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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master in Equity

Appellate Case No. 2023-001897

Erin Burns Anderson,

Respondent,

v.

Rudy Lamar Pearson,

Appellant.

RETURN TO RESPONDENT'S
PETITION FOR REHEARING

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INTRODUCTION

The South Carolina Court of Appeals' Decision and Order, reversing the Decision and Order of the Master in Equity, is fully supported by the facts and the law. Respondent, Dr. Anderson, fails to state with particularity any points that were overlooked or misapprehended by the South Carolina Court of Appeals. Therefore, Respondent's Request for Rehearing should be denied.

ARGUMENTS

I. The Court of Appeals correctly ruled that Appellant did not interfere with Respondent's rights under The Contract.

The Court of Appeals addressed the Respondent's argument that Appellant interfered with Respondent's performance under the contract. Respondent argued that oral discussion of a survey of a right of way to a contiguous nine acres relieved Respondent from performing her obligations under a contract for the sale of land ("The Contract"), and under the terms of her financing obligations with her lender ("Loan Commitment Letter").

A. Respondent's argument that Appellant interfered with Respondent's performance under The Contract is subject to the Statute of Frauds.

First, the Court of Appeals addressed the legal standard in their review of Respondent's contractual interference argument. The Court of Appeals cited the Statute of Frauds as controlling statutory law. The Statute of Frauds prevents

Respondent from pursuing an action based on an oral contractual modification of a land sale contract unless the oral modification is 1. reduced to writing and 2. signed by the party to be charged therewith. S.C. Code Ann. § 32-3-10(4) (2007). The Court of Appeals stated that "the Statute of Frauds also prevents the oral modification of a contract governed by it" and cited Windham v. Honeycutt, 279 S.C. 109, 110, 302 S.E.2d 856, 856 (1983) (holding evidence of oral modification of a real estate contract was violative of the Statute of Frauds.)¹

The Court of Appeals next analyzed the facts to the legal standard and held that unless the doctrine of estoppel prevents Appellant from asserting the Statute of Frauds, the action is barred by the Statute of Frauds. It is undisputed that this case involves a contract for the sale of land. No written instrument, signed by Appellant or his wife, was introduced into evidence to demonstrate that Appellant, or his wife, ever agreed to relieve Respondent of her financing contingencies.

Respondent argued that Appellant agreed to obtain a survey required by the Contract and Loan Commitment Letter. Appellant pointed out that The Contract did not contain a provision that Appellant would obtain a survey.

¹ For further legal support of the Court of Appeals opinion, see also, Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding that contract modifications are subject to the Statute of Frauds. "Any contract for an interest in land . . . must be in writing and signed by the party against whom it is seeking to be enforced.") Player, 299 S.C. at 105. (holding that failure to put such a contract in writing renders it void.) Player, 299 S.C. at 105 (holding that a contract required to be in writing by the Statute of Frauds cannot be orally modified.) Player, 299 S.C. at 105.

The relevant contract provisions state as follows:

7. **FINANCE:** Buyer's obligation under this Contract is is not contingent upon obtaining financing of a 15 year or 30 year or other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts of minimum _____ % and maximum _____ % of the Purchase Price or Appraised Value whichever is lower. ("Financing Contingency"). Financing Contingency expires at Closing ("Financing Period"). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions ("Financing Effort"). In a timely

The Contract states that Buyer (Respondent Dr. Anderson) is responsible to obtain a 15-year purchase money loan. The Financing Contingency expires at Closing. Further, the Contract stated Brokers recommend Buyer have the property surveyed:

10. **SURVEY, TITLE EXAMINATION, ELEVATION, INSURANCE:** Brokers recommend Buyer have Property surveyed,

Additionally, Dr. Anderson's Loan Commitment Letter placed the onus on Dr. Anderson to obtain a survey:

12. Special conditions of approval:

- "Schedule A" is attached.
- This loan is subject to a prepayment penalty, see loan documents for specifics.
- This loan has a floor rate, see loan documents for specifics.
- This loan has a rate cap, see loan documents for specifics.
- This loan has a balloon payment, see loan documents for specifics.
- Escrows may be required as a condition of your loan.
- This loan is subject to penalty interest, see loan documents for specifics.

- 1) A mortgagee title insurance policy is required for this loan consistent with paragraph 13 of this document.
- 2) Prior to closing, AgSouth Farm Credit, ACA (the Association) must have received a survey and appraisal of the proposed real estate collateral that is satisfactory to the Association in all respects at its sole discretion.

It is undisputed that nowhere in The Contract or The Loan Commitment Letter is it written that Appellant, or his wife, will have the property surveyed. Respondent's burden shifting attempt to place the contractual requirement on Appellant to obtain

the survey required for the financing contingency would orally modify The Contract.

