at footnote 1 in your order addressing
25 this. You recognized that this is not stayed.

1 THE COURT: Right. What did you appeal?
2 What issue did you appeal?

3 MR. RODE: Well, we appealed
4 Judge Buckner's order as to whether or not they
5 were entitled to specific performance,
6 particularly -- you know, within that, obviously,
7 is --

8 THE COURT: Well, why would they have
9 needed to perform on that date if, in fact, you
10 were appealing that without a decision rendered by
11 the Court of Appeals.

12 MR. RODE: Because the law requires them
13 to do that. That right has expired under
14 Rule 70.

15 THE COURT: And so you're saying that if
16 they would have gone ahead and participated in
17 this specific performance and given you the
18 312,000, you all would have given the parcel of
19 land over. If the Court of Appeals overturned
20 Judge Buckner, you would have required -- then
21 been required to give the money back and they're
22 to give the parcel back.

23 MR. RODE: I don't -- in a theoretical
24 sense, yes, but I don't agree with that
25 categorization of the process through which it

1 would have gone through. They would have been
2 required to tender the money, which they were
3 required to do under Judge Buckner's order. If we
4 did not tender the property, under Rule 70, they
5 would have been able to come before the Court and
6 say, Court, force them to give me the property,
7 issue an order attaching the property. There are
8 five or six different things that Rule 70 would
9 allowed them to do.

10 THE COURT: If they gave you \$312,000,
11 under your theory, what you just explained, why
12 wouldn't you have just tendered the property?

13 MR. RODE: We would have to either tender
14 the property or suffer the consequences from this
15 Court of not complying with Judge Buckner's order.
16 And that is precisely what is required during the
17 pendency of that appeal.

18 And equitable tolling is simply not a
19 proper or correct remedy. Even if they had moved
20 for it, which they didn't, it's not a proper
21 remedy because equity doesn't follow the law. And
22 here the law sets out that procedure of, what do
23 we have to do when this other party, which, in
24 your hypothetical, would have been us, is
25 noncompliant with the judge's order, and they have

1 legal relief that they could have pursued against
2 us.

3 But the filing of the appeal simply
4 doesn't stop the pendency or the deadline within
5 that order, and I think the Gordan case from 2018
6 sort of speaks to that.

7 THE COURT: Let me ask you this: What
8 are your damages? I mean, what are you -- what --
9 how did my order affect you in any way whatsoever?

10 MR. RODE: Well, your order tolled --
11 your order amended Judge Buckner's order.

12 So, in our motion, we, sort of, walked
13 through that.

14 THE COURT: Right. I read it.

15 MR. RODE: And I don't think that this
16 Court has jurisdiction to amend it. I think you
17 could have denied our order or granted our order
18 for relief from judgment.

19 THE COURT: I agree with you 1,000
20 percent. I can't amend any other Circuit Court
21 judge's order, unless it's a bond hearing -- I
22 mean, unless it's a bond. That's it.

23 But under this scenario, what are -- what
24 relief are you seeking from me?

25 MR. RODE: The relief that I'm seeking

1 from you is relief from the judgment, essentially
2 declaring the judgment to be moot because the
3 deadline has passed under Rule 60(b)(5).

4 THE COURT: Okay.

5 MR. RODE: So that was -- the relief that
6 we had requested in our Rule 60(b)(5) motion
7 initially was, this judgment is, in essence, moot.
8 Their time to perform has expired. They did not
9 tender the money. They did not bring us before
10 the Court if we failed to hand over the property.
11 They did not follow the legal relief that is set
12 forth in the law.

13 THE COURT: All right.

14 MR. RODE: In response to that motion,
15 then they get this equitable tolling, which has
16 now, we argue, amended it.

17 The only addition that I would make,
18 Judge, is, even had they filed this equitable --
19 this motion for equitable tolling, I don't think
20 that tolling is -- I can't find any case in
21 South Carolina that tolls a judgment. You're
22 ordinarily tolling a statute of limitations, or
23 something like that.

24 THE COURT: Sure.

25 MR. RODE: I don't think that it can toll

1 the survival of the judgment, which is typically
2 hard and fast, and we see that in the Gordon case.

