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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Shannon M. Phillips, Master in Equity

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Appellate Case No. 2023-001897

Erin Burns Anderson,

Respondent,

v.

Rudy Lamar Pearson,

Appellant.

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INITIAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR IN GRANTING SPECIFIC PERFORMANCE WHEN THE CONTRACT EXPIRED, THE PARTIES NEVER EXECUTED AN EXTENSION OF TIME PRIOR TO EXPIRATION, AND TIME IS EXPRESSLY OF THE ESSENCE?
2. DID THE TRIAL COURT ERR IN GRANTING SPECIFIC PERFORMANCE WHEN THE PAROL EVIDENCE RULE, MERGER CLAUSE, AND NON-RELIANCE CLAUSE EXCLUDE EVIDENCE OF PRIOR ORAL DISCUSSIONS NOT EXPRESSLY DRAFTED INTO THE FOUR CORNERS OF THE CONTRACT?
3. DID THE TRIAL COURT ERR IN GRANTING SPECIFIC PERFORMANCE ON A CONTRACT FOR THE SALE OF REAL ESTATE WHEN THE STATUTE OF FRAUDS RENDERS VOID AN ALLEGED ORAL CONTRACTUAL MODIFICATION THAT WAS NEITHER REDUCED TO WRITING NOR EXECUTED BY APPELLANT?
4. DID THE TRIAL COURT ERR IN DETERMINING THAT APPELLANT WAS EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF FRAUDS TO VOID THE RIGHT OF WAY SURVEY AND ENFORCE THE CONTRACT EXPIRATION PROVISION WHEN THE RESPONDENT LOST NOTHING MORE THAN A BENEFIT OF THE CONTRACT?
5. DID THE TRIAL COURT ERR IN DETERMINING THAT THERE WAS A MEETING OF THE MINDS ON AN ALLEGED ORAL CONTRACTUAL MODIFICATION REGARDING A RIGHT OF WAY WHEN THE DETAILS OF THE SIZE, OWNERSHIP, CONSTRUCTION, AND MAINTENANCE OF THE RIGHT OF WAY WERE NOT AGREED UPON BY THE PARTIES AND THE PARTIES DID NOT AGREE TO A NEXUS BETWEEN THE RIGHT OF WAY AND RESPONDENT'S FINANCING?

## **STATEMENT OF THE CASE**

On April 10, 2018, Respondent, Erin Burns Anderson, M.D., a young and wealthy physician in the Spartanburg area, commenced this action against Appellant, Rudy Lamar Pearson, an elderly gentleman from Maryland, seeking specific performance of a contract for the sale of land in the Town of Wellford, County of Spartanburg, State of South Carolina. Mr.

Pearson answered Dr. Anderson's complaint, denying that Dr. Anderson complied with the terms of the contract. In his answer, Mr. Pearson also alleged that the contract expired, that Dr. Anderson's claim was barred by the Statute of Frauds, and that Dr. Anderson signed a release of all claims. Based on these defenses, Mr. Pearson filed a motion for summary judgment on September 26, 2019. On October 29, 2019, Dr. Anderson also filed a motion for summary judgment alleging that the facts were sufficient for the court to grant specific performance.

On November 12, 2019, this case was referred to the Master in Equity for Spartanburg County, Judge Gordon G. Cooper. On March 11, 2020, Judge Cooper granted Pearson's motion for summary judgment, holding the contract expired based on the contents of the contract and a clear reading of the contract. Judge Cooper also held that no extension for the contract was granted prior to expiration, and no closing occurred on September 29, 2017, or five business days thereafter, allotted by the contract. Judge Cooper found that the issues regarding a survey expired with the contract.

On March 20, 2020, Respondent filed a motion to alter or amend Judge Cooper's decision and order granting Appellant summary judgment. On May 5, 2022, a newly appointed Master in Equity for Spartanburg County, Judge Shannon Phillips, granted Respondent's motion to alter or amend and found that Respondent had created genuine issues of material fact whether Appellant's actions regarding the survey impeded Respondent's ability to purchase the property by the closing date set forth in the contract. On May 13, 2022, Appellant filed a motion to alter or amend Judge Phillip's order of May 5, 2022. Judge Phillips issued an order denying Appellant's Motion to Alter or Amend on October 28, 2022.

The parties tried this specific performance action before the Master in Equity, Judge

Phillips, on August 30, 2023. On October 3, 2023, Judge Phillips issued a decision and order granting specific performance of the real estate sales contract. Specifically, the Master in Equity found (1) that Respondent is entitled to specific performance of the contract, (2) the failure of the contract to close by the date in the written agreement was caused by actions of Appellant in failing to provide the survey he had promised to provide to Respondent on a timely basis so that Respondent could finalize her loan, and (3) Appellant shall select a closing attorney and notify Respondent of the closing date within thirty days of the date of the decision and order. On October 9, 2023, Appellant filed a motion to alter or amend. The Master in Equity issued an order denying Appellant's motion to alter or amend on December 5, 2023. Appellant served a notice of appeal on December 6, 2023, initiating this appeal.

### **STANDARD OF REVIEW**

An action for specific performance is one in equity. Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (S.C. App. 2004) (See also, Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000) (applying the equitable standard of review to the trial court's findings of fact in a specific performance action); Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 406, 656 S.E.2d 775, 779 (S.C. App. 2008) (holding that an action for specific performance lies in equity); Settlemeier v. McCluney, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (S.C. App. 2004) (applying equitable standard of review to action for specific performance of an alleged oral contract for the conveyance of land); Parker v. Shecut, 340 S.C. 460, 478, 531 S.E.2d 546, 556 (S.C. App. 2000), rev'd on other grounds, 349 S.C. 226, 562 S.E.2d 620 (2002), (holding that an action for specific performance lies in equity).

"On appeal from an action in equity, [the appellate court] may find facts in accordance with

its view of the preponderance of the evidence." Walker v. Brooks, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [circuit court] was in a better position to assess the credibility of the witnesses." Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (S.C. App. 2004). Further, "this broad scope does not relieve the appellant of [the] burden to show that the trial court erred in its findings." Ballard v. Roberson, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012); Miller v. Dillon, 432 S.C. 197, 851 S.E.2d 462 (S.C. App. 2020).

