

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Opinion No. 2023-UP-249 (S.C. Ct. App. Filed June 21, 2023)

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SC Court of Appeals

Buck Investments, LLC,Respondent,

v.

ROA, LLC; Deborah Rice-Marko; and PNC Bank, N.A.,
Successor to RBC Bank, Defendants,

Of whom

ROA, LLC is Appellant/Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Buck Investments, LLC

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies there was an unpublished opinion of the Court of Appeals in this matter filed June 21, 2023, and the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 15, 2023.

QUESTIONS PRESENTED

A. In affirming the circuit court's grant of a directed verdict dismissing ROA's impossibility defense, did the Court of Appeals misapply ROA's impossibility defense because, as a matter of law, the lack of any ascertainable sum of money to release the property from the encumbrance of the mortgage made it impossible for ROA to close its contract to sell that property to Buck?

B. Did the Court of Appeals err in affirming the circuit court's failure to grant ROA's motion for a judgment notwithstanding the verdict on its waiver affirmative defense?

C. Did the Court of Appeals err in analyzing the directed verdict motion on impossibility?

I. INTRODUCTION

The issue in this case is the application of the impossibility defense to the breach of contract claim asserted in the underlying action.

Petitioner, ROA, LLC ("ROA"), respectfully submits the Court should grant this Petition and reverse the Court of Appeals and the circuit court because both misapplied the defense of impossibility to the facts of this case, making that defense one that is impossible, in the generic sense, to mount successfully. The Court of Appeals and circuit court's application of the impossibility defense is not in keeping with South Carolina's common law of impossibility nor with that of other states. The impossibility defense must be applied in a common-sense, real-world, practical fashion because South Carolina's formulation of the defense is designed to relieve a party, in this case, ROA, from its duty to perform when performance has become impossible due

to the act or acts of a third party especially when non-performance concerns a fact or consideration contemplated by the parties in their written contract.

II. STATEMENT OF THE CASE

A. Procedural History.

Respondent Buck Investments, LLC (“Buck”) filed its Second Amended Complaint on October 1, 2014.¹ (Second Amended Complaint, ROA 9). Buck’s breach of contract cause of action was the only cause of action that went to the jury and was the only subject of the appeal to the South Carolina Court of Appeals and this Petition.

ROA filed its Second Amended Answer to Buck’s Second Amended Complaint on May 2, 2018 (Second Amended Answer, ROA 39). In its Second Amended Answer, ROA asserted the affirmative defenses of impossibility of performance, impossibility of performance/frustration of purpose, and waiver and estoppel (Fifth, Seventh, and Eighth Defenses, respectively, Second Amended Answer, pp. 4 and 5, ROA 42-43).

The circuit court granted Buck’s directed verdict motion and dismissed ROA’s impossibility/frustration of purpose defense. (Transcript p. 314, l. 22 – p. 315, l. 8, ROA 239-240).

After deliberations, the jury returned a verdict against ROA on Buck’s breach of contract cause of action for \$900,000.00. (Form 4, Jury Verdict, ROA 4-6).

Thereafter, ROA timely moved for judgment notwithstanding the verdict under Rule 50(b), SCRCP (JNOV) or alternatively, under Rule 59(e), SCRCP, regarding its impossibility defenses (JNOV Motion and Amended JNOV Motion ROA 48 and 55). ROA’s JNOV motion was denied by order entered August 16, 2018. (Form 4 order denying ROA’s post-trial motions, ROA 7).

¹ Buck’s Second Amended Complaint is the pleading upon which the issues in the case were tried to a jury.

An appeal followed, with the South Carolina Court of Appeals affirming the circuit court in an unpublished opinion filed June 21, 2023.

ROA timely filed a Petition for Rehearing, which was denied by order filed August 15, 2023.

B. Facts.

This lawsuit involves an attempt by ROA to sell commercial property at 438 King Street, Charleston, South Carolina.