3 But had there been, and even if that were
4 a proper remedy to seek, had they sought it, they
5 would have had the burden as the parties seeking
6 equitable tolling to provide evidence to support
7 that tolling. Judge, that's Hooper vs. Ebenezer,
8 386 SC 108, 2009. That's a Supreme Court case.
9 And that's just talking about, generally, the
10 party who wants something tolled is the party that
11 must come forward with evidence to establish why
12 it should be tolled. That didn't happen here.

13 THE COURT: All right.

14 MR. RODE: So, in essence, to go back to
15 your question at the top, the relief we're
16 requesting is, Judge Buckner's order is moot.
17 July 11th passed. They no longer have the right
18 to pay. We no longer have the obligation to
19 deliver.

20 THE COURT: So the dispute -- so the
21 dispute, I guess, is, your clients don't want to
22 sell the property no more for the \$312,000, in
23 essence.

24 MR. RODE: In essence.

25 THE COURT: Okay. Mr. Crosby.

1 MR. CROSBY: Yes, Your Honor.

2 Ronnie Crosby on behalf of the plaintiff. This
3 controversy now goes back to sometime around 2005.
4 It is a dispute among siblings that was mediated.

5 In that mediation, there was an agreement
6 reached where property would be divided, and
7 Miss Smith, the defendant here, would be paid
8 \$312,000, which was more than 1/4 of the appraised
9 value of the land and timber, the assets of the
10 estate.

11 We -- all the parties executed deeds to
12 one tract giving up their interest to one of the
13 sisters whom I had to file a lawsuit against to
14 compel that transfer. Because after the
15 mediation, they did not want to comply with it.

16 Once that was completed, to the prejudice
17 of my clients, I represent two of the -- one of
18 siblings in the estate and one other sibling.

19 Miss Smith then decided that, well, I
20 don't want to go through with it either, when
21 everybody had already given up a portion of the
22 property the way the mediation agreement was
23 structured. I had to file suit against
24 Miss Smith.

25 Judge Buckner granted summary judgment,

1 an appeal was taken on that. Summary judgment did
2 direct that transfer of the property occur in
3 July of 2020 and that the transaction be
4 consummated. And I will agree. At that time,
5 either party had the right to execute on that.

6 Execution, as you found, would have been
7 essentially moot or made no sense or been futile
8 because of the ongoing appeal that was being
9 pursued by the defendant, Miss Smith.

10 Those statutes that are cited as you
11 noted in the order, while they would allow
12 execution by either party, they don't mandate it.
13 It just says that judgments are not stayed
14 concerning the payment of money or payment of
15 land, and there's a lot of procedural mechanisms
16 that can take place. There's no mandate there.
17 The cases that are cited dealing with expirations
18 of judgments, options, are just not applicable
19 here.

20 We did not execute on the judgment
21 because they made it clear that they were not
22 going to transfer the property until the Court of
23 Appeals had examined Judge Buckner's order.

24 These arguments were made, and we did
25 argue in the petition -- the Rule 60 motion filed

1 by the defendant asked for equitable relief. And
2 if I recall the conversation with Your Honor that
3 we did talk about the inequities that would have
4 occurred to my clients in this situation given the
5 position that they had taken that they were not
6 going to transfer it, and now we're in trying to
7 claim some technicality suggesting that we had to
8 somehow tender the money.

9 One thing that they even note in this
10 motion to reconsider, they say that there's no
11 evidence that the plaintiff was ready, willing,
12 and able. They made a contention. And I'll say
13 that that was an incorrect word in your order,
14 that there was no contention. There was a
15 contention that the plaintiffs were not ready,
16 willing, and able.

17 But, as pointed out Mr. Rode, and
18 Judge Buckner's order in its effect, Judge Buckner
19 made a finding that the plaintiffs were ready,
20 willing, and able, and there's been nothing to set
21 that aside. So at the time, and as it still
22 stands today, Judge Buckner's order that the
23 plaintiffs were ready, willing, and able to make
24 that payment still stands and still is the case.
25 There is no evidence that anything changed between

1 the issuance of the order in December of 2019 and
2 July of 2020 when that time passed.

3 So, Your Honor, I believe that your
4 finding that that time period was equitable to be
5 tolled, first off, is within your court powers
6 because the parties were here before you in equity
7 arguing for equitable relief.