### FACTS

Appellant, Rudy Lamar Pearson, inherited 21 acres of pristine waterfront property nestled into Lake Cooley on 355 Gibbs Road, Wellford, South Carolina 29385. (Respondent's Trial Exhibits 1 and 2, Transcript p. 232). Respondent, Erin Burns Anderson, M.D., owns neighboring waterfront acreage along Lake Cooley and desired to purchase Appellant's property to add to her estate. (Respondent's Trial Exhibit 2, Transcript pp. 62-63). Respondent approached Katie Graves, a local realtor of Century 21, and directed Katie Graves to make a cold call to Appellant, a Maryland resident, to see if Appellant was interested in selling his unlisted property. (Transcript, pp. 63, 64, and 126). Katie Graves spoke to Appellant's wife, Eleanor Pearson, via phone calls and text messages. (Transcript, p. 180, Respondent's Trial Exhibits 3, 4, 4a).

On July 9, 2017, Katie Graves texted Respondent that Appellant sought legal advice about a right of way for nine acres, owned by Appellant and his siblings, adjacent to the subject property. (Respondent's Trial Exhibit 3). Katie Graves indicated that Appellant would also be willing to sell the adjacent nine acres of property to Respondent. (Respondent's Trial Exhibits 2 and 3). Respondent refused to purchase the adjacent 9 acres. (Transcript, p. 67). According to testimony

of Respondent, Appellant then orally indicated that he would obtain a survey of an access right of way to the adjacent nine acres. (Transcript, p. 76). Appellant, Respondent, and Katie Graves never reduced the discussions regarding the access right of way to writing and did not seek signatures by either party. (Transcript, pp. 76, 87, 94, 97, 103). Appellant's counsel moved to exclude any evidence of the right of way survey, asserting the parol evidence rule for pre-contract discussions and the Statute of Frauds for post-contract discussions. (Motion in Limine, Transcript, pp. 15-27, 69-72).

Appellant and Respondent entered into an Agreement/Contract: To Buy and Sell Real Estate (General Use and Lots/Acreage) ("the Contract") on July 25, 2017. (Respondent's Trial Exhibit 1). Respondent agreed to pay \$400,000.00 in a combination of finance and cash for the purchase of 355 Gibbs Road, Wellford, South Carolina 29385, tax map number 5.08-00-017.00. (Respondent's Trial Exhibit 1). Paragraph 4 of the Contract required closing to occur no later than 5 PM on or before September 29, 2017, with an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party. (Respondent's Trial Exhibit 1). The Contract expressly stated in bold print in paragraph 1 that **"time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."** (Respondent's Trial Exhibit 1). The Contract required Respondent to pay \$3,000.00 earnest money to be a credit to Respondent at closing. (Respondent's Trial Exhibit 1).

Paragraph 7 of the Contract, "Finance", required Respondent to secure a 15-year purchase money loan. (Respondent's Trial Exhibit 1). The finance contingency expired at Closing. (Respondent's Trial Exhibit 1). The Contract required Respondent to make good faith efforts to apply for and obtain financing. (Respondent's Trial Exhibit 1). Final loan approval occurred when

the lender funds the loan. (Respondent's Trial Exhibit 1). The Contract stated that if the seller was notified of the inability to obtain financing before closing, then either party may terminate the Contract by notice and the earnest money shall be returned to the Respondent. (Respondent's Trial Exhibit 1). Paragraph 9 of the Contract indicated that the Contract was contingent upon the property being valued according to the lender's appraisal or other appraisal agreed to by the Parties. (Respondent's Trial Exhibit 1). The lender, AgSouth, did not secure an appraisal prior to closing, and the parties never agreed to an appraisal prior to closing. (Transcript, p. 144).

Paragraph 10 of the Contract, "Survey, Title Examination, Elevation, Insurance", indicated that Brokers recommend Respondent to have the property surveyed and title examined. (Respondent's Trial Exhibit 1). The commitment letter issued by the lender, AgSouth, to Respondent mandated that Respondent's loan commitment was contingent upon Respondent securing a mortgage title insurance policy, a survey of the proposed real estate collateral, and an appraisal of the proposed real estate collateral that is satisfactory to the lender, AgSouth. (Respondent's Trial Exhibit 6). Respondent failed to secure a mortgage title insurance policy, a survey of the proposed real estate collateral, and an appraisal of the proposed real estate collateral prior to closing. (Transcript, pp. 134, 144, and 147). Appellant did not enter any written contractual provision or sign any writing requiring Appellant to perform any of the contingent finance obligations of Respondent. (Respondent's Trial Exhibits 1 and 6). Specifically, Appellant did not agree in the contract or in a signed writing to secure either a survey or an appraisal of the proposed real estate collateral; these were obligations of Respondent. (Respondent's Trial Exhibits 1 and 6).

Two days after executing the Contract, Respondent was very unclear about whether

Appellant would need to secure a survey of the proposed real estate collateral, opposed to just a right of way survey. (Respondent's Trial Exhibit 7). On July 27, 2017, Respondent emailed Lynne Christiansen, the loan officer at AgSouth, "They [Appellant and his wife] met with a surveyor when they were down here who will be working on carving out enough of a piece for the adjoining 9 acres that they still own to have road access. So the overall acreage will be slightly less than 21.99. **I am not sure if they [Appellant and his wife] will need to do an entire new survey when they do this (I would think that they would need to????).**" (Respondent's Trial Exhibit 7).

The details of size, ownership, construction, and maintenance of the right of way are unknown, other than Respondent testified that the Parties agreed that the right of way would be no larger than 2 acres. (Transcript, pp. 74, 94, 110, and 149). The Parties never agreed that Appellant would relieve Respondent of her finance contingencies. Katie Graves testified that the contract never changed in acreage. (Transcript, p. 199). Respondent testified that Mr. Pearson did not want to reduce the amount of property he had for sale; he wanted access to the nine acres. (Transcript, p. 154). Respondent further testified that she "never heard Mr. Pearson discuss reducing the amount of property that he had up for sale." (Transcript, pp. 156-157). Dr. Anderson then said "maybe it was Mrs. Pearson. I don't know." (Transcript, pp. 156-157). The right of way survey obtained by the Pearsons indicated that the right of way remained a part of the proposed real estate collateral. (Respondent's Trial Exhibit 8). No evidence was presented that Appellant ever agreed to get a survey of the remainder proposed real estate collateral. (Respondent's Trial Exhibit 6). No modifications to the Contract were ever made to place the onus on Appellant to get the survey of the proposed real estate collateral that Respondent needed for financing. (Transcript, pp. 141-143).

3D Land Surveying completed a right of way survey on August 16, 2017. (Respondent's Trial Exhibit 8). Appellant consulted with an attorney, as recommended by the Contract, regarding the right of way survey, prior to having it recorded. (Transcript, p. 211). After consulting with the attorney, Appellant recorded the right of way survey on October 10, 2017. (Respondent's Trial Exhibit 8). Dr. Anderson did not want to prevent Appellant from seeking legal advice. (Transcript, p. 144).