On March 20, 2013, ROA agreed to sell the King Street property to Buck under a written contract. (Buck, Ex. 1, ROA 288). The contract provided a purchase price of \$3,500,000.00 and a ten-day inspection period during which Buck had to conduct a title examination of the property, from which a title insurance commitment, opinion, or report was to be issued. The contract required Buck to provide ROA, within ten days of receipt of the title commitment, etc., notice of any exception to title not acceptable, the contract giving ROA a “reasonable period, not to exceed 15 days,” to elect to remove any unacceptable exception. Most important for purposes of this Petition, the sales contract required ROA, at closing, to remove “those exceptions which can be removed *by paying an ascertainable sum of money such as mortgages...*” *Id.* (emphasis added). Accordingly, the contract parties – ROA and Buck – contemplated that a mortgage or mortgages could encumber the property and, if that were the case, ROA’s responsibility was to remove any such encumbrance which could be done by paying an *ascertainable sum of money*.

The contract closing date was set for April 3, 2013, but the contract provided if ROA did not close the contract on that date, ROA had an additional 30 days (until May 3, 2013) in which to close the transaction. *Id.*

When the contract was signed, the King Street property was encumbered by a mortgage held by PNC Bank. (Portion of ROA Ex. 7, PNC Bank Foreclosure Complaint, ROA 498 – 512).

The mortgage was dated November 2007 and was amended in 2009 to provide cross-collateralization with several other properties owned by Defendant Deborah Rice-Marko or other entities. The mortgage was again modified in July 2011 with the execution of a Forbearance Agreement between ROA, other parties and RBC Centura, the original mortgagee. (Portion of ROA Ex. 7 PNC Bank Foreclosure Complaint, ROA 519 – 528). The Forbearance Agreement and the modified mortgage were recorded in the public land records of Charleston County. *Id.*

PNC Bank acquired the note, mortgage, and related documents when it bought the original lender, RBC Centura. (Transcript p. 246, ll. 3 – 4, ROA 182). PNC Bank did not look favorably on the terms of the mortgage modification, the forbearance agreement, the interest rates provided thereby, or just about anything regarding the ROA loan. (*Id.* at ll. 12 – 20, ROA 182).

Section 9 of the mortgage prohibited ROA from selling the King Street property without PNC Bank's consent "which may be withheld in [PNC Bank's] sole discretion...." (Order granting PNC Bank summary judgment, and Portion of ROA Exhibit 7, ROA 1 and 503, respectively).

When it entered into the contract, Buck did not know specifically that a mortgage encumbered the King Street property, but it expected its attorneys to "figure that out at some point....," and such an encumbrance would not come as a surprise to Buck. (Transcript, p. 142, l. 16 – p. 143, l. 3, ROA 84-85).

Regarding the modified mortgage and forbearance agreement, ROA received a default notice from PNC Bank dated November 26, 2012 (Buck Ex. 3, ROA 306, and Transcript, p. 215,

ll. 6 – 12, ROA 151), and a second default letter dated February 15, 2013, (Buck Ex. 6, ROA 312, and Transcript, p. 215, ll. 17 – 20, ROA 151).

When the contract to sell the King Street property was signed, ROA was in negotiations with PNC Bank to resolve their dispute regarding the mortgage and the other cross-collateralized properties. (Transcript, p. 251, l. 18 – p 252, l. 23, ROA 187-188). These negotiations continued after the contract was signed, following the sales contract closing date, through May 3, 2013, at which point PNC Bank filed a lis pendens and foreclosure complaint.² (Transcript, p. 253, l. 17 – p. 255, l. 20, ROA 189-191, and Portion of ROA Ex. 7, ROA 425-428).

