RECEIVED
Apr 05 2023
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

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

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ……...Respondent,

v.

Barbara Smith, ……..Appellant.

APPELLANT'S BRIEF

THURMOND KIRCHNER & TIMBES, P.A.
Thomas J. Rode (SC Bar No. 77480)
15 Middle Atlantic Wharf
Charleston, SC 29401
(843) 937-8000
thomas@tktlawyers.com

and

PARKER LAW, LLC
Gregory E. Parker, Jr. (SC Bar No. 101328)
PO Box 584
Columbia, SC 29202
(803) 768-4800
greg@parkerlawsc.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ISSUES ON APPEAL 2

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

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

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

STATEMENT OF THE CASE 2

PROCEDURAL HISTORY 5

APPELLATE PROCEDURE 9

ARGUMENT PART ONE (Mootness) 10

I. The Orders on appeal have expired and so too has Respondent's right to specific performance, and therefore, this matter is moot. 10

ARGUMENT PART TWO (Orders issued by Judges Price and Buckner are erroneous) 13

II. Judge Price Committed Reversible Error in Denying Smith's Rule 60 Motion and *sua sponte* tolling the July 11, 2020, option deadline established by Judge Buckner. 14

A. Standard of Review Regarding the Appeal from a Rule 60 Motion. 14

B. Judge Price's Improper Denial of Smith's Rule 60 Motion. 14

1. Judge Price's Order is legally defective because it was entered without jurisdiction and amounts to an illegal *nunc pro tunc* order. 15

2. Application of the doctrine of equitable tolling in this case is inconsistent with the law and unsupported by evidence. 17

III. Judge Buckner committed reversible error in finding the Option period extended until July 11, 2020. 20

A. Standard of Review regarding review of Judge Buckner's Order. 20

B. Judge Buckner erred in granting Respondent Summary Judgment. 20

1. The circuit court erred in finding that Harriett's execution of the deed was a condition precedent to the commencement of the option period. 21

a. The circuit court's interpretation of the Agreement is inconsistent with its plain language. 21

b. The circuits court's conclusion that Smith could not perform prior to the deed from Harriett is wrong because the law permits the transfer of a future interest in property. 23

2. Judge Buckner erred in awarding specific performance of the option because there was no evidence that Respondent was ready willing and able to perform. 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Am. Legion Post 15 v. Horry Cty., 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009) 18
BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) 14
Belton v. State, 313 S.C. 549, 443 S.E.2d 554 (1994) 15
Ben. Fin. I, Inc. v. Windham, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020) 25
Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 747 S.E.2d 426 (2013) ... 16
BMW of N. Am., LLC v. Complete Auto Recon Servs., 399 S.C. 444,
731 S.E.2d 902 (Ct. App. 2012) 16
Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) 27
C & S Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966) 14
Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009) 20
Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) 27
Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992) 14
Cotter v. James L. Tapp Co., 267 S.C. 647, 230 S.E.2d 715 (1976) 22
Croft v. Town of Summerville, 433 S.C. 473, 860 S.E.2d 352 (2021) 13
Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) 18
Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 449 S.E.2d 251 (Ct. App. 1994) 15
Earle v. Maxwell, 86 S.C. 1, 67 S.E. 962 (1910) 24
Eldridge v. Eldridge, 398 S.C. 113, 728 S.E.2d 24 (2012) 20
Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 22
Ex parte Strom, 343 S.C. 257, 539 S.E.2d 699 (2000) 16
Gordon v. Lancaster, 425 S.C. 386, 823 S.E.2d 173 (2018) 10, 17
Greer v. Spartanburg Technical College, 338 S.C. 76, 524 S.E.2d 856 (Ct. App. 1999) 20
Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009) 17, 18
Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000) 10, 13, 25
Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 394 (2014) 22
McDill v. Nationwide Mut. Ins. Co., 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2006) 13
McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933) 27
Michel v. Michel, 289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986) 15
Miller v. Dillon, 432 S.C. 197, 851 S.E.2d 462 (Ct. App. 2020) 25

N. Am. Rescue Prods. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015) 22
Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 721 S.E.2d 447 (Ct. App. 2011)..... 18, 19
*Peoples Loan & Exchg Bank v. Garlington,*54 S.C. 413, 32 S.E. 513 (1899)..... 24
Rembert v. Evans, 86 S.C. 445, 68 S.E. 659 (1910) 24
Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009) 17
Roundtree v. Rountree, 26 S.C. 450, 2 S.E. 474 (1887) 24
S.C. Dep't of Revenue v. Elliott, 350 S.C. 404, 566 S.E.2d 196 (Ct. App. 2002) 15
S.C. Dept. of Nat. Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001) . 16
S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645,
667 S.E.2d 7 (Ct. App. 2008)..... 20
Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) 20
Smith v. Barr, 375 S.C. 157, 650 S.E.2d 486 (Ct. App. 2007) 14
Southern Silica Mining & Manufacturing Company v. Hoefer, 215 S.C. 480,
56 S.E. (2d) 321 (1949)..... 22
Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418,
392 S.E.2d 460 (1990) 25
Strickland v. Chaplin, 199 S.C. 203, 18 S.E.2d 736 (1942) 11
Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990)..... 14
Trivelas v. S.C. DOT, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) 27
Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)..... 18