8 But even if that weren't the case,
9 Judge Buckner's order that the plaintiff was
10 ready, willing, and able still stands in this
11 matter. The fact that the -- there was no
12 execution over that portion of the judgment --
13 they actually make it as if I should have executed
14 against myself and said, here, you all take
15 \$312,000 and just give it to them, which is, as
16 was noted in your order, form over substance
17 here.

18 THE COURT: Well, that's what I was
19 bringing up with Mr. Rode. I was like, what did
20 you expect to happen on July 11th, because my
21 position was, had you tendered the payment, then
22 he was arguing that we would have to fight out
23 whether they are to transfer over the parcel while
24 it's up on appeal as to Judge Buckner's order.
25 And all that just seems to be -- we're just

1 chasing our tails at that point.

2 MR. CROSBY: It's a circle, and I'll tell
3 you --

4 THE COURT: Sir, what did the Court of
5 Appeals come back on Judge Buckner's order?

6 MR. CROSBY: They haven't ruled because
7 they stayed that appeal to come back and try to
8 say, well, hey, here's the -- you all didn't pay
9 us and, therefore, we don't need to go forward
10 with the appeal. Everything is just done and we
11 win as opposed to going through with their appeal.

12 I would take the position, Your Honor, to
13 the extent that there was any altercation of your
14 order that it should include a finding that
15 Judge Buckner's order is the law of the case. He
16 made a finding. There's zero evidence. There's
17 been no contest that the plaintiff was ready,
18 willing, and able, and stood there on this
19 July 12th.

20 And given the fact that there was an
21 ongoing appeal where it was clear that they were
22 not going to tender this property, that the
23 parties in equity should be left in the position
24 they were at the time the appeal was filed.

25 THE COURT: Well, I'm 100 percent -- like

1 I even indicated to Mr. Rode, I agree with him
2 1,000 percent. I did not alter or amend
3 Judge Buckner's order at all. I mean, as I
4 indicated, I don't have that power whatsoever.
5 And so, as far as I'm concerned, it's 100 percent
6 the law of the case.

7 And so if they're going to allow the
8 Court of Appeals to continue forward, I think what
9 should happen is that they should either withdraw
10 the appeal or withdraw the stay. Let the Court of
11 Appeals either rule or withdraw it.

12 And then if you wanted to come back to me
13 and ask for some other type of relief, I'm not
14 even sure what it really would be at this point in
15 time, I guess you would have to ask that I --
16 because his -- well, what would be the position,
17 Mr. Crosby? Because, see, his order has expired.
18 Would we just need a new order from myself for
19 specific performance? How would that work?

20 MR. CROSBY: Your Honor, I haven't
21 thought that through.

22 THE COURT: I hadn't either. I'm
23 thinking out loud.

24 Let's say this, Mr. Rode. Let's say the
25 Court of Appeals says, his order is the law -- you

1 know, the law of the land. However, it's moot at
2 this point in time. It goes back to the trial
3 judge for adjudication. Then what's your position
4 going to be?

5 MR. RODE: I think Your Honor has hit
6 directly on -- the problem that we have in this
7 case, is you -- I don't think that this Court can
8 now issue a new order on specific performance
9 because the entire issue in that previous
10 litigation was, how long do the parties have to
11 commence this deed?

12 THE COURT: I got it, Mr. Rode. But my
13 position -- and I'm not faulting you for this, but
14 your client chose to appeal that.

15 MR. RODE: That's right.

16 THE COURT: That's the problem. Had they
17 not appealed, we would not be in this position
18 right now. When she chose to appeal that, that's
19 what messed all this up. That was a position that
20 she chose. I don't feel like they should be
21 damaged for her decision at all.

22 The fact that the time came and went, I'm
23 never going to make them -- if you would have came
24 to me on 10th and said, these guys need to pay us
25 on the 11th, but it's up on appeal. I would say,

1 absolutely not, get out of here. And so that
2 would be my position if that would have
3 transpired, regardless of whether your clients
4 were going to go forward with their portion. You
5 know, because the specific performance portion was
6 up on appeal, I was never going to allow them to
7 give you all \$312,000 to put in your trust account
8 and let's see where this ends up. That's never
9 going to happen. You're never going to get a
10 court to do that.