The foreclosure complaint was 70 pages long, containing 202 paragraphs, describing many properties, including the King Street property, and naming ROA as a defendant. Among the entities also named as defendants was The Brothers of SC, LLC, which is a limited liability company owned by the sons of Deborah Rice-Marko, whose loans were unrelated to the loan secured by the PNC Bank mortgage on the King Street property but were cross-collateralized to the PNC Bank note and mortgage regarding that property. (Portion of ROA Ex. 7, and Affidavit of Rice-Marko, Buck Ex. No. 20, ¶ 5, 14, 16 ROA 425-428 and 329, 331, 332, respectively).

PNC Bank's foreclosure complaint requested the debts regarding all the notes secured by all the mortgages, including the note secured by the mortgage on the King Street property, be "ascertained and determined under the direction of the Court..." that the Court render a judgment of foreclosure regarding all the mortgages, including the PNC Bank mortgage encumbering the King Street property, and all the property described, including the King Street property, be sold under the direction of the Court. (Portion of ROA Ex. 7, prayer for relief paragraphs 2, 5, and 6, ROA 494 and 495, respectively).

² May 3, 2013, was also the expiration date of the 30-day extension period to close the transaction.

ROA was never able to secure the consent of PNC Bank to release its mortgage encumbering the property, nor was it ever able to obtain from PNC Bank an ascertainable sum of money by which it could obtain that release.

The contract never closed, and this litigation ensued.

III. ARGUMENT

A. In affirming the circuit court’s grant of a directed verdict dismissing ROA’s impossibility defense, the Court of Appeals misapplied ROA’s impossibility defense because, as a matter of law, the lack of any ascertainable sum of money to release the property from the encumbrance of the mortgage made it impossible for ROA to close its contract to sell that property to Buck.

1. There was no “ascertainable” sum of money which, by its payment, ROA could obtain the release of the property from the encumbrance of the mortgage, and the mortgagee refused to approve the sale of the property.

“A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or **by a third party.**” *V.E. Amick & Assocs., LLC v. Palmetto Environ. Group, Inc.*, 394 S.C. 538, 545, 716 S.E.2d 295, 299 (Ct. App. 2011) (emphasis added) (quoting *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997)).

In granting Buck’s directed verdict dismissing ROA’s impossibility defense, the circuit court said, “[i]t must appear the thing to be done cannot be accomplished by *any means*. I emphasize any means.” (Transcript p. 315, ll. 3 – 4, ROA 240, emphasis added).

The articulated basis for the circuit court’s grant of a directed verdict dismissing ROA’s impossibility defense is not in accord with South Carolina’s common law.

In affirming the circuit court, the Court of Appeals relied on two cases, *Hawkins* and *Morin v. Innegrity, LLC*, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018). Both cases correctly set out South Carolina’s law of impossibility. ROA respectfully submits, however, if the Court of

Appeals properly applied this law, it would have reversed the circuit court and remanded the case for entry of judgment for ROA. The Court of Appeals erred in not recognizing the facts of both cases are easily distinguishable from the facts here.

In *Hawkins*, Greenwood Development Corporation contracted with Hawkins to build a road whose location was less than precisely shown in the contract documents. Greenwood Development Corporation applied to the Corps of Engineers for a permit to build the road where Hawkins wanted. The Corps rejected the permit application because there was no development plan for the property on which the proposed road was to be located. Greenwood Development Corporation then built a road, but not where Hawkins wanted it built, and litigation ensued.

The circuit court let the defense of impossibility be submitted to the jury, the jury rejected that defense, and awarded Hawkins \$1,500,000.00 in damages. Following the verdict, Greenwood Development Corporation moved for judgment notwithstanding the verdict, arguing that any duty it had to build the proposed road where Hawkins wished was rendered impossible by the Corps' denial of a permit. The circuit court rejected that argument and was affirmed by the Court of Appeals, which cited trial testimony to the effect that "it would be difficult, but not impossible, to obtain the required permits...." *Id.* at 592, 493 S.E. 2d at 879.