The Contract expired on September 29, 2017. Prior to expiration of the Contract and the five-business day grace period, Respondent never secured a survey of the collateral, an appraisal of the property, or a policy of title insurance on the collateral, and Respondent did not send the cash to the closing attorney. (Transcript, pp. 132-134, 144, and 147). Additionally, Respondent did not submit a written and signed request for extension of the Contract prior to expiration of the Contract. (Respondent's Trial Exhibit 4). On October 23, 2017, weeks after the Contract expired, Katie Graves emailed a written and signed request for an extension of the Contract to Appellant, and Mrs. Pearson responded that Appellant and she were going to build on the property and did not wish to extend the contract. (Respondent's Trial Exhibit 4).

Respondent asked Appellant if Appellant would reconsider selling the property to Respondent after the Contract expired; Respondent wanted to make a higher offer. (Respondent's Trial Exhibit 4). Respondent, through Katie Graves, contacted Appellant and stated "Ms. Anderson [Respondent] would like to make you [Appellant] an offer on the other parcel at this time, it is more than before. I think you will like this offer much better." (Respondent's Trial Exhibit 4). Appellant offered the 33.96 acres for \$900,000.00. (Respondent's Trial Exhibit 4). When the Parties did not reach a new contract, Respondent's agent sent Appellant a release of the

Contract signed by Respondent. (Respondent's Trial Exhibit 4). After negotiations for a new contract failed on February 12, 2018, Respondent then commenced this action on April 10, 2018. (Summons and Complaint, Respondent's Trial Exhibit 4).

## ARGUMENTS

### I. **BECAUSE THE CONTRACT EXPIRED, THE PARTIES DID NOT EXECUTE A WRITTEN EXTENSION PRIOR TO EXPIRATION, AND TIME IS EXPRESSLY OF THE ESSENCE, THE TRIAL COURT ERRED BY GRANTING SPECIFIC PERFORMANCE.**

The trial court erred in granting specific performance of an expired contract when the Parties agreed to a contract containing a time of the essence provision. (Respondent's Trial Exhibit 1). "A contract for the sale of land containing a clause that 'time is of the essence' must be performed by the date fixed in the contract or the contract is no longer viable." 61 Am. Jur. 3d *Proof of Facts* § 325 (2001).

#### A. **Time is of the Essence in the Contract.**

In the present case, paragraph 1. (G) of the Contract clearly and unequivocally contains a time is of the essence provision. (Respondent's Trial Exhibit 1). The Contract expressly states, in bold print, in paragraph 1 (G) that **"time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."** (Respondent's Trial Exhibit 1). The Parties initialed the bottom of page 1 containing paragraph 1. (G) and signed the Contract. Paragraph 4 of the Contract required closing to occur no later than 5 PM on or before September 29, 2017, with an automatic extension of 5 business days, for an unsatisfied contingency, through no fault of either party. (Respondent's Trial Exhibit 1).

## **B. The Contract Expired.**

The closing date, September 29, 2017, and the grace period of five business days thereafter, came and went with no closing. The Contract expired pursuant to its time is of the essence terms on September 29, 2017. (Respondent's Trial Exhibit 1). At the time of the expiration of the Contract, even including a five-business day grace period, Dr. Anderson still had not performed most of her obligations under the contract and her loan commitment letter. (Transcript, pp. 134, 144, and 147). Dr. Anderson failed to secure a mortgage title insurance policy required of the loan commitment letter. (Transcript, p. 134). Dr. Anderson failed to secure a survey of the proposed real estate collateral. (Transcript, p. 147). Also, Dr. Anderson failed to secure an appraisal of the proposed real estate collateral. (Transcript, p. 144). The parties never agreed to an appraisal prior to closing. (Transcript, p. 144). As Dr. Anderson did not perform the contingencies required for her to secure financing, Dr. Anderson failed to obtain financing by the time of closing. Also, Dr. Anderson failed to send the cash, \$100,000.00, to close. (Transcript, pp. 132-134).

## **C. The present case is distinguishable from Faulkner v. Millar.**

The Court's reliance on Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995) is misplaced for three main reasons.

First, in Faulkner, time was not of the essence. The Court laid out the general rule "it is well established in this state that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication." Faulkner, 319 S.C. at 219 (citing Bishop v. Tolbert, 249 S.C. 289, 153 S.E.2d 912 (1967)). The exception to the general rule is an option contract, where time is of the essence is implied without an express provision. Faulkner, 319 S.C. at 219 (citing Dargan v. Page, 222 S.C. 520, 73 S.E.2d 705 (1952)). In Faulkner, the Court held that the

contract was not an option contract and time was not of the essence as an express term, and therefore a reasonable time to perform would be allowed. Faulkner, 319 S.C. at 220.

Second, in Faulkner, the party seeking specific performance had requested an extension of time **prior to the expiration of the contract**, which went unanswered by the other party. Faulkner, 319 S.C. at 221. Unlike Faulkner, Katie Graves, acting as Dr. Anderson's agent, sent a written and signed request for an extension of the Contract to Appellant by email on October 23, 2017, **weeks after the contract expired**. (Respondent's Trial Exhibit 4).

Katie Graves served as Dr. Anderson's agent throughout the Contract and its execution. Katie Graves testified that she was Dr. Anderson's agent. (Transcript, pp. 174, 218-221). Dr. Anderson sought Katie Graves' assistance in reaching out to the Pearsons when the Pearsons did not even have the property for sale. (Transcript, pp. 63, 126). Katie Graves communicated with the Pearson's on Dr. Anderson's behalf. (Transcript, pp. 220-221). The Contract submitted to the Court by the Respondent's Counsel in the Summons and Complaint had "Buyers Agent" checked regarding agency. (Exhibit 1 to Summons and Complaint, Appellant's Trial Exhibit 1). Katie Graves and Dr. Anderson also signed a Buyer's Service Pledge Certificate to be used in an exclusive buyer's agent agreement. (Transcript, pp. 170, 220).

Dr. Anderson's agent, Katie Graves, represented to Appellant that the Contract expired, sent a written request for extension after the contract expired, and sent a Release of Contract signed by Respondent. (Respondent's Trial Exhibit 4). The Contract expired as represented by Dr. Anderson's agent, Katie Graves. (Respondent's Trial Exhibit 4).