Statutes

S.C. Code Ann. § 18-9-170..... 7, 10, 13, 18

Rules

Rule 225, SCACR..... 15
Rule 241, SCACR..... 7, 10, 19
Rule 59, SCRCP..... 8
Rule 60, SCRCP..... 1, 14, 15
Rule 70, SCRCP..... passim

Other Authorities

77 Am. Jur. 2d *Vendor and Purchaser* § 53 (1997)..... 25
91 C.J.S. *Vendor and Purchaser* § 10 (1951)..... 25
Black's Law Dictionary 1174 (9th ed. 2009)..... 17

INTRODUCTION

On November 20, 2015, the appellant Barbara Smith ("Smith") signed an agreement granting her brother, Larry Rahn ("Respondent"), an option to purchase her interest in a parcel of real property for $312,000.00. The agreement provided Respondent "[had] 24 months to deliver [the] funds." (R. p. 14). Although the funds were never delivered, on March 21, 2019 (*i.e.*, 42 months after the option was given) Respondent brought this action for specific performance of the agreement. (R. pp. 10-11). The primary dispute before the trial court was whether Respondent's right to purchase the property had expired. (R. pp. 35-37).

This consolidated appeal concerns two separate orders (from two separate judges). The first is a summary judgment order issued by Judge Perry M. Buckner on December 3, 2019, and finding Respondent was entitled to specific performance if he tendered payment on or before July 11, 2020—a date Smith asserts is contrary to the plain language of the 2015 agreement which provided for a 24-month option period. (R. pp. 1-5). Although Smith appealed, under Section 18-9-170 of the South Carolina Code, this appeal did not stay Judge Buckner's Order. Therefore, when the July 11, 2020, deadline passed without Respondent tendering payment (or seeking to enforce the Order under Rule 70, SCRCP) Smith filed a motion pursuant to Rule 60, SCRCP (with leave of this Court) for relief from Judge Buckner's Order on the basis that it was expired. (R. p. 92).

The second order on appeal stems from Smith's Rule 60 Motion and was issued by Judge Bentley Price on December 14, 2021 (as amended). (R. p. 95). Although Judge Price determined Judge Buckner's previous Order had expired on July 11, 2020, rather than granting Smith's Rule 60 Motion, Judge Price *sua sponte* declared (nearly a year and a half after the fact) that this deadline for specific performance was "equitably tolled" until February 1, 2022—a completely arbitrary

date. (R. p. 95). Not only did Judge Price lack the authority to modify Judge Buckner's Order in this way, the *sua sponte* imposition of equitable tolling is without any factual basis or evidentiary support.

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

ISSUES ON APPEAL

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

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

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

STATEMENT OF THE CASE

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

their father.[1] Brantley died in 2011, and his 1/4 interest was split between his two children Kenneth Rahn and Nancy Crosby (*i.e.*, 1/8th or 12.5% each).

In 2015, the five owners held a mediation in the hopes of consolidating ownership of the parcels in a more practical way. From this it was agreed that Harriett would take 100% ownership of Glover Place (the smaller parcel) in exchange for relinquishing her interest in Home Place (the larger parcel) to the remaining owners pro-rata. This arrangement would leave Home Place owned by Smith (1/3); Respondent (1/3); Nancy (1/6); and Kenneth (1/6). (R. pp. 12-14). The pre-mediation and post-mediation interests are shown here for convenience:

Fig. 1 – Pre-Mediation Interests

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

Fig. 2 – Post-Mediation Interests

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

At the mediation it was separately agreed that Smith would give the owners of Home Place (*i.e.,* Respondent, Nancy, and Kenneth) a 24-month option to purchase her (now increased) 1/3 interest in Home Place for $312,000.00. To memorialize this, on November 20, 2015, the parties executed two written agreements entitled: "Settlement Agreement 1" and "Settlement Agreement 2," which are described below.

Settlement Agreement 1:

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

. . .

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

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

(R. p. 12, ¶ 4).

Settlement Agreement 2:

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

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

(R. p. 14).