Here, there is no evidence the contract was merely "difficult, but not impossible...." to close. The contract anticipated the existence of mortgages encumbering the property and the removal of those mortgages by ROA if that could be done by payment of an **ascertainable** sum of money, "ascertainable" being the key word.

The plain meaning of "ascertain" is "to render certain." *Webster's New International Dictionary* at 160 (2d Ed. 1956). The mortgagee refused to provide an ascertainable sum of money to release the property from the mortgage, as evidenced by the mortgagee's May 3, 2016,

foreclosure complaint, which did not “render certain” any sum necessary to release the property from the mortgage. The mortgage release sum was in the control of the mortgagee, a fact clearly contemplated by the ROA – Buck contract, and the mortgagee’s refusal to provide an ascertainable sum of money by which ROA could obtain the release of the property from the mortgage made ROA’s performance under the contract impossible, not merely “difficult.” The impossibility of ROA’s performance concerned a matter within the contemplation of Buck and ROA when they signed the sales contract, and the mortgagee’s acts, or more precisely its failure to act, in not consenting to releasing the mortgage, or providing an ascertainable sum, by which ROA could obtain that release, were the acts of a third party beyond the control of ROA.

In *Morin*, an employer (Innegrity) agreed that if an employee (Morin) were terminated without cause, Innegrity would remove Morin as a guarantor on Innegrity’s loans. Morin was terminated without cause. Innegrity asked the lender to remove Moran as a guarantor on the loans, but the lender refused.

Morin sued, and Innegrity argued that performing its contractual obligation was rendered impossible due to its financial inability to meet its outstanding obligations and the lender's refusal to consent to the removal of Morin as a guarantor.

Applying the JNOV review standard, i.e., viewing the trial evidence and inferences in the light most favorable to the nonmoving party, the Court of Appeals concluded that Innegrity had not proven impossibility.

Citing *Hawkins*, the Court of Appeals said Innegrity failed to establish the defense of impossibility because its failure to obtain Morin’s release from the loan guaranty was not a “... thing [which] ... cannot by any means be accomplished...” but was “only improbable or out of the power of the obligor....” to accomplish. *Id.* at 592, 493 S.E.2d at 879.

Morin is distinguishable from the facts here. The *Morin* circuit court let the impossibility defense go to the jury and the jury rejected the defense, finding for Morin. Here, the circuit court granted Buck a directed verdict on ROA's impossibility defense. The standard of review in *Morin* differs from the standard of review here.

In addition, the contract between Morin and Innegrity contained an unconditional promise by Innegrity to remove Morin as a guarantor if he was terminated without cause. The ROA - Buck contract, however, contemplated the existence of mortgages encumbering the property and provided ROA would "remove at closing those [mortgages] *which can be removed by paying an ascertainable sum of money...*" Innegrity assumed the risk that the lender would refuse to forego its contractual guarantee rights against Morin and remove him as a guarantor of the loan. ROA assumed no such risk because the contract specifically provided that it would remove the mortgages which could be removed by paying an ascertainable sum of money. Neither the mortgagee nor its foreclosure filing would or did provide the required "ascertainable sum" that ROA would have to pay to release the property from the mortgage's encumbrance.

As the *Morin* court said, early impossibility cases "were uniform that once a party contracted to perform an act, their failure to perform the act promised breached the contract, *unless it expressly excused performance or allocated the risk of nonperformance elsewhere.*" *Id.* at 568, 819 S.E. 2d at 136. The ROA – Buck contract contemplated title exceptions, e.g., mortgages, premising their removal on an "ascertainable sum of money." The mortgage could not be removed by an "ascertainable sum of money" which rendered ROA's performance impossible.