Third, in Faulkner, the Buyer was merely trying to obtain a little more time to get his obligation of a more detailed inspection of the structure of the building that he was purchasing. 319

S.C. at 219. In the present case, Buyer, Respondent, tries to shift the burden to Seller, Appellant, to get Buyer Respondent's financing and then asks for more time after the contract expired. Nowhere in the Contract, loan commitment letter, or text messages did Appellant ever agree to obtain Respondent's survey of the collateral to enable her to secure financing. (Respondent's Trial Exhibits 1, 3, 4, 4a, and 6). The loan commitment letter requires a survey of the real estate collateral, not a right of way. (Respondent's Trial Exhibit 6). A clear difference in a survey of a .65 acre right of way, and a survey of 21.99 acres of real estate collateral required for financing exists in the eye of Dr. Anderson and Lynne Christiansen. Dr. Anderson knew that a right of way survey would not satisfy the requirement to get a survey of the collateral. Dr. Anderson wrote to Lynne Christiansen "**I am not sure if they [Appellant and his wife] will need to do an entire new survey when they do this (I would think that they would need to????).**" (Respondent's Trial Exhibit 7). There was no evidence that Dr. Anderson, Lynne Christiansen, or Katie Graves ever communicated to Mr. Pearson that he was responsible for the collateral survey, appraisal, or policy of title insurance for Dr. Anderson's financing. There is no evidence that the Pearsons ever agreed to survey the entire collateral. Unlike the present case where Anderson tries to shift the burden of obtaining financing to Pearson, in Faulkner, the Buyer was not trying to shift the Buyer's burden of the inspection over to the Seller.

Appellant also never agreed to obtain Respondent's appraisal of the collateral, policy of title insurance, or cash to close. (Respondent's Trial Exhibits 1, 3, 4, 4a, and 6). The evidence indicates that the Appellant discussed in text messages obtaining a right of way over existing acreage to access 9 contiguous acres. (Respondent's Trial Exhibits 3 and 4).

**D. The present case is similar to Ingram v. Kasey's Associates.**

Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000), involves a contract where time is of the essence. In Ingram, the Court laid out the rule for a "time is of the essence" contract stating, "the party seeking to compel specific performance 'must be able to perform at the exact time he requested specific performance, not some 'reasonable time' in the future.'" Ingram, 340 S.C. at 106 n.1. The Court held that when time is of the essence, the party seeking specific performance must be able to perform. Ingram, 340 S.C. at 106 n.1.

In Ingram, the party seeking specific performance failed to demonstrate that he had the purchase money in any deposit account under his control, his attorney's control, or any escrow account. Ingram, 340 S.C. at 104 and 106. In the present case, while Dr. Anderson testified that she did have the money in her account, Dr. Anderson failed to complete all the contingencies required of her to obtain financing. (Transcript, pp. 132, 134, 144, and 147). First, **Dr. Anderson did not obtain a policy of title insurance prior to closing or the five-business day grace period.** (Transcript, p. 134). **According to the loan commitment letter, a policy of title insurance is the number one contingency for Dr. Anderson to obtain the financing.** (Respondent's Trial Exhibit 6). **A policy of title insurance is entirely unrelated to a survey.** Dr. Anderson never completed her number one contingency to obtain financing. Second, Dr. Anderson did not obtain a survey of the collateral. (Transcript, p. 147). Dr. Anderson tries to shift the burden to Mr. Pearson, an elderly man who lives out of State, to obtain the survey of the entire collateral. All Appellant discussed was obtaining a survey of a right of way. He never agreed to obtain a survey of the collateral to obtain Dr. Anderson's financing. Dr. Anderson knew this. Dr. Anderson wrote to Lynne Christiansen "**I am not sure if they [Appellant and his wife] will need to do an entire**

**new survey when they do this (I would think that they would need to????).**” (Respondent’s Trial Exhibit 7). Third, Dr. Anderson did not obtain an appraisal. (Transcript, p. 144).

As Dr. Anderson failed to satisfy her contingencies under the loan commitment letter, Dr. Anderson did not obtain financing. The finance company did not send the money to the closing attorney. Appellant did not promise to provide a policy of title insurance, survey of the collateral, appraisal, or financing. Dr. Anderson is unable to point to any provisions in the Contract or loan commitment letter where any of these loan obligations are those of the Appellant. (Respondent’s Trial Exhibit 1 and 6). The finance contingencies were Dr. Anderson’s obligations under Dr. Anderson’s loan commitment letter and under the Contract where time was of the essence. (Respondent’s Trial Exhibits 1 and 6). Dr. Anderson did not perform her loan requirements by the closing date or the five-business day grace period thereafter, nor did she send a written and signed request for an extension prior to expiration. This contract expired by its express terms, and this case should be reversed and dismissed.

**II. BECAUSE THE PAROL EVIDENCE RULE, MERGER CLAUSE, AND NON-RELIANCE CLAUSE EXCLUDE EVIDENCE OF PRIOR ORAL DISCUSSIONS NOT EXPRESSLY DRAFTED INTO THE FOUR CORNERS OF THE CONTRACT, THE TRIAL COURT ERRED IN BASING ITS DECISION ON EVIDENCE OF PRE-CONTRACTUAL DISCUSSIONS.**

The trial court erred by allowing evidence of oral discussions prior to and contemporaneous with the Contract to contradict the express terms of the Contract for three reasons: the parol evidence rule, the merger clause, and the non-reliance clause.

**A. The Parol Evidence Rule prevents introduction of evidence of prior or contemporaneous oral agreements.**

Evidence of oral agreements prior to or contemporaneous with the Contract is inadmissible

pursuant to the parol evidence rule to contradict, vary, or explain the terms of the Contract. The parol evidence rule “prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.” Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000), See also Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (S.C. App. 2001). Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Holden, 343 S.C. at 275-276. The parol evidence rule is a rule of substantive law, not a rule of evidence. Holden, at 276. Accordingly, admission of evidence violating the parol evidence rule is legally incompetent and should not even be considered even if no objection is made at trial. Id.

In the present case, paragraph 7 of the Contract, entitled “Finance”, required Respondent, Dr. Anderson, to obtain a 15-year purchase money loan. (Respondent’s Trial Exhibit 1). The Contract also indicates that either party may terminate the Contract by Notice if Respondent could not obtain financing during the Financing Period, and the earnest money shall be returned to the Buyer. (Respondent’s Trial Exhibit 1). Paragraph 9 of the Contract, entitled “Appraised Value”, indicated that the Contract is contingent upon the property being valued according to the Lender’s appraisal or other appraisal agreed upon by the parties. (Respondent’s Trial Exhibit 1). Finally, paragraph 10 of the Contract, entitled “Survey, Title Examination, Elevation, Insurance”, indicates that Brokers recommend Buyer to have the property surveyed, title examined . . .”. (Respondent’s Trial Exhibit 1). Nowhere in the four corners of the Contract does the Contract state that Appellant is required to obtain the survey, title insurance, or appraisal needed by the Respondent to obtain financing. The Contract requires Respondent to obtain and deliver to Appellant a pre-final loan

approval that contains no unreasonable terms. (Respondent's Trial Exhibit 1).