11 MR. RODE: And I agree with that. I
12 don't believe that anybody would give me \$312,000,
13 but I think that if we refuse to accept it, they
14 would have to deliver it to the Court. And I'm
15 just pointing out Rule 70. If a judgment directs
16 a party to execute a conveyance in land or deliver
17 a deed or documents to perform other specific act
18 and they fail to do so, they have to file a motion
19 to compel me to do it. And that's simply -- the
20 point is, the time period -- the clock is ticking
21 on the appeal.

22 THE COURT: I understand that. But where
23 in that that you just read it says, unless we
24 appeal the original order?

25 MR. RODE: And that's the statute,

1 Your Honor, that's cited in our original memo.
2 And I can pull that up here. It's titled 18,
3 which specifically says this judgment is not
4 stayed by the appeal. The clock is ticking. Just
5 like in Gordan where they were trying to enforce
6 the judgment that they had, the 10-year limitation
7 ran while the litigation was ongoing. And
8 Justice Hearn and a majority of the Supreme Court
9 says, times up. The right has expired.

10 And that's -- I do agree, Your Honor,
11 yes, we appealed it. But the law says it is not
12 stayed. The law provides them with relief to
13 force me to do something if we -- in that
14 situation. That relief exists whether the case is
15 pending on or not. I don't believe they are
16 entitled to the assumption that simply because
17 it's up on appeal then I am not going to perform,
18 because the law says make them perform. They have
19 the remedy to do it.

20 THE COURT: All right. What evidence do
21 you have that your client was going to perform
22 their duties on the 11th whenever they showed up
23 with the \$312,000?

24 MR. RODE: I don't know that I have that
25 evidence, because that evidence -- I mean, I don't

1 know how that would exist.

2 THE COURT: I see what you're saying.
3 They have the burden to force you to do something.
4 But my point is that, if they're getting -- it's
5 nonsensical for me to sit here and think that
6 because they didn't file a specific document to
7 force you all to do something when they are under
8 the impression with the communication they've had
9 with you all that it's going to be moot and
10 pointless anyway so why would they have to go
11 through it. And now you're hanging you all's hat
12 on a technicality that they didn't go and file
13 some document to force you to do something that
14 they're not going to do. I mean, that doesn't
15 make any sense.

16 MR. CROSBY: And the only thing I would
17 point out is, Your Honor, assumes that there was
18 communication that created within them the
19 assumption that we were not going to perform.
20 That has not been -- there is no evidence of
21 that.

22 THE COURT: Well, I'm just going on --
23 Mr. Crosby is an officer of the Court.

24 MR. RODE: Sure.

25 THE COURT: He said, you know, that there

1 was no reason for them to believe any sort of
2 fashion --

3 MR. RODE: I'm not saying that they were
4 necessarily wrong in that. I was not part of this
5 case at that point in time.

6 But the point is simply this: They have
7 a judgment. They are required to pursue that
8 judgment. They have avenues under the law to
9 pursue that judgement.

10 THE COURT: All right. Well, let's do
11 this.

12 MR. RODE: That's the basis for my
13 motion.

14 THE COURT: I'm with you. As you see,
15 I'm open minded. I'm trying to work this out.

16 MR. RODE: It is sort of this pickle
17 where --

18 THE COURT: Right. Let's do this. I'll
19 grant your motion to reconsider. What happens?

20 MR. RODE: Then what I would ask for is
21 an order that says Judge Buckner's order has
22 expired.

23 THE COURT: Okay. And then what happens?

24 MR. RODE: Then the appeal gets dismissed
25 and the case is over.

1 THE COURT: Well, that ain't fair. That
2 ain't equitable at all.

3 MR. RODE: And we're not here on an
4 equitable basis. I think that they had a
5 judgment. They were required to enforce that
6 judgment. They didn't. The right has expired.
7 They didn't tender. They didn't offer to tender.
8 They didn't say, I've got the money, give me the
9 deed. They didn't come to the Court and say,
10 Judge, I've offered to give them the money and
11 they're not performing.