This is not a case of "subjective impossibility," as in *Moon v. Jordan*, 301 S.C. 161, 164, 390 S.E. 2d 488, 490 (Ct. App. 1990), quoted by the Court of Appeals' opinion at 6, denying an

impossibility defense where a party is “... unable to perform ... because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing money....” In *Moon*, the residential real estate sales contract in question had a standard financing contingency – that the purchaser obtains “adequate financing.” The purchaser’s loan application was approved, but before closing, the purchaser suffered “financial difficulties” when the sale of her own home did not close, and her securities account incurred a substantial loss. *Id.* at 162, 390 S.E.2d at 489. The Court of Appeals concluded that the contingency of adequate financing was met, the purchaser’s impossibility defense was not made out, and therefore, the *Moon* circuit court correctly granted summary judgment to the seller.

The ROA–Buck contract expressly contemplated title exceptions, premising their removal on an “ascertainable sum of money.” The mortgage could not be removed because there was no “ascertainable sum of money” to remove it, and the mortgagee would not consent,³ rendering ROA’s performance impossible.

The Court of Appeals misapplied South Carolina’s common-law defense of impossibility. Therefore, this Petition should be granted, and this Court should reverse the Court of Appeals decision.

2. The out-of-state cases cited by ROA in its briefs are persuasive given the unique facts of this case.

ROA respectfully submits that no South Carolina cases are directly on point. However, ROA cited in its Court of Appeals briefs *Serio v. Copeland Holdings, LLC*, 521 S.W.3d 131 (Ark. Ct. App. 2017), which is instructive. A mortgage and an IRS tax lien encumbered the

³ The consent of the mortgagee being required as demonstrated by the circuit court’s early grant to the mortgage of summary judgment on Buck’s specific performance cause of action. *See* Order of the Hon. J.C. Nicholson, Jr., ROA 1 – 3.

Serio property. Its owners defaulted under the mortgage, and the mortgagee began foreclosure proceedings. The owners then entered into a sales agreement, agreeing to sell a portion of the property to a third party. The owners could not obtain a release of the portion of the property they sought to sell from either the mortgagee or the IRS. Ultimately, the property was sold at a foreclosure sale. The contract purchaser sued the owners for breach of contract, and the owners pleaded impossibility as a defense. The lower court rejected the impossibility defense. The Arkansas Court of Appeals reversed.

An Arkansas impossibility pleader "... must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be affected by any means...." *Id.* at 138 (quoting *Frigillana v. Frigillana*, 584 S.W.2d 30, 33 (Ark. 1979)). "Impossibility of performance ... sufficient to excuse the nonperformance on the part of either party means an impossibility consisting in the nature of the thing to be done, and not the inability of the party to do it, and it must be shown that the thing required under the contract cannot be accomplished." *Id.* (citing *Whipple v. Driver*, 215 S.W. 669 (Ark. 1919)).

The Arkansas Court of Appeals referenced the doctrine of "impracticality," saying "the law of impossibility has evolved into a broader and more equitable rule of impracticality [which] may excuse a party from performing contractual obligations ... [and] [p]revention of performance by a government order or regulation may qualify as an impracticability-of-performance defense," *Serio* at 138. However, the 1919 Arkansas Supreme Court *Whipple* opinion, which the Arkansas Court of Appeals cited for Arkansas' general law of impossibility,⁴ makes no reference to

⁴ "Impossibility of performance of a contract sufficient to excuse the non-performance upon the part of either party means an impossibility consisting of the nature of the thing to be done and not

“impracticality” regarding the impossibility jury instruction questioned in that case. Further, the jury instruction questioned in the 1919 case accurately states both Arkansas and South Carolina law regarding the defense of impossibility.

Here, the “nature of the thing” to be done, which rendered ROA’s performance under the contract impossible, is analogous to what the owners/sellers in *Serio* found impossible – obtaining a release of a portion of the property to be sold from the encumbrance of a defaulted mortgage and an IRS lien. ROA’s impossibility conundrum was not based on its inability to accomplish the release of the mortgage through a lack of funds or funding sources. Instead, it was brought about by the “thing” itself – the impossible ascertainment of an amount to release the mortgage lien and obtaining the consent of the mortgagee to release the property.