There was apparently a delay in executing the deeds related to Glover Place under Settlement Agreement 1. As a result, on January 23, 2017—roughly 14 months after the agreement was executed—Respondent filed a lawsuit against Harriett for specific performance of Settlement Agreement 1 and seeking to compel Harriett to execute the necessary deeds. (Case No. 2017-CP-15-059). On May 4, 2018, the circuit court ordered Harriett to execute the deeds within fifteen days. (R. at *id*.). Although not in the record, Respondent claims Harriett executed the deed conveying her interest in Home Place on July 11, 2018. (R. p. 64, lines 18-19); (R. p. 2).

In the fall of 2018—roughly a year after the 24-month option period expired—Respondent approached Smith with a proposal to cut the timber on Home Place. (R. p. 50, ¶ 22). However,

rather than pay Smith her 1/3 share of the proceeds from the Home Place timber, Respondent proposed to use Smith's share of the proceeds to purchase her interest in Home Place for the option price of $312,000.00 (R. at *id.*). In essence, Respondent proposed to pay Smith with her own money. Smith declined this proposal, not only because it was a bad deal, but also because the option had long since expired. (R. at *id.*). Neither before nor since has Respondent (or any other owner) ever tendered (or attempted to tender) the required $312,000.00 option price. (R. pp. 111-113).

PROCEDURAL HISTORY

The procedural history of this matter is both confusing and troubling. On March 21, 2019, Respondent filed this lawsuit for specific performance of Settlement Agreement 2. (R. pp. 10-11). The Complaint seeks to "compel [Smith] to execute the deed in performance of the obligation she agreed to in the mediation agreement." (R. p. 11, ¶ 12). The other owners of Home Place (*i.e.*, Nancy and Kenneth) are not parties to this suit although they are parties to Settlement Agreement 2. Although Respondent's Complaint alleges that he was "ready, willing, and able to *execute the deed*," the complaint does not allege that Respondent was ready willing and able to *pay the purchase price* or that he had attempted to make such payment. (R. p. 11, ¶ 11). (emphasis added). This is important because a plaintiff's tender of performance is a necessary element to succeed on a claim for specific performance.[2] Smith answered the Complaint asserting the option period had expired. (R. pp. 35-37).

[2] In addition to "delivering" payment, Settlement Agreement 2 also requires Respondent to prepare the deed that Smith was to execute upon tender of payment. (R. p. 12). Although Respondent claims, at paragraph 9 of the Complaint, that he has already prepared the required deed (which he purports to be Exhibit B to the Complaint), this is not correct. Exhibit B to the Complaint is a series of deeds all associated with Glover Place and which only relate to Respondent's previous suit against Harriett (R. pp. 10-34). To date Respondent has never presented the deed required by Settlement Agreement 2—which Respondent acknowledges he is required to prepare as a

JUDGE BUCKNER'S SUMMARY JUDGMENT ORDER

On June 12, 2019 (just 18 days after Smith answered the Complaint) Respondent filed a Motion for Summary Judgment. (R. p. 38). This motion was filed before any discovery was conducted. (R. p. 38). The only evidence Respondent submitted in support of his motion was a copy of Settlement Agreement 2 which was also attached as an exhibit to his complaint. (R. p. 38). The only written argument Respondent offered in support of his motion consisted of two conclusory sentences in the filed notice of motion: "Despite [Smith's] execution of the mediation agreement, she has refused to comply with its terms. [Respondent] prays for an order granting the relief sought in his complaint." (R. p. 38).

In opposition to summary judgment, Smith filed a detailed affidavit establishing that neither Respondent nor any other owner had ever delivered or attempted to deliver the purchase money. (R. pp. 47-51). Further, Smith argued the plain language of Settlement Agreement 2, established a 24-month option period, for which there were no conditions precedent, and which expired. (R. pp. 39-46).

Judge Buckner heard Respondent's Motion for Summary Judgment on October 9, 2019. (R. p. 52). Because Respondent submitted no evidence to support his motion, Respondent relied only on the representations of his counsel, Mr. Crosby, of Peters, Murdaugh, Parker, Eltzroth & Detrick. To substantiate the claim for specific performance, Respondent's counsel told Judge Buckner that Respondent stood "ready to pay [Smith] the $312,000 whether the timber had been cut or not." (R. p. 83, lines 1-7). However, there is/was no evidence to support this assertion. Moreover, there was no discussion for why that money had not, to date, been offered to Smith.

condition precedent to his option rights under the Settlement Agreement. *See* (R. p. 11) (stating the "deed ha[s] been prepared per the mediation agreement.").

On December 3, 2019, Judge Buckner issued an Order finding that Harriett's execution of the deeds was a condition precedent, and therefore the 24-month period did not begin to run until July 11, 2018—when Harriett allegedly executed the deeds. (R. pp. 3-5). Judge Buckner directed that "[Smith] is hereby ORDERED to transfer her interest in the Home Place **upon payment** of $312,000.00 . . . [and] the Parties are further ORDERED to fully comply with the terms of the Settlement Agreement 2 on or before July 11, 2020." (R. pp. 4-5) (emphasis added). Smith appealed, and this Court assigned the matter Appellate Case No. 2020-00607 (the "Initial Appeal").