12 THE COURT: You know, but like you --

13 MR. RODE: Like it's laid out in the
14 rules.

15 THE COURT: Like you admit, you weren't
16 involved in the case back then. I mean, maybe --
17 you know, Mr. Crosby may have information where
18 they were going down that same road. You know,
19 that they were going to accomplish that goal and
20 obviously thought that it would be an absolutely
21 futile point to say, hey, here's \$312,000, put it
22 in your trust account, let me know how my appeal
23 turns out -- or your appeal turns out.

24 MR. RODE: Yes. Well, I don't think so.
25 Here we are two years later, and at no point

1 during that has anybody said, I've got the 300.
2 I'm willing to do this. Here I am. That hasn't
3 happened.

4 THE COURT: All right.

5 MR. CROSBY: But Judge Buckner found that
6 we were, and, if I would have needed to bring
7 evidence from the timber companies in a financial,
8 I could have. But Judge Buckner, there's a
9 finding that we were ready, willing, and able, and
10 that finding was still good. As Mr. Rode has
11 pointed out, it's the law of the case. And
12 Judge Buckner had said that we were ready,
13 willing, and able. I don't know if -- frankly, if
14 that was part of the appeal. I think it was more
15 interpretation of the mediation agreement saying
16 that he was wrong. But that very well may be tied
17 up in that. I don't remember if that was an issue
18 because I don't think a briefing ever gone done on
19 that, Your Honor.

20 But it wasn't equity. They cited equity.
21 Obviously, the specific performance was in equity.
22 And they, in their Rule 60(b), said and quoted
23 that it was being equitable in their favor.

24 And so, Your Honor, it is equity that
25 they're asking for here.

1 THE COURT: What stops me from denying
2 the motion to reconsideration and issuing a new
3 order, and agreeing with you saying,
4 Judge Buckner's order is no good anymore? It was
5 the law of the land. It's expired and I'm going
6 to do a new order.

7 MR. RODE: A new order to do what?

8 THE COURT: To grant the specific
9 performance.

10 MR. RODE: Well, I think that --

11 THE COURT: If they made a motion to have
12 me do it.

13 MR. RODE: There is no jurisdiction to do
14 that because that case has been litigated, decided
15 by Judge Buckner, and is pending at the Court of
16 Appeals.

17 THE COURT: All right.

18 MR. RODE: So I don't -- and, you know,
19 if all of this were to go away -- and I think this
20 -- candidly, Judge, all of this is all roped into
21 the same thing because, what happens if I go leave
22 here now --

23 THE COURT: What's it roped into?

24 MR. RODE: -- and dismiss my appeal?

25 THE COURT: Well, there's my confusion.

1 What's it all roped into?

2 MR. RODE: Well, I think the issues that
3 you are pointing out, they directly relate to the
4 issues that are pending on appeal. And I
5 understand that there's no real way to separate
6 them because the question remains, you have tolled
7 the deadline in Judge Buckner's order without --
8 not saying you tolled for any period of time. But
9 if I were to go dismiss my appeal this
10 afternoon --

11 THE COURT: Okay.

12 MR. RODE: -- then where does that leave
13 us?

14 THE COURT: Specific performance.

15 MR. RODE: Which the order said expired
16 in July of 2020.

17 THE COURT: But I said it tolled. So I
18 would then set a new date. If they didn't do it,
19 it's over.

20 MR. RODE: And that's my point. It's
21 tolled to when?

22 THE COURT: Whatever I say.

23 MR. RODE: Where do you say that? Like,
24 it's not in the order. Like, do we have to file a
25 new action?

1 THE COURT: No. We're grown adults. We
2 can sit here and talk about it.

3 MR. RODE: What's that?

4 THE COURT: I said, we're grown adults.
5 We can sit here and talk about it. When do you
6 all want to give them the money and when do you
7 all want to give them the land?

8 MR. RODE: But from the legal perspective
9 of it --

10 THE COURT: I got it.

11 MR. RODE: -- how do we proceed with this
12 thing that's pending at the Court of Appeals? We
13 have an order that appears to have expired.