The only evidence adduced at trial was that PNC Bank simply refused to provide an ascertainable sum of money by which ROA could obtain the release of the mortgage as an encumbrance on the property, a situation contemplated by the parties when they included the “ascertainable sum of money” phrase in the purchase contract. Had PNC Bank provided ROA an “ascertainable sum of money” by which ROA could obtain the release of the property from the mortgage encumbrance, regardless of the reasonableness of that sum (it could very well have been a sum bearing no relationship to the true value of the property), ROA would have had the choice of either paying that sum and obtaining the mortgage release, or, failing to do so, breach the purchase agreement with no impossibility defense being then available. PNC Bank’s refusal to provide an ascertainable sum to release the property from its mortgage made ROA’s performance under the contract impossible. The circuit court applied the wrong standard for this

the inability of the party to do it and it must be shown that the thing required under the contract cannot be accomplished.” *Whipple* at 671.

defense, and while the Court of Appeals cited the correct standard, it misapplied that standard to the fact of this case.

ROA's briefs also cited *Olbum v. Old Home Manor Inc.*, 459 A.2d 757 (Pa. Super. 1983), where a mining company agreed to pay landowners \$3,000 per month for four years for the right to mine coal on their property. When the coal ran out in 14 months, the mining company stopped paying, and the landowners sued. The trial court entered judgment for the mining company; the landowners appealed, contending that the mining company's contractual obligation to pay royalties did not terminate when the merchantable coal under their property became exhausted.

The Superior Court of Pennsylvania agreed with the trial court, saying that if the existence of a specific thing was necessary for performing a duty, its failure to come into existence, destruction, or such deterioration as made performance "impracticable" was an event the nonoccurrence of which was a basic assumption on which the contract was made. *Id.* at 762 (quoting *Restatement of Contracts 2d* § 263, Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance).

The Pennsylvania court found both parties understood the contract was based on two specific veins of coal under the landowners' property. Thus, the court concluded that the mining company's duty to pay royalties terminated when the coal was exhausted. Although the Pennsylvania Superior Court used the word "impracticability" in a footnote to its opinion, it explained its use of the word, saying:

[t]he instant situation [the exhaustion of the coal source] presents a genuine problem of impracticability; it presents a case of 'the thing cannot be done' as opposed to one of 'I cannot do it.' The fact that performance is merely beyond a party's capacity to render would not be sufficient to discharge his obligation.

Olbum at 762, n.1.

Subjective impossibility, the “I cannot do it” defense, is not enough to excuse performance under a contract. Objective impossibility, “the thing cannot be done,” defense is. Buck and ROA understood and contemplated the existence of mortgages encumbering the King Street property. The sales contract provided for the removal of such mortgages where there existed an ascertainable sum of money. No such ascertainable sum of money existed, i.e., the “thing” necessary to remove the mortgage encumbrance,⁵ and ROA’s failure to perform was thus excused.

The Court of Appeals ignored the persuasive authority of *Serio* and *Olbum*, which this Court should not.

3. Buck’s claims for fraudulent misrepresentation and breach of contract accompanied by a fraudulent act were dismissed, and neither claim nor evidence presented supporting those claims are relevant to the impossibility issue.

Buck’s third cause of action alleged fraudulent misrepresentation, and its fourth cause of action alleged breach of contract accompanied by a fraudulent act. ROA 15 and 16. Neither cause of action went to the jury, as both were dismissed. ROA 282. Any evidence of either claim is not relevant to the issues before this Court on appeal.