Pursuant to the Contract, Respondent obtained a loan commitment letter and provided it to Appellant, however, neither the Contract nor the loan commitment letter require Appellant to complete any of the finance contingencies. (Respondent's Trial Exhibits 1 and 6). Respondent's loan commitment letter required Respondent to obtain a survey and appraisal of the collateral and required Respondent to obtain a policy of title insurance. (Respondent's Trial Exhibit 6). The commitment letter stated, "subject to certain conditions shown hereafter, your loan in the amount of \$300,000.00 has been approved." (Respondent's Trial Exhibit 6). Under paragraph 12 of the loan commitment letter, entitled "special conditions of approval", Dr. Anderson must secure a mortgage title insurance policy and a survey and appraisal of the proposed real estate collateral that is satisfactory to AgSouth Farm Credit. (Respondent's Trial Exhibit 6).

After the Contract expired and re-negotiations failed, Respondent, Dr. Anderson, attempted to shift the burden to an elderly couple to satisfy her finance contingencies by arguing that the Pearsons, in pre-contractual discussions, promised to secure a right-of-way survey. Appellant's counsel objected to the introduction of the pre-contractual discussions arguing the parol evidence rule. (Transcript pp. 69-72). Respondent argued that the discussions of a right of way survey excused her from obtaining a survey of the collateral, an appraisal of the collateral, a mortgage title insurance policy, and an extension of the deadline of the contract. This flawed logic is misplaced. The parol evidence rule prohibits the Court from considering anything that the parties discussed prior to or contemporaneous with the formation of the Contract which would modify, contradict, or explain the terms of the Contract. Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000), See also Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (S.C. App. 2001). The express

language of the Contract, in the present case, incorporating the terms of the finance commitment letter is clear, unambiguous, and controlling. (Respondent's Trial Exhibit 1). The express and unambiguous language requires Respondent to produce a loan commitment, which required Respondent to obtain a survey and appraisal of the collateral and a policy of title insurance.

**B. The Merger Clause of the Contract also prevents prior or contemporaneous oral modifications to the Contract.**

Paragraph 25 of the Contract, "Entire and Binding Agreement (Merger Clause)", states "Parties agree that this Contract expresses the entire agreement between the parties, that there is no other agreement, oral/otherwise, modifying the terms and this Contract is binding on Parties and principals." (Respondent's Trial Exhibit 1). The Contract unambiguously places the burden on Dr. Anderson to obtain financing. The Contract in no way relies upon Appellant to obtain financing for Respondent. To allow in evidence of pre-contract discussions of a right of way survey and to expand a right of way survey to Dr. Anderson's duty under the contract to obtain a survey of the entire collateral, an appraisal of the collateral, and a policy of title insurance not only violates the parol evidence rule but it is inconsistent to the Merger Clause in the Contract.

**C. The Non-Reliance Clause of the Contract prevents reliance on statements by Agents or parties not incorporated into the Contract.**

Respondent also attempts to excuse her noncompliance with her conditions of financing by arguing that she relied on statements of Appellant and Katie Graves that Appellant would obtain a survey to enable her to obtain financing. However, the contract contains a non-reliance clause. (Respondent's Trial Exhibit 1). Paragraph 29 of the Contract, entitled "Non-reliance clause (Not a Merger Clause nor Extension of a Merger Clause)", states "Parties execute this Contract freely and

voluntarily without reliance upon any statements, representations, inducements, promises, or agreements by Brokers or Parties except as expressly stipulated or set forth in this Contract. If not contained herein, such statements, representations, inducements, promises, or agreements shall be of no force or effect.” (Respondent’s Trial Exhibit 1).

The Court of Appeals, in Redwend L’td P’ship v. Edwards, defined a non-reliance clause. 354 S.C. 459, 470, 581 S.E. 2d 496 (S.C. App. 2003). “The typical language of a non-reliance clause can be found in Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000): ‘The parties further declare that they have not relied upon any representation of any party hereby released ... or of their attorneys ..., agents, or other representatives.’” Redwend, 354 S.C. at 470. The magic language, without any reliance, is included in the non-reliance clause in the Contract. (Respondent’s Trial Exhibit 1). The non-reliance clause acts to void any reliance by Dr. Anderson on any statements by Katie Graves or Appellant that are inconsistent with the Contract. The non-reliance clause bars Dr. Anderson’s reliance upon any statements by the Broker, Century 21 (Katie Graves), or Parties (Mr. Pearson, or his agents) regarding a right of way survey.

In sum, documentation defeats conversation in contracts for the sale of land. The Contract contains a specific provision, requiring the Parties to incorporate into the Contract any additions. Paragraph 33 of the Contract, “Attachments, Other Contingencies, Terms and/or Stipulations”, states “there may be attachments to this Contract. The most recent changes, amendments, attachments, contingencies, stipulations, addendum, additions, exhibits, or writings, agreed to by the Parties; is evidence of the Parties’ intent and agreement and shall control any Contract language conflicts. (Land issues may include: restrictions and easements that may affect desired use. . . ). If any documents are attached as addenda, amendments, attachments, or exhibits considered a part of

this Agreement, they are further identified or described here.” (Respondent’s Trial Exhibit 1). **The lines following paragraph 33 are blank.** (Respondent’s Trial Exhibit 1). Therefore, the Parties never included the right of way survey oral discussions into the Contract as required by the provisions of the Contract.

The parties stipulated that there are consequences of failure to incorporate oral agreements into the Contract. The consequences, expressly agreed upon, are that **oral agreements shall be of no force or effect and not binding on the parties.** Per the four corners of the Contract, Dr. Anderson failed to comply with her loan commitment letter. Dr. Anderson tries to excuse her noncompliance with her loan commitment letter by arguing that conversation with herself, Katie Graves, and Appellant caused her to delay securing a policy of title insurance, a survey of the collateral, and an appraisal of the collateral. These discussions were not incorporated into the Contract. Dr. Anderson simply did not secure financing and the Contract expired. In a text to Katie Graves, Respondent’s agent, Mr. Pearson expressly stated that he considered the expired Contract terminated. (Respondent’s Trial Exhibit 4). Century 21 turned Dr. Anderson’s security deposit into the State of South Carolina’s Treasury in the unclaimed property. The security deposit is awaiting Dr. Anderson’s claim. This case should be reversed and dismissed.