14 THE COURT: Right.

15 MR. RODE: We need a ruling on whether or
16 not that order has expired --

17 THE COURT: All right.

18 MR. RODE: -- in order to present that
19 issue to the Court of Appeals.

20 So either Your Honor says, yes, it has
21 expired.

22 THE COURT: Okay.

23 MR. RODE: Or Your Honor says, no, it
24 hasn't expired, and then I appeal Your Honor's
25 ruling as part of the appeal that's already

1 pending at the Court of Appeals. That's basically
2 the bottom line, brass tax of where we are with
3 this.

4 THE COURT: What I'm trying to get to the
5 bottom -- I know you don't know me that well,
6 Mr. Rode, but I'm trying to get to a resolution of
7 this case that doesn't rhyme with appealing for
8 the next 18 more years. Is there one or no?

9 Ronnie knows me just as well as anybody.
10 I'm not a Judge Buckner. I don't holler and
11 scream at people to do all these things, but I've
12 been sitting in this seat long enough where I'm
13 starting to feel like Judge Buckner. I can say,
14 we got to figure this out, because I don't feel
15 like having to deal with this for the next five
16 years when they've been dealing with this since
17 2005.

18 MR. RODE: I certainly appreciate the
19 practical aspect of that.

20 THE COURT: Right.

21 MR. RODE: My engagement in this case is
22 to deal with the aspect of it, Your Honor.

23 THE COURT: All right.

24 MR. RODE: I can't talk cogently with you
25 about that, but I appreciate that sort of

1 mentality of this.

2 The simple question that we are today to
3 figure out is, they filed an action for specific
4 performance saying they have until July 11, 2020
5 to pay money and get property. That has passed.
6 For all the various reasons why that has passed,
7 that has passed. Here we are trying to deal with
8 what the law makes of that. And that's -- you
9 know, unfortunately for your practical aspect of
10 this, that's where -- that's where I'm at.

11 MR. CROSBY: Your Honor, I would say,
12 just as Judge Buckner did, when we filed this
13 specific performance, any time had passed in that,
14 because there was a time period coming out of the
15 lawsuit with the first sister, they claim that
16 Judge Buckner made the time commensurate -- added
17 the time on. Once he granted, he went back and
18 added the amount of time that had passed on.

19 And here, if we're tying it to the appeal
20 date, that would seem, to me, to be the
21 appropriate amount of time that got extended that
22 it was tolled for. From the day they filed the
23 appeal until the appeal is over.

24 And I do appreciate Your Honor's
25 practicality. You can really and truthfully see

1 what this is. This is a bitter dispute amongst
2 siblings who inherited several hundred thousand
3 dollars a piece, and two of them -- several of the
4 family members have died since I started trying to
5 resolve this. All that for no remuneration to
6 myself because it's a friendly thing that I
7 thought I was going to do.

8 THE COURT: What do they say? No good
9 deed goes --

10 MR. CROSBY: No good deed goes
11 unpunished.

12 THE COURT: Unpunished. That's for sure.
13 Trust me.

14 All right. So let's do this. All right,
15 Mr. Rode, when did you file the appeal?

16 MR. CROSBY: I believe March sometime.

17 MR. RODE: Yeah.

18 THE COURT: That would be fine. Close
19 enough.

20 MR. RODE: Judge, it was within the time
21 period after Judge Buckner's order. So, I mean,
22 it has been up there for a while.

23 THE COURT: When did you --

24 MR. RODE: It was stayed --

25 THE COURT: Right.

1 MR. RODE: -- for the purposes of filing
2 the Rule 60 motion. And it has been stayed
3 pending the outcome of this. Monthly, I have to
4 send a letter to the Court of Appeals saying, you
5 know, where our motions are pending, this, that,
6 and other thing. So it's literally being held in
7 abeyance until the Circuit Court has had an
8 opportunity to rule on the Rule 60. A final
9 ruling on the Rule 60 motion.

10 THE COURT: Okay. It was filed in March.
11 And when did you stay the appeal?

12 MR. CROSBY: September of --

13 MR. RODE: The last two months.

14 MR. CROSBY: About two months after that
15 time period went. They stayed it. And then they
16 filed a 60(b). We heard it maybe in April or
17 March.

18 MR. RODE: Yeah, something like that. It
19 was heard in April. Your order is dated April of
20 last -- last April. This April.