The Court of Appeals, nevertheless, appeared to rely in some measure on this evidence, saying that ROA’s impossibility defense “... ignores Rice-Marko’s own trial testimony supporting Buck’s claim that she ‘and ROA knowingly and intentionally omitted and

⁵ In footnote 7 at page 8 of the Opinion, the Court of Appeals says “... the sum of money ROA may have had to pay to release the Property could have been in excess of \$20 million, that option was still legally *possible*.” (emphasis in the original). One cannot write a check or initiate a wire transfer for a “sum in excess of \$20 million” unless there is an ascertainable “excess” amount, and here there was none. The footnote also says, “[a]s the circuit court recognized, Rice-Marko presented no evidence of her financial condition...” Rightfully so - Rice-Marko’s financial condition, i.e., possible poverty or lack of funding sources, would not support ROA’s impossibility defense.

misrepresented facts concerning the status of the Property.” Court of Appeals Opinion at 7. The Opinion goes on to say that Rice-Marko “never disclosed to Buck that the note and mortgage were in default....” and that she “admitted she was nonresponsive to [Buck’s] inquiry [concerning closing] but continued to assert she was not having any difficulty with [the mortgagee] because ... ‘we were negotiating’” and finally that ROA breached the “Representations and Warranties” section of the sales contract. Opinion at 7 – 8.

None of this has anything to do with the issue before the Court of Appeals – whether the circuit court was correct in granting Buck a directed verdict, dismissing ROA’s impossibility affirmative defense, and the Court of Appeals erred in its apparent reliance on these matters.

4. Conclusion regarding impossibility.

As provided in the sales contract, the “nature of the thing to be done” was the removal of the encumbrance of the mortgage on the property by payment of an ascertainable sum of money.

PNC Bank’s refusal to provide an ascertainable sum it would require for the release of the property from the mortgage incumbrance, even when Buck directly requested such a sum,⁶There being no ascertainable sum of money, ROA was excused from performance by the defense of impossibility, and the circuit court erred in granting Buck a directed verdict dismissing this affirmative defense.

The Court of Appeals misapplied South Carolina’s common-law defense of impossibility and, therefore, ROA respectfully requests this Court grant its Petition, reverse the Court of Appeals’ decision, and remand this case to the circuit court for entry of judgment for ROA.

⁶ See Transcript p. 174, ll. 11 – 19, ROA 110.

B. The Court of Appeals erred in affirming the circuit court's failure to grant ROA's motion for a judgment notwithstanding the verdict on its waiver affirmative defense.

The Court of Appeals affirmed the circuit court's denial of ROA's motion for judgment notwithstanding the verdict regarding its waiver defense, saying a reasonable jury "could have found .. that Buck had not waived its rights." Opinion at 9. ROA respectfully disagrees.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)); *see also King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010); *Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009). It may be expressed or implied by a party's conduct. *Parker*, 313 S.C. at 487, 443 S.E.2d at 391. Acts inconsistent with a continued assertion of a right may constitute a waiver. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)." "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or *constructive* knowledge of ... all the material facts" Opinion at 9 (emphasis added) (quoting *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415, S.E. 2d 384, 387-88 (1992)).

The Court of Appeals' Opinion recognizes that Buck waived its rights under the sales contract by not proceeding with the title inspection and exception process the contract provided. As a matter of public record, the mortgage provided Buck constructive knowledge of the mortgagee's unfettered discretion to consent, or not to consent, to the sale of the property and the same holds true for the cross-collateralization agreement entered into by ROA in 2011 (ROA 462). By waiving its title exception rights under the sales contract, Buck waived its right later to seek damages under the contract because ROA could not secure the consent of the mortgagee to sell the

property. ROA respectfully submits no reasonable jury could have decided otherwise, and the Court of Appeal erred in affirming the circuit court's denial of its motion for judgment notwithstanding the verdict. This Court should grant ROA's petition on this issue

C. The directed verdict motion on impossibility.

In footnote four on page 5 of the Court of Appeals' opinion, the court disagrees with ROA's argument that in light of the circuit court's grant of Buck's directed verdict motion, its own directed verdict motion on the same subject would have been futile. In the footnote, the Court of Appeals says that ROA's argument on impossibility fails "procedurally."