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

Because Judge Buckner's Order directed the conveyance of real property, pursuant to S.C. Code Ann. § 18-9-170 and Rule 241(b)(4), SCACR, this Order was not stayed by the initiation of an appeal. Moreover, Respondent did not take any action to enforce or stay Judge Buckner's Order. *See* Rule 70, SCRCP (providing the procedure for enforcing a court order which directs the conveyance of land with a specified time). Therefore, when Respondent failed to tender payment by July 11, 2020, it stood that Judge Buckner's Order, whether right or wrong, had expired. Because the Initial Appeal was pending, on October 2, 2020, Smith filed a motion with this Court seeking leave to file a Rule 60 Motion with the circuit court to obtain relief from Judge Buckner's expired Order. (R. pp. 107-109). This Court granted such leave on November 30, 2020. (R. p. 106). Smith filed the Rule 60 Motion with the circuit court, together with supporting affidavits. (R. pp. 99-114). Respondent offered no written memoranda or evidence in opposition to Smith's Rule 60 motion, and this motion was heard by Judge Price[3] on March 18, 2021. (R. p. 115).

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

On April 5, 2021, Judge Price issued an Order confirming that Smith's "notice of appeal did not stay execution [of Judge Buckner's judgment]" or its July 11, 2020 expiration date. (R. pp. 92-93). However, Judge Price proceeded to declare, *sua sponte,* that "equity required" that this long-expired deadline be "tolled pending the appeal." (R. p. 93). In response, Smith filed a motion pursuant to Rule 59(e), SCRCP, asserting this relief (which was never requested by Respondent) was improper and unsupported by any evidence support. (R. pp. 134-139).

Smith's Rule 59 Motion was heard on November 2, 2021. (R. p. 141). At the hearing Judge Price clarified his ruling by stating: "My finding is that Judge Buckner's order was the law of the land. It got stayed by myself beginning on that July[, 11, 2020] date, basically because of the appeal that was filed as to Judge Buckner's Order and the date and time came in July 11th. I simply said that it had been stayed from July 11, '20 until I made my April ruling." (R. p. 170, lines 16-22). The Court went on to explain: "I'm going to agree that his [*i.e.*, Judge Buckner's order] has expired, however, I tolled it and I'm giving it a new date three months from today's date for specific performance." (R. p. 171, lines 4-7). This was reduced to a written order on December 14, 2021, in which Judge Price amended his prior order to provide the July 11, 2020, deadline would be equitably tolled until February 1, 2022. (R. p. 95). Specifically, the court stated: "the Parties shall have until February 1, 2022 to complete performance under the contract after which the non-performing party(s) rights shall expire." (R. p. 95). Smith timely filed notice of appeal from this order which was assigned Appellate Case No. 2021-01540 (herein the "Second Appeal").

Because this order (like Judge Buckner's Order before it) was not stayed by the Second Appeal, the court's additional finding that the parties would lose their rights under the contract on February 1, would ostensibly resolve the issues pending in the Initial Appeal. However, this was problematic because Smith could not perform until Respondent tendered the required $312,000

payment *and* prepared a deed for her execution, neither of which occurred as the February 1 deadline approached. *See* (R. p. 14) (Settlement Agreement 2 requiring each party to be responsible for their own deed preparation). Therefore, to avoid losing her "rights" (whatever the court meant by "rights"), on January 27, 2022, Smith filed an Emergency Motion for Supersedeas, asking Judge Price to have the parties deposit their respective performance with the court or in escrow pending the appeal. (R. p. 176). (Smith offering to place the executed deed (once prepared) in escrow and asked Judge Price to order Respondent to place the purchase money in escrow).[4]

On February 1, 2022, Judge Price issued an order denying Smith's offer to place performance in escrow, but nonetheless stating "the Court finds it appropriate to impose supersedeas pending the outcome of the appeal." (R. p. 97).[5]

APPELLATE PROCEDURE

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

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

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

ARGUMENT PART ONE
Mootness

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

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

Here the mootness discussion begins with Section 18-9-170 of the Code as well as Rule 241(b)(4), SCACR, both of which provide that an order directing the conveyance of real property is not stayed by the initiation of an appeal. *See* S.C. Code Ann. § 18-9-170 ("If the judgment

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

appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgement shall not be stayed" by the filing of a notice of appeal); *see also* Rule 241(b)(4), SCACR (judgment directing the sale of real property not stayed on appeal). Moreover, it has long been recognized that the passage of time can render a matter moot during the pendency of an appeal. *See e.g., Strickland v. Chaplin*, 199 S.C. 203, 205, 18 S.E.2d 736, 737 (1942) ("[P]ending this action and appeal the question [on appeal] has become a moot one . . . by lapse of time.").