**III. BECAUSE THE STATUTE OF FRAUDS RENDERS VOID AN ALLEGED ORAL CONTRACTUAL MODIFICATION, NEITHER REDUCED TO WRITING NOR EXECUTED BY APPELLANT, THE COURT ERRED BY GRANTING SPECIFIC PERFORMANCE BASED ON AN ALLEGED ORAL MODIFICATION**

The Court erred in awarding specific performance of the Contract as the Statute of Frauds voids a contractual modification to a real estate sales contract; any discussions regarding a right of way survey were neither reduced to writing nor signed by Appellant. Dr. Anderson argued that the Court should not only excuse her from obtaining financing but also permit her to have an extension

of time because the parties continued to discuss the Appellant obtaining a right of way survey after the Contract was formed. However, the Statute of Frauds voids contractual modifications to a real estate sales contract not reduced to writing and signed by the party whose enforcement they are sought against, or in this case, Appellant, Mr. Pearson. Neither the right of way survey nor the contract extension were reduced to writing nor signed by Mr. Pearson.

**A. The Statute of Frauds requires oral modifications to be reduced to writing and signed by the party against whom enforcement is sought regarding contracts for the sale of land.**

S.C. Code of Laws § 32-3-10, (Agreements required to be in writing and signed) states, no action shall be brought whereby: (4) to charge any person upon any contract or sale of lands . . . or any interest in or concerning them; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) states that contract modifications are subject to the Statute of Frauds. “Any contract for an interest in a land . . . must be in writing and signed by the party against whom it is seeking to be enforced.” Player, 299 S.C. at 105.

Failure to put such a contract in writing renders it void. Player, 299 S.C. at 105. **A contract**

**required to be in writing by the Statute of Frauds cannot be orally modified.** Player, 299 S.C.

at 105. In Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983), the court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds.

**B. The Statute of Frauds prevents oral modifications of the Contract regarding a right of way survey.**

Mr. Pearson, Appellant, did not sign any writing indicating that he would obtain a right of way survey or assume any financial contingency assigned to Respondent. In the present case, the written and signed contract, and the loan commitment requirements, place the onus on the Buyer, Dr. Anderson, to obtain and to pay for a survey. Paragraph 6 of the contract states that Buyer, Dr. Anderson, is responsible for paying the costs of any inspector, appraiser, and surveyor. (Respondent's Trial Exhibit 1). Paragraph 10 of the contract indicates that Brokers recommend Buyer, Dr. Anderson, to have the property surveyed. (Respondent's Trial Exhibit 1). Nowhere in the contract, or even the text messages, is there any indication that Mr. Pearson would satisfy any of Dr. Anderson's loan contingencies. The Pearsons only surveyed a right of way over the property subject to sale. (Respondent's Trial Exhibit 8).

There is a reason for land sale contracts and anything affecting any interest concerning land to be reduced to writing. The reason is to prevent confusion from unclear oral discussions. Writing provides clarity. For example, Dr. Anderson herself confirms that conversations regarding a right of way do not clarify who is responsible for the overall survey of the collateral. Dr. Anderson wrote, "they [the Pearsons] met with a surveyor when they were down here who will be working on carving out enough of a piece for the adjoining 9 acres that they still own to have road access. So the overall acreage will be slightly less than 21.99. *I am not sure if they will need to do an entire new survey when they do this (I would think they would need to????).*" (Respondent's Trial Exhibit 7). Dr. Anderson is posing a question to Lynne Christiansen, the loan officer, as to whether an overall survey of the collateral would need to be done. If Dr. Anderson is

unsure of whether she needs to get an entire new survey of the overall property, she should have clarified this with the Pearsons in writing and have the Pearsons sign it as required by the Statute of Frauds. This email clearly indicates that Dr. Anderson was unsure if a survey of the overall collateral would be necessary. Neither Dr. Anderson, nor her agent, Katie Graves, ever asked the Pearsons to conduct an entirely new survey of the overall collateral. According to both Dr. Anderson and Katie Graves, the overall collateral would never change.

Any modification to the contract which would require the Pearsons to obtain and pay for a survey of the overall land being sold to enable Dr. Anderson to obtain the loan must be in writing and signed by the Pearsons. A burden shift to Appellant to complete a contingency of Respondent's financing would be a clear and material contract modification. **It is undisputed that the Parties did not sign any writing that the Pearsons would be responsible to pay for and/or obtain a survey of the overall property.** Neither the Contract, nor the parties to the Contract, ever shifted the burden to the Pearsons to handle Dr. Anderson's conditions precedent to her financing. As such, any modification to the land sale contract requiring the Pearsons to obtain the survey or pay for the survey is null, void, and violative of the Statute of Frauds.

**C. The Statute of Frauds prevents oral extensions of time to the Contract's deadline.**

Prior to the expiration of the Contract, an extension of time was neither reduced to writing nor signed by Appellant, Mr. Pearson. Dr. Anderson's agent, Katie Graves, emailed Mr. Pearson a written request for an extension of time to complete the contract weeks after the Contract expired. An extension of a deadline for a time is of the essence real estate contract would be a contract modification. Pursuant to the Statute of Frauds, contractual modifications for real estate contracts or any interest in them must be reduced to writing and signed by the Party against whom

enforcement is sought. Player, 299 S.C. at 105. Dr. Anderson's agent, Katie Graves, sent Mr. Pearson a written request to extend the Contract on October 23, 2017, several weeks after the contract expiration date, September 29, 2017, and five-business day grace period. (Respondent's Trial Exhibit 4). Mr. Pearson refused to sign the extension and indicated that he considered the Contract to be terminated. (Respondent's Trial Exhibit 4). The Contract expired by its clear terms, the Contract was terminated, and the case should be reversed and dismissed.

**IV. BECAUSE RESPONDENT LOST NOTHING MORE THAN A BENEFIT OF THE CONTRACT, THE COURT ERRED WHEN IT DETERMINED THAT APPELLANT IS EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF FRAUDS TO VOID THE RIGHT OF WAY SURVEY AND ENFORCE THE CONTRACT EXPIRATION.**

The Court erred in holding that Appellant is equitably estopped from asserting the Statute of Frauds regarding the right of way survey and contract expiration. While equitable estoppel is an exception to the Statute of Frauds, the burden is upon the Respondent to prove equitable estoppel.