However, this Court and the Court of Appeals have said that neither "... require[s] parties to engage in futile actions in order to preserve issues for appellate review." *Feggler v. Gentner*, 396 S.C. 461, 469, 722 S.E. 2d 26, 31 (Ct. App. 2012) (quoting *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E. 2d 543, 547 (2000)). "Appellate courts recognize — or at least they should recognize — an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

At the close of all the evidence, Buck moved for a directed verdict on Buck's breach of contract cause of action. ROA 232. There followed a lengthy discussion of the impossibility defense by ROA's counsel, which began "... With respect to the impossibility of performance argument, Your Honor, our position is that ...," at which point the circuit court said, "Let's deal with this first, please if you don't mind..." The circuit court then asked ROA's counsel for ROA's position about the existence of a contract between ROA and Buck and ROA's non-performance, to which ROA's counsel responded, "... sure we have a contract that breached, we have the question of whether or not it was a justifiable breach," the circuit court responding "[o]n the issue of impossibility..." to which ROA's counsel rejoined "[c]orrect." ROA 234-235. A discussion

followed between the circuit court and ROA's counsel regarding the impossibility defense, including references to the evidence adduced at trial on that issue and the *Morin* case. Turning then to Buck's counsel, the circuit court said, "... [i]f you have something new, I'll hear from you on those issues. With regard – let me say what I'm gonna rule..." at which point the circuit court granted Buck's directed verdict motion on the impossibility defense and explained the basis for its decision. ROA 239-241. Faced with the circuit court's grant of Buck's directed verdict motion on ROA's impossibility defense, ROA moving for a directed verdict on impossibility would have been futile and bordering on disrespectful, the circuit court having just ruled, and explained its ruling, on the same issue.⁷

IV. CONCLUSION

"A party to a contract must perform its obligations under the contract unless its performance is rendered impossible **by a third party.**" *V.E. Amick & Assocs., LLC*, at 545, 716 S.E. 2d at 299.

This is not a case, as in *Hawkins* where a jury found performance was rendered by a third party "difficult but not impossible," nor is it a case where the non-performing party, as in *Morin* assumed the risk of it not being able to obtain the consent of a lender to remove a guarantor of a loan.

The Buck-ROA contract required ROA to remove title "... exceptions which can be removed *by paying an ascertainable sum of money such as mortgages.*"

⁷ The Court of Appeals' footnote four also said ROA did not request a directed verdict on the question of impossibility, "instead stating 'we believe that issue should go to the jury.'" ROA's counsel said, "... we have the issue of waiver and estoppel which we believe should go to the jury ... [a]nd then ... we have as to damages and mitigation of damages argument (sic) that we believe should go to the jury." ROA 235.

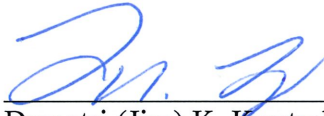
The mortgagee refused to provide an ascertainable sum of money by which the property could be released from the encumbrance of the lender's mortgage and, as a result, the sales contract could not close. This is not a case of economic impracticality nor is it a case where ROA assumed the risk of non-performance.

The facts of this case fit squarely within South Carolina's common law defense of impossibility.

The Court of Appeals erred in its application of this law. This Court should grant this Petition, reverse the Court of Appeals and remand to the circuit court of entry of judgment for ROA.

Respectfully submitted,

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September 14, 2023
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. Craig Brown, Circuit Court Judge

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Sep 14 2023

Opinion No. 2023-UP-249 (S.C. Ct. App. Filed June 21, 2023)

SC Court of Appeals

Buck Investments, LLC, Respondent,

v.

ROA, LLC; Deborah Rice-Marko; and PNC Bank, N.A.,
Successor to RBC Bank, Defendants,

Of whom

ROA, LLC is Appellant/Petitioner.

PROOF OF SERVICE

I certify that I have served a copy of the following as indicated hereinbelow via email, as follows:

Document Served: **Petition for a Writ of Certiorari**

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September 14, 2023
Columbia, South Carolina