21 THE COURT: Yeah, see, I just heard it.

22 MR. CROSBY: So the appeal was filed
23 in --

24 THE COURT: March.

25 MR. CROSBY: Of '20.

1 THE COURT: '20.

2 MR. CROSBY: The motion to stay the
3 appeal, I believe, came in or about September of
4 '20. The 60(b) was filed, and then you had heard
5 it in April. COVID had everything --

6 THE COURT: Yeah, then everything was
7 messed up.

8 MR. CROSBY: And then after your order,
9 Mr. Rode filed the motion to reconsider, which was
10 scheduled to be heard in on about the time of all
11 the things going on around my law firm. You all
12 graciously agreed to put it off. And so it's drug
13 out for a while.

14 THE COURT: Here's the only way this is
15 going to work. The only way this is going to work
16 is this: My finding is that Judge Buckner's order
17 was the law of the land. It got stayed by myself
18 beginning on that July date, basically because of
19 the appeal that was filed as to Judge Buckner's
20 order and the date and time came in July, 11th. I
21 simply said that it had been stayed from July
22 11th, '20 until I made my April ruling. So that
23 would be nine months.

24 All right. In doing so, what I'm going
25 to do, just so you'll procedurally know what to do

1 next is, I'm going to deny your motion to
2 reconsider. I'm going to stick with my original
3 order that it was tolled. And I'm going to set a
4 new date as of now. And I'm going to agree that
5 his has expired, however I tolled it and I'm
6 giving it a new date of three months from today's
7 date for specific performance and you'll appeal
8 that.

9 MR. RODE: Are you going to issue a new
10 order?

11 THE COURT: Uh-huh.

12 MR. RODE: Okay.

13 THE COURT: You just have to appeal it.

14 MR. RODE: So there will be a new order
15 coming?

16 THE COURT: Yes.

17 MR. RODE: Okay.

18 THE COURT: That's the only way this is
19 ever going to work. If not, we're just going to
20 keep chasing our tails. So somebody else is going
21 to have to sort this out.

22 MR. RODE: Okay.

23 THE COURT: Because we can't.

24 So what I'm going to do is, I'm going to
25 say that it is -- that it's tolled until whatever

1 it is, 90 days from today's date. And if
2 performance hasn't been accomplished by then, they
3 either tender the money and you tender the
4 property, then, of course, that will be -- we'll
5 have a finite -- you know, because the appeal is
6 still up there. They can do whatever they want
7 with that. You see my point? But we got to have
8 a finite date to see what's going to happen on
9 that day. Because, procedurally, he's either
10 going to have to do what you think he needs to do,
11 which is to file a motion to stay or to file a
12 motion to execute the judgment, or you're going to
13 have to take this up and appeal it and say I
14 wasn't able to do what I did. I shouldn't have
15 stayed the judgment, and that Judge Buckner's, you
16 know, was unable to be stayed. What I did was
17 wrong or, you know, not legally correct.

18 But for us to be able to come to a
19 resolution either to see what's going to happen on
20 the 90th day -- let's find out what's going to
21 happen on the 90th day and that will just, kind
22 of, procedurally tell us where we need to go.

23 Without that, we're not going to get
24 anywhere. Without me setting a new specific
25 date.

1 MR. RODE: And just for the purposes of
2 the record --

3 THE COURT: Yes.

4 MR. RODE: -- so that my objection to
5 that is clear and so I don't have to file another
6 Rule 59 motion, is that motion to stay was never
7 filed.

8 THE COURT: That's correct.

9 MR. RODE: And, basically, incorporating
10 all the other arguments that we've made.

11 THE COURT: Right.

12 MR. RODE: Just because I don't want to
13 get caught up in a situation where we filed
14 another Rule 59 motion.

15 THE COURT: Right, that's fine. I
16 equitably tolled it. You filed your motion
17 because it was up on appeal. That's why I chose
18 to do that. I've set now a new date. We're going
19 to find out what's going to happen on that 90th
20 day and we're going to proceed forward from there.
21 I think that's the only way we're going to be able
22 to do it. So figure it out from there. All
23 right.

24 All right?

25 MR. CROSBY: Thank you, Your Honor.

1 THE COURT: All right. If I've created a
2 bigger mess, that's what they get paid to do up in
3 Columbia. Not down here.