Respondent argued that the Transaction Brokerage Agreement brought the alleged oral modification into compliance with the Statute of Frauds. Respondent's argument is misplaced as The Court of Appeals noted in the Facts that only Dr. Anderson, Respondent, signed the Transaction Brokerage Agreement. Appellant, whom Dr. Anderson seeks enforcement, did not sign the Transaction Brokerage Agreement. Additionally, the plain reading of the Transaction Brokerage Agreement does not state that Appellant will obtain a survey.

Respondent could obtain a survey of the collateral at any point. The right-of-way did not alter the collateral. The right-of-way would go over the collateral, not take away from it. Even Respondent was confused about what needed to be surveyed and who was to do it. Dr. Anderson wrote to Lynne Christiansen, her loan officer, "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, R. 0366). If Respondent, Dr. Anderson, a very bright physician, was unsure of the type of survey needed from Appellant, it is very unreasonable of her to expect and rely on Appellant, an elderly man, living out of State, whom Dr. Anderson argued needed a Conservator, to know if he is surveying the right of way or the collateral.

B. The present case is distinguishable from Faulkner v. Millar and Lowcountry v. Charleston Southern University.

The Respondent's reliance on Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995) is completely misplaced. 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, it is undisputed that Dr. Anderson did not request an extension prior to the expiration of The Contract. Katie

Graves sent Dr. Anderson's written and signed request for an extension of the Contract to Appellant by email on October 23, 2017, weeks after the contract expired. (R. p. 346).² 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. (R. pp. 345-346). The Contract expired as represented by Dr. Anderson's agent, Katie Graves. (R. pp. 345-346). Dr. Anderson received her security deposit back.

Third, in Faulkner, the Buyer was merely trying to obtain a little more time to complete his obligation of a more detailed inspection of the structure of the building. Faulkner, 319 S.C. at 219. In the present case, Buyer, Respondent, a young, intelligent physician tries to shift the burden to Seller, Appellant, an elderly non-resident, struggling with health issues, to get Buyer Respondent's financing and then asks for more time only after the time is of the essence contract expired. It is important to note for reasons of equity, Dr. Anderson also wants the Court to shift her obligations of a survey on Appellant **but didn't perform the other requirements of her loan commitment (appraisal and title insurance)**. She also

² Katie Graves served as Dr. Anderson's agent throughout The Contract and its execution. Katie Graves testified that she was Dr. Anderson's agent. (R. pp. 223, 260-263). Dr. Anderson sought Katie Graves' assistance in making a cold call to the Pearsons when the Pearsons did not even have the property for sale. (R. pp. 123, 176). Katie Graves communicated with the Pearsons on Dr. Anderson's behalf. (R. pp. 262-263). The Contract submitted to the Court by the Respondent's Counsel in the Summons and Complaint had "Buyers Agent" checked regarding agency. (R. pp. 55, 383). Katie Graves and Dr. Anderson also signed a Buyer's Service Pledge Certificate to be used in an exclusive buyer's agent agreement. (R. pp. 170, 262).

did not bring the \$100,000.00 cash to the closing table. She asks the Court to excuse her from these requirements in this time is of the essence contract.

Dr. Anderson's actions and arguments are unreasonable. 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. (R. pp. 323-331, 337-344, 345-347, 355-358). The loan commitment letter requires a survey of the real estate **collateral**, not a survey of a **right of way**. (R. p. 356). There is a clear difference in a survey of a .65 acre right of way, not required for financing, and a survey of 21.99 acres of real estate collateral, required for financing. Dr. Anderson was uncertain what type of survey was even needed. 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????)." (R. p. 366).

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 for Dr. Anderson's financing. Unlike the present case where Dr. 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.

Finally, in Faulkner, the Court was not dealing with a forfeiture of a contract, but merely a forfeiture of a security deposit. The Court in Faulkner merely was returning the security deposit to the Buyers after the inspection contingency fell through. Here, the Buyer, Dr. Anderson, did obtain her security deposit back from her own Broker when her financing contingency fell through.

Lowcountry v. Charleston Southern is also distinguishable from the present case because similar to Faulkner, time was not of the essence in Lowcountry. Lowcountry, 656 S.E.2d at 779 (stating that "we agree with the master that Buyer's failure to close on the projected closing date did not entitle the University to terminate the contract because time was not of the essence under the contract.") On the other hand, as The Court of Appeals properly determined, the present case is similar to Ingram v. Kasey's Associates in which time was of the essence. Ingram, 340 S.C. 98, 531 S.E.2d 287 (2000).

C. The Court of Appeals properly determined that 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 the present case, Dr. Anderson failed to complete all the contractual requirements by the time of closing or five business day grace period. First, Dr. Anderson did not obtain a policy of title insurance prior to closing or the five-business day grace period. (R. p. 184). According to the loan commitment letter, securing a policy of title insurance is Dr. Anderson's number one contingency to obtain financing. (R. p. 356).

Second, Dr. Anderson did not obtain a survey of the collateral. (R. p. 197). Dr. Anderson tries to shift the burden to the seller, Mr. Pearson, an elderly man who lives out of State, to obtain the survey of the entire collateral. If text messages were admissible, which Appellant disputed under the Parol Evidence Rule and