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

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

Rule 70, SCRCP (emphasis added).

Plainly Rule 70, SCRCP, provides a means of preventing an order from becoming moot. However, as the emphasized language above demonstrates, for a party to avail himself of Rule 70, he must be "entitled to performance" from the other party. That is important here, because under the terms of Settlement Agreement 2, and Judge Buckner's Order, Respondent did not become

entitled to performance from Smith until Respondent delivered payment. (R. p. 4); (R. p. 14). Thus, the means of avoiding mootness, by availing himself of Rule 70, was always within Respondent's control, and the fact that Smith appealed did nothing to impede this. Moreover, because Respondent's tender of the purchase money was a necessary element of his claim for specific performance (*see* discussion *infra*) this payment requirement creates no additional burden on Respondent that he did not already assume by filing this action to begin with.

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

To distract from this, Respondent attempts to excuse his failure to tender payment by claiming Smith's commencement of the Initial Appeal entitled him to believe that Smith would not accept the payment even if it were tendered. (R. p. 122, lines 21-25). Not only is this assumption unsupported by evidence, but it also misses the point entirely. Delivery of the purchase money is not some favor; it is Respondent's legal obligation. Likewise, whether Smith would have accepted the money is wholly immaterial. Rule 70, SCRCP, makes this point clear. Had Respondent tendered the money and Smith refused to accept it, or refused to execute the deed on

its delivery, Respondent could have availed himself of Rule 70, SCRCP, or other legal means to force Smith's performance. However, the fact remains Respondent did not do this.

In the same way that Smith cannot use the appeal to avoid enforcement of Judge Buckner's Order, Respondent surely cannot use the appeal to expand his rights under the same Order. *Accord,* S.C. Code Ann. § 18-9-170 (*supra*); *and Ingram*, 340 S.C. at 106 n.1, 531 S.E.2d at 291 (an appeal cannot "expand the time for [an optionee] to tender the money"). Because both July 11, 2020 (as determined by Judge Buckner) and February 1, 2022 (as determined by Judge Price) have passed, even if this Court were to affirm both orders, Respondent would still have no *present* right to purchase Smith's interest in Home Place. Thus, the question of whether these orders are erroneous has become purely academic—the quintessential hallmark of mootness. *See Croft v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) ("An appellate court will not pass on moot and academic questions . . . [and] A moot case exists where a judgment rendered by the court will have no practical legal effect") (internal citation omitted); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 31, 627 S.E.2d 749, 750 (Ct. App. 2006).

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

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

Judge Buckner's Order expired on July 11, 2020. Although Judge Price agreed, he decided to *sua sponte* toll this expiration.[7] (R. p. 93, n. 1). As a result, any potential efficacy that Judge

[7] Although Judge Price did not specifically state in his written orders that Judge Buckner's Order had expired, he explained on the record that was the reason for his ruling. (R. p. 171). Moreover, a finding that Judge Buckner's Order was expired is inherent in the decision to impose equitable tolling because if it had not expired, there would be nothing to toll.

Buckner's Order may have turns on whether Judge Price erred in tolling its expiration. Therefore, Smith addresses the errors in Judge Price's Order first and Judge Buckner's Order second.

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

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

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

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

The question presented by Smith's Rule 60 Motion was whether Judge Buckner's Order had expired. Judge Price properly concluded that it had. However, without any factual support, the court *sua sponte* applied the doctrine of equitable tolling to extend the period for specific performance contained in Judge Buckner's Order. (R. pp. 92-95). This was error, and Judge Price's Order must be reversed for two reasons. First, this Order is legally defective because Judge Price lacked jurisdiction to amend Judge Buckner's Order, and further, to do so retroactively amounts to an improper *nunc pro tunc* order. Second, the *sua sponte* decision to apply equitable tolling is without any evidentiary support and contrary to the law. *See e.g., Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) ("It is well known that equity follows the law."); *C & S Nat'l Bank v. Modern Homes Constr. Co.*, 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966).

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

The circuit court lacks jurisdiction to address the merits of an order that is pending on appeal. *See* Rule 225(a), SCACR (providing that on appeal, the circuit court only "retains jurisdiction over matters not affected by the appeal"). Further, it is settled that a circuit judge lacks authority to overrule the decision of another circuit court judge. *See Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding that one judge does not have the authority to overrule another judge's order regarding questions of law).