4 (The hearing was concluded.)

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CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Colleton County, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

January 8, 2022



Sharon G. Hardoon, CSR
Official Circuit Court Reporter, III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A No.: 2019-CP-15-00218
COUNTY OF COLLETON	)	Appellate Case No.: 2021-01540
	)	
Larry Rahn,	)	
	)	
Plaintiff,	)	EMERGENCY MOTION FOR
	)	SUPERSEDEAS
vs.	)	
	)	
Barbara Smith,	)	
	)	
Defendant.	)	

COMES NOW the Defendant, who, pursuant to Rule 24(c), SCACR, moves for Supersedeas, and who further **HEREBY GIVES NOTICE** of Defendant's offer to place the performance contemplated by the Circuit Court's December 14, 2021 Order in escrow (or to be held by the Court) pending the resolution of the appeal of said Order. This motion is based upon the following:

1. Plaintiff commenced this action seeking specific performance of "Settlement Agreement 2" regarding the sale of land. On December 3, 2019, Judge Buckner issued an Order directing Defendant to convey the real property to Plaintiff in exchange for Plaintiff's payment of \$312,000.00 on or before July 11, 2020. Defendant appealed this Order (Appellate Case No. 2020-000607).

2. Plaintiff did not perform within the time ordered by Judge Bucker, and Defendant subsequently filed a Rule 60 Motion seeking relief from Judge Bucker's Order on the basis that it had expired.

3. The Circuit Court denied Defendant's Rule 60 Motion on April 5, 2021, and Defendant subsequently filed a Rule 59 Motion in response.

4. On December 14, 2021, the Circuit Court issued an Order amending its previous Order denying the Rule 60 Motion. In the amended Order the Circuit Court directed that “the Parties shall have until February 1, 2022, to complete performance under the contract after which the non-performing party(s) rights shall expire.” This Order was based, in part, upon the conclusion that Plaintiff is “ready, willing and able to perform.” (*See Order*).

5. Defendant appealed the Circuit Court’s December 14, 2021 Order (Appellate Case No.: 2021-001540) and moved to consolidate this with the other pending appeal identified at Paragraph 1 above.

6. Under the contract in dispute, Plaintiff was to tender payment of \$312,00.00 and prepare the deed that Defendant is required to execute in favor of Plaintiff if on appeal it is determined that Plaintiff still has the right to purchase the property. (*See Ex. A to Complaint p. 3*).

7. Because the Order directs the sale of real property, the Circuit Court’s December 14, 2021 Order is not stayed by the commencement of the appeal. *See* Rule 241(b)(4); S.C. Code Ann. § 18-9-170; *see also* S.C. Code Ann. § 18-9-160.

REQUEST FOR SUPERSEDES

The question to be decided by the appellate courts in this matter is whether performance is required by the parties. While this issue is in dispute, if the appellate courts affirm the December 14, 2021 Order, then performance will be required by both parties on, or before, February 1, 2022. However, this deadline will have passed by the time the issue is decided by the appellate courts.

So there is no question about the performance of the parties (and to avoid the December 14, 2021 Order from becoming moot) Defendant requests this Court grant a supersedeas and order that each party shall tender and deposit their performance into escrow (or into the Court) to be held pending the outcome of the appeal.

Therefore, Defendant asks this Court to order as follows:

- (1) that Plaintiff shall pay \$312,000.00 into escrow (or into the Court) on or before the deadline;
- (2) that Plaintiff prepare and deliver the required deed to Defendant on or before the deadline;
- (3) that upon receipt of the deed, Defendant shall execute the deed and deposit the same in escrow; and
- (4) that the money and deed be held in escrow (or by the Court) pending the outcome of the appeal(s) and be distributed upon final resolution of the appeal(s) in accordance with the decision of the appellate court.

Defendant asserts that such an Order would secure all parties and is further compelled by, and consistent with, the Circuit Court's disputed finding that Plaintiff is ready willing and able to perform.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

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January 27, 2022
Charleston, South Carolina

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

Common Pleas Case No.: 2019-CP-15-00218

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ...Respondent,

v.

Barbara Smith, ...Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210, SCACR, I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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