**A. The Elements of Equitable Estoppel**

The elements of equitable estoppel are broken down as related to the party estopped and as related to the party claiming the estoppel. The essential elements as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965). The elements as to the party claiming estoppel are (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party

estopped; and (3) prejudicial change in position. Regions Bank v. Schmauch, 354 S.C. 648, 674-75, 582 S.E.2d 432, 446 (S.C. App. 2003) (quoting Zabinski v. Bright Acres Assocs. , 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001)). The party asserting equitable estoppel bears the burden of establishing all the elements. Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 7 (S.C. App. 2009).

**B. Respondent failed to prove a false representation or concealment of material facts as Appellant told Respondent the right of way survey was complete and the only evidence offered for Appellant not recording a right of way survey prior to expiration of the Contract was Appellant was seeking a legal review.**

The trial court erred in determining that Appellant was estopped from asserting the Statute of Frauds as Respondent failed to prove Appellant made a false representation or concealment of material facts. The theory of Respondent's case is that Appellant, prior to the Contract and during the execution of the Contract, came up with a need for a right of way survey and then intentionally delayed the preparation and recording of the survey to run out the time in the Contract. This is pure speculation and conjecture.

The only evidence presented by Respondent to the trial court is that Appellant did in fact tell Respondent that Appellant did obtain the right of way survey and the only reason for the delay in recording the right of way survey was Appellant was seeking a legal review of the right of way survey prior to recording the right of way survey with the Town of Wellford. There is no other evidence presented to the trial court for the delay in recording the right of way survey. (Respondent's Trial Exhibits 3 and 4). To speculate that Mr. Pearson, an elderly man who lived out of town in Maryland, had a nefarious reason not to record the survey is not based on any facts.

The Contract signed by both parties indicates that Brokers recommend the Parties receive legal advice prior to and during the execution of the Contract; specifically, Paragraph 35 of the Contract indicates “parties are solely responsible for obtaining legal advice prior to signing this Contract and **during the transaction.**” (Respondent’s Trial Exhibit 1). Both Appellant and Respondent initialed each page of the Contract and signed the Contract. (Respondent’s Trial Exhibit 1). Dr. Anderson testified that she would not want to prevent Mr. Pearson from receiving legal advice. (Transcript, p. 144). As such, no evidence, other than obtaining recommended legal advice on the right of way survey, was provided to the Court for the timing of recording the survey.

**C. Respondent failed to prove a substantial, detrimental change of position in reliance on the promise to obtain a right of way survey because she failed to show that she lost anything more than a benefit to the Contract.**

In Collins Music Co., Inc. v. Cook, the South Carolina Court of Appeals held “in order to overcome the statutory requirement of a writing, however, the party asserting the estoppel must show that he has suffered a substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. **It is not sufficient to show merely that he has lost an expected benefit under the contract.**” 316 S.E.2d 418, 420, 281 S.C. 580, 583 (S.C. App. 1984).

In Collins Music Co., Inc. v. Cook, 281 S.C. 580, 316 S.E.2d 418 (S.C. App. 1984), Collins Music, Inc. executed a written contract with George Petusky for an exclusive right to place game machines in Petusky’s lounge in downtown Clemson (Tiger Town Tavern) for a period of five years. Collins, 281 S.C. at 581-582. The contract provided that Collins and Petusky would split the machine’s profits 50/50 and applied to Petusky’s successors. Collins, 281 S.C. at 582. Petusky

sold his lounge to Cook, but the Collins machine contract was not included in the sales agreement. Id. at 582. Collins met with Cook to discuss the old Petusky contract and reached an oral agreement that Collins would pay Cook 60% of profits for the first four weeks of the machine's collections. Id. The parties operated under the contract for two years. Id. Cook gave Collins notice to remove the machines because of poor service and maintenance. Id. Collins conceded that the contract could not be performed within one year of its making and therefore is within the Statute of Frauds. Id. at 583. Collins argued that Cook and Moore were estopped from asserting the Statute of Frauds because Collins detrimentally relied on the contract. Id.

The Court denied estoppel because Collins did not meet the requirement of the rule. Id. The Court reasoned that Collins could not show that Collins suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore Collins to his former position. Id. at 583-584. The Court held that all Collins could show is that Collins lost an expected benefit under the contract. Id. Under the original contract, Collins expected to receive profits from the machines. Id. at 583. Collins stated that Collins expected to receive two more years of profits. Id. The Court held that this expectation was nothing more than that Collins lost a benefit of the bargain. Id. ***Losing only a benefit of the bargain is not enough to prove estoppel.*** Id. Collins would have to show that Collins suffered ***direct out of pocket costs or losses from incidental reliance on the contract.*** Id. The Court of Appeals reversed the lower Court's ruling granting specific performance and ruled that the Statute of Frauds bars enforcement of the contract.

A case supporting a detrimental change of position is Atlantic Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E. 2d 720 (S.C. App. 1984). In Atlantic, a precious metal buyer

bought silver as a part of a contract to sell the silver on an exchange, “The Gold Exchange”, to another buyer, Solondz. 283 S.C. at 37. The price of silver dropped substantially causing considerable financial loss when the buyer, Solondz, backed out of the contract. Id. at 37, 39-40. While the contract was not in writing, the buyer, Atlantic Wholesale Co., Inc., suffered a considerable financial loss due to the drop in price of silver, and the only way to make him whole was to enforce the oral agreement. Atlantic, 283 S.C. at 41-42.

The current case is consistent with Collins and distinguishable from Atlantic Wholesale. Like the Plaintiff in Collins, Dr. Anderson only lost the benefit of the bargain. She has no out of pocket costs or expenses. Unlike the Plaintiff in Atlantic Wholesale, Dr. Anderson failed to prove that she lost anything other than the benefit of the bargain. Dr. Anderson did not lose any money for out of pocket costs or expenses. Dr. Anderson did not have any losses incidental to the contract. Dr. Anderson remains in her former position. Dr. Anderson has suffered no detrimental change of position. The trial court’s order should be reversed as the established law required that Respondent prove more than a loss of a benefit of the bargain to prevail on a theory of equitable estoppel. As such, this case should be reversed and dismissed.