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

Here, there is no way to view Judge Price's imposition of equitable tolling as doing anything other than affecting the merits of the order on appeal—*i.e.*, the duration of the option period as determined by Judge Buckner's Order. The precise issue before Judge Buckner was when Respondent's right to compel specific performance of his option would expire. In granting summary judgement, Judge Buckner determined, *as a matter of law*, that the option period created

by Settlement Agreement 2 expired on July 11, 2020.[8] (emphasis added); *see e.g., Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013) (the interpretation of a contract is a matter of law); *citing S.C. Dept. of Nat. Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001); *see also BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 450, 731 S.E.2d 902, 906 (Ct. App. 2012) (recognizing that summary judgment as to the interpretation of a contract is only proper where the moving party "is entitled to judgment *as a matter of law*") (emphasis added). Accordingly, the July 11, 2020, deadline is more than the expiration of Judge Buckner's Order. Instead, it represents Judge Buckner's final determination as to the merits of the controversy that was before him—and the very issue on appeal in the Initial Appeal. It is inescapable that by extending this deadline, Judge Price's Order expands Respondent's option right under Settlement Agreement 2.[9] Thus, Judge Price lacked the authority to issue this Order, and it must therefore be reversed. But there is more.

The Order tolling the July 11, 2020, deadline was entered in April of 2021, and amended in December of 2021—well after July 11, 2020—as if Respondent had timely requested this relief, or as if the circuit court had timely granted this relief. But neither of these things occurred. Such a retroactive order is an improper *nunc pro tunc* order. *See Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702-03 (2000) ("*Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. A prerequisite for a [valid] *nunc pro tunc* order…

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

[9] That Judge Price's Order speaks to the merits of the parties' rights under Settlement Agreement 2 is equally apparent from the text of the amended Order itself which provides that Respondent would have until February 1, 2022, to "complete performance under the **contract**" as opposed to having until this date to enforce Judge Buckner's Order. (R. p. 95) (emphasis added).

is some previous action by the court that is not adequately reflected in its record." (italics original) (citation omitted)); *see also Black's Law Dictionary* 1174 (9th ed. 2009) (providing *nunc pro tunc* is Latin for "now for then" and that the phrase means having retroactive legal effect through a court's inherent power). Thus, Judge Price's Order is legally defective and must be reversed.

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

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

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

It is well-established that a party seeking the benefit of equitable tolling "bears the burden of establishing sufficient facts to support it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) *citing Rodriguez v. Superior Court,* 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009). Here, Respondent never requested equitable tolling. Moreover, Respondent submitted no written memoranda or affidavits opposing Smith's Rule 60 Motion. To the contrary, Smith supported her Rule 60 Motion with uncontested affidavits establishing Respondent's failure to tender payment and creating the inference that Respondent had no practical ability or intent to pay. (R. pp. 111-113). Therefore, even if Respondent had

requested equitable tolling (which he did not), there is no evidentiary support for this relief. The fact that Smith appealed does not change that.

This Court has held that "[e]quitable tolling is reserved for extraordinary circumstances" or where the party to benefit from the tolling has been actively misled by the conduct of the other party. *Am. Legion Post 15 v. Horry Cty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009); *citing Hooper,* 377 S.C. at 230, 659 S.E.2d at 219. It follows that because the law specifically addresses the effect an appeal will have on an order, there is nothing extraordinary or unfair about Smith taking an appeal.

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

Here, the circuit court's rationale appears to rest on the notion that by taking an appeal Smith somehow mislead Respondent, as if Smith's proper and legal appeal should somehow be considered nefarious conduct. The circuit court's *sua sponte* decision to impose equitable tolling

rests on the conclusory assumption that Smith's appeal made Respondent's obligation to tender the purchase money by July 11, 2020, "futile and potentially damaging." (R. p. 93) (concluding that "[Smith] said . . . through her filing of an appeal that she would not take" the money if offered). However, Rule 70, SCRCP, makes plain that the payment would not have been futile. As explained above, Smith's appeal did nothing whatsoever to impair Respondent's ability to enforce the judgment. Had Respondent timely made payment he could have availed himself of the relief afforded by Rule 70, and effectively forced Smith's performance. *See* (Brief at Section I *supra*) (explaining the effects of an appeal and the import of Rule 70, SCRCP). Although the circuit court made no finding of what "potential damage" Respondent would have suffered (nor is there any evidence of this), it remains that had Respondent sought to enforce Judge Buckner's Order, the court could have crafted means for mitigating this "potential damage," whatever it may have been. *See e.g.* Rule 241(c)(3), SCACR ("the granting of supersedeas . . . may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking as . . . may be deemed appropriate"). The problem invariably comes back to the fact that Respondent elected not to tender payment.

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

an adequate remedy at law"); *see also, Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012) ("Equity aids the vigilant, not those who slumber on their rights.") (citations omitted).

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

Even if Judge Price did not err (which he did), it remains that Judge Buckner's Order must be reversed because the law and plain language of Settlement Agreement 2 demonstrates that Respondent's right to specific performance expired 24 months after the agreement was executed—*i.e*., November 20, 2017.

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

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

B. Judge Buckner erred in granting Respondent Summary Judgment.

Settlement Agreement 2 expressly states that Respondent would "have 24 months to deliver funds to [] Smith, in exchange for her interest in the land." (R. p. 14). Smith argued this 24-month period ran from the execution of the agreement on November 20, 2015. However, Judge Buckner found the period did not begin to run until Harriett issued a deed conveying her 1/4

interest in Home Place to the remaining owners. (R. pp. 4-5). Because this purported condition precedent did not occur until July 11, 2018, the trial court determined the option to purchase extended until July 11, 2020, and therefore granted Respondent's request for summary judgment on specific performance. (R. pp. 4-5). This was reversible error for two reasons. First, the determination that Harriett's execution of a deed was a condition precedent to starting the option period is inconsistent with the plain language of the agreement and contrary to the law. Second, the circuit court's decision to grant specific performance was without *any* evidentiary support.

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

In finding Harriett's execution of the deed to be a condition precedent to the commencement of the option period, the circuit court's reasoning was two-fold. First, the court opined that the agreement "required [Smith] to deed a 1/3 interest in Home Place[] to [Respondent]." (R. p. 3). Second, the circuit court reasoned that because Smith's ownership of the property did not increase from 1/4 to 1/3 until Harriett executed the deed on July 11, 2018, "it was [therefore] impossible for any of the parties to successfully perform under the terms of Settlement Agreement 2 until that date." (R. pp. 3-4). However, this reasoning is flawed on both fronts. The agreement contemplates Smith conveying "her interest," it does not specifically require her to convey a precise 1/3 interest. (R. p. 14). But even if it did, the law plainly allows for Smith to convey this future interest. Thus, the circuit court's assumption that Smith could not perform prior to Harriett issuing the deed is simply wrong.

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

"The primary concern of the court interpreting a contract is to give effect to the intent of the parties[, and] the best evidence of [] intent is the contract's plain language." *Lee v. Univ. of*

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

"It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee." *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717-18 (1976); *citing Southern Silica Mining & Manufacturing Company v. Hoefer*, 215 S.C. 480, 497, 56 S.E. (2d) 321, 328 (1949). Thus, interpretation of Settlement Agreement 2 begins with the premise that it must be interpreted in favor of Smith. The fact that the agreement is silent as to when the 24-month option period begins must be construed against Respondent and in favor of Smith. But Judge Buckner improperly took the opposite view. *See* (R. p. 73, lines 15-19) (regarding Smith's contention that the option "would run 24 months from the date the agreement was signed," Judge Buckner countered, stating "there is no explicit language in the agreement to that effect.").

When viewed in Smith's favor, as the law requires, there is no basis to support the circuit court's assumption that Smith is specifically obligated to convey a precise 1/3 interest in Home Place. Instead, Smith's obligation under the contract is to convey "her interest." (R. p. 14). Further, when strictly construed, nothing in the plain language of the agreement requires Harriett to issue a deed to consummate the relinquishment of her interest in Home Place as contemplated by the agreement. To the contrary, the language of the agreement suggests that for the purposes of Settlement Agreement 2, whatever act was required for Harriett to relinquish her interest in Home

Place had already occurred. *See* (R. p. 14). (Settlement Agreement 2 stating: "[i]n light of mediation, Loretta Harriett **has relinquished** her interest in the Home Place[, and] Due to such, **the current ownership** [is] . . . 1/3 interest to Barbara Smith.") (emphasis added). In other words, at the time Smith executed the option, the parties intended it to be assumed that Smith currently possessed the requisite interest for the option period to commence even if the deed from Harriett may not have technically been issued. This interpretation is perfectly consistent with the law that permits the transfer of a future interest in real property and dovetails into the second reason why the circuit court erred.

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

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

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

It has long been the law of South Carolina that a party is free to sell or transfer her future or contingent interest in property. Even if it were assumed that at the time Smith executed Settlement Agreement 2, a portion of her 1/3 interest in Home Place was contingent upon a future

event (like Harriett executing additional documents) such a contingent future interest is still alienable. More than a century ago the Supreme Court explained "these contingent remainders were transmissible by devise or assignment." *Rembert v. Evans*, 86 S.C. 445, 451, 68 S.E. 659, 661 (1910); (*citing Roundtree v. Rountree,* 26 S.C. 450, 2 S.E. 474 (1887); *and Peoples Loan & Exchg Bank v. Garlington,*54 S.C. 413, 32 S.E. 513 (1899); and *Earle v. Maxwell,* 86 S.C. 1, 67 S.E. 962 (1910)).

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

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

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

This Court has recently explained:

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

> who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

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

The law requires that in order for a party to be entitled to specific performance, it must be that he "has performed . . . [or] remains able and willing to perform his or her part of the contract." *Ingram,* 340 S.C. at 106, 531 S.E.2d at 291. In the context of an option to purchase land, specific performance requires delivery of payment. *Id.* "Generally, actual payment is essential to the acceptance of an option contract when payment is made a condition precedent to the exercise of the option." *Id.* at 108, 531 S.E.2d at 292 *citing* 91 C.J.S. *Vendor and Purchaser* § 10 (1951) *and* 77 Am. Jur. 2d *Vendor and Purchaser* § 53 (1997).

Here, the plain language of the option created by Settlement Agreement 2 requires that Respondent is to "have 24 months **to deliver funds to Barbara R. Smith**, in exchange for her interest in the land." (R. p. 14) (emphasis added). Thus, to exercise the option under Settlement Agreement 2, Respondent was required to tender funds by delivering this money to Smith. (R. *Id*.).

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

Here, Respondent neither claimed nor submitted any evidence that he had offered (or could offer) payment.[10] The only evidence Respondent submitted in support of summary judgment was a copy of Settlement Agreement 2. Respondent submitted no affidavits or other evidence tending to support this necessary element of the claim. Instead, the only information relative to Respondent's ability to pay the purchase money came by way of argument from Respondent's counsel, during the summary judgment hearing. *See* (R. p. 68, lines 10-12) (Mr. Crosby arguing "They stood ready, willing, and able and still can, you know, I'm getting calls regularly from the timber people. . ."). After some confusion about whether Respondent could pay without first cutting Smith's timber from the land the court clarified:

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

(R. p. 82, line 24 – R. p. 83, line 4).[11]

This in-court argument does not satisfy Respondent's burden of proof. Statements of counsel cannot take the place of evidence. "This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered" and are not evidence. *See McManus*

[10] Although the circuit court stated Respondent "has alleged that he and the other heirs stand ready, willing, and able to comply with the terms of Settlement Agreement 2," this is incorrect. (R. p. 4). In his Complaint, Respondent did not allege that he tendered payment or that he was able to tender payment. Instead, he alleged he was prepared to execute the deed. (R. p. 11, ¶ 11). However, his execution of a deed does not satisfy his performance obligation nor is this a requirement for specific performance.

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

v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."); *Cobb v. Benjamin*, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) ("Where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.") *accord Trivelas v. S.C. DOT*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (Howard, J. concurring) ("Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment.").

Thus, there is no evidence to support the assumption that Respondent was ready, willing, and able to deliver the purchase price. To the contrary the only evidence before the Court at the summary judgment stage was Smith's comprehensive affidavit which detailed the fact that Respondent had not offered payment. (R. pp. 47-51). This is fatal to Respondent's claim for specific performance, and because the circuit court's grant of summary judgment is wholly unsupported by evidence, it must therefore be reversed.

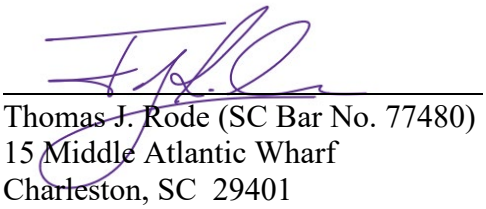
CONCLUSION

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

[signature page to follow]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



Thomas J. Rode (SC Bar No. 77480)
15 Middle Atlantic Wharf
Charleston, SC 29401
(843) 937-8000
thomas@tktlawyers.com

and

PARKER LAW, LLC
Gregory E. Parker, Jr. (SC Bar No. 101328)
PO Box 584
Columbia, SC 29202
(803) 768-4800
greg@parkerlawsc.com

Attorneys for Appellant

RECEIVED
Apr 05 2023
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

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

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ……...Respondent,

v.

Barbara Smith, ……..Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the enclosed complies with Rule 211, SCACR.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Thomas J. Rode (SC Bar No. 77480)
15 Middle Atlantic Wharf
Charleston, SC 29401
(843) 937-8000
thomas@tktlawyers.com
Attorneys for Appellant

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.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Appellant's Brief** to all counsel of record on April 5, 2023, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

Ronnie L. Crosby, Esq.
John E. Parker, Jr., Esq.
Parker Law Group, LLP
101 Mulberry Street East
Hampton, SC 29924
rcrosby@parkerlawgroupsc.com
jayparker@parkerlawgroupsc.com
Attorneys for Respondent

S.Cerone
Shannon R. Cerone, Paralegal