**V. BECAUSE THE DETAILS OF THE OWNERSHIP, CONSTRUCTION, AND MAINTENANCE OF THE RIGHT OF WAY WERE NOT AGREED UPON BY THE PARTIES AND THE PARTIES DID NOT AGREE TO A NEXUS BETWEEN THE RIGHT OF WAY AND RESPONDENT’S FINANCING, THE TRIAL COURT ERR IN DETERMINING THAT THERE WAS A MEETING OF THE MINDS ON AN ALLEGED ORAL CONTRACTUAL MODIFICATION REGARDING A RIGHT OF WAY.**

The details of the ownership, construction, and maintenance of the right of way were insufficient to form a meeting of the minds required to orally modify the Contract. The reason for the parol evidence rule and the Statute of Frauds is to require parties to a contract to think out the

contractual provisions and reduce them to a clear and coherent enforceable writing to show a clear meeting of the minds. In Player v. Chandler, 299 S.C. 101, 382 S.E. 2d 891 (1989), the Supreme Court of South Carolina found that any modification of a written contract must satisfy all requisites of a valid contract. The Supreme Court elaborated that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties as to all of the essential and material terms of the contract. Player, 299 S.C. at 105. The court stated “the ‘meeting of the minds’ required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. Player, 299 S.C. at 105. One of the key elements of the meeting of the minds is the “extent and boundary of the property.”

**A. Ownership details of the right of way were undefined.**

Similar to Player, in the present case the Parties to the Contract did not discuss the essential terms to create an extent and boundary of the right of way. Dr. Anderson could not describe what the right of way would look like. (Transcript, p. 149). Dr. Anderson said that in the discussions, the right of way was called many things along the way, not clearly defined. (Transcript, p. 139). Dr. Anderson testified that the right of way could be no greater than 2 acres. (Transcript, p. 94). However, Respondent was confused on ownership of the right of way. Respondent testified inconsistently at trial. On direct, Respondent testified that the right of way would take from the collateral. (Transcript, pp. 68, 75-76). On cross-examination, Respondent then inconsistently testified that she never heard the Pearsons discuss reducing the size of the collateral and testified that Appellant only wanted access to the nine acres. (Transcript, pp. 154, 156-157). Other key

players to a right of way agreement would be Mr. Pearson's siblings, who co-owned the 9 acres obtaining access. Mr. Pearson's siblings were not involved in the alleged right-of-way discussions.

Dr. Anderson is trying to convince the court that the ownership to the right of way was intended to transfer to the Pearsons. Otherwise, the size of the collateral does not change and does not affect the survey or appraisal of the property. Katie Graves, Respondent's agent, testified that the size of the collateral never changed, and the Pearsons only wanted access to the 9 acres. (Transcript, pp. 199, 223-224, and 228). The right of way would go over the collateral to be sold but not reduce from it. (Transcript, p. 228). No documentation in the Contract or loan commitment letter indicated that the size of the collateral would change. The survey conducted and recorded by the Pearsons clearly indicated that the right of way would remain part of Tract 1. (Respondent's Trial Exhibit 8). On the right of way survey, Tract 1 was the collateral and the right of way remained part of Tract 1. (Respondent's Trial Exhibit 8).

Respondent fails to show that the right of way survey would remain in the ownership of the Pearsons. It remained part of the collateral. As such, the right of way was immaterial to the survey and an appraisal of the property. Dr. Anderson did not discuss with a surveyor, an appraiser, or the closing attorney if the right of way survey was needed for the financing. She just emailed Lynne Christiansen to see if she needed a survey of the entire collateral, to which Lynne responded that she would need to survey the entire collateral. (Respondent's Trial Exhibit 7). It is unclear if Dr. Anderson ever relayed to Appellant that he would need to survey the entire collateral. The survey that the Pearsons completed demonstrates a .65 acre right of way next to the road. (Respondent's Trial Exhibit 8). This right of way in no way impedes the most valuable part of the acreage, the lots alongside the waterfront. The right of way survey excuse is a red herring for Dr. Anderson to

excuse her noncompliance with the finance contingencies.

**B. Construction and Maintenance details regarding the right of way were undefined.**

In addition to failing to solidify ownership of the right of way, the parties did not clarify who would be responsible for maintaining the right of way, how the right of way would be constructed, or who would construct and maintain it. Dr. Anderson could not state with clarity if the right of way would be a footpath or a roadway or how long or wide it would be; other than that that the right of way could be no more than two acres. (Transcript, p. 94, 148-149, and 152). Dr. Anderson could not clarify if the right of way would be made of gravel or pavement. (Transcript, p. 149-150). She testified that she did not want any gravel on her property that she was buying. (Transcript, pp. 149-150). Thus, Dr. Anderson would not agree with the right of way survey as it was drafted, remaining as part of Tract 1, the collateral. (Respondent's Trial Exhibit 8). There was no agreement as to which of the Parties would maintain the right of way. (Transcript, p. 149).

**C. No evidence was presented that Appellant and Respondent agreed to a nexus between a right of way survey and Respondent's financing.**

Respondent's loan commitment letter required Respondent to obtain (1) a mortgage title insurance policy, (2) a survey of the proposed real estate collateral, and (3) an appraisal of the real estate collateral. (Respondent's Trial Exhibit 6). Nowhere in this loan commitment letter does it mention that the finance company needs a right of way survey. Additionally, absent in the discussions between the parties is a mention of Appellant assuming the Respondent's loan commitment contingencies. Respondent knew that she would need an entirely new survey of the real estate collateral (not just the right of way). While Respondent asked her loan officer if an entirely new survey of the collateral would be required, there is no evidence that the Pearsons

agreed to secure the survey of the collateral. No evidence was presented by an appraisal expert as to whether the appraisal could move forward without a survey. Respondent simply did not get or engage an appraiser. Additionally, Respondent admitted that she did not obtain a mortgage title insurance policy. Respondent did not fulfill the requirements of her financing, and as such, there is no proof of a nexus between the right of way survey and the Respondent's financing. Appellants never agreed to satisfy the contingencies for Respondent's financing.

As such, no meeting of the minds occurred on the survey. Without specificity as to size, boundaries, ownership, construction and maintenance of the right of way, the right of way was merely a concept. Without an agreement that Appellant would complete the Respondent's financing contingencies for her, there is no nexus between a right of way survey and financing. Dr. Anderson did not secure an appraisal of the collateral or a mortgage title insurance policy. Dr. Anderson allowed the Contract to expire as she waited for the Pearsons to obtain a legal review of the right of way survey. Dr. Anderson did not send a written and executed request for an extension prior to expiration of this time is of the essence contract. As such, this case should be dismissed.

### **CONCLUSION**

For the reasons stated, this Court should reverse the judgment of the Master in Equity and dismiss this case with prejudice.

January 3, 2024

Respectfully submitted,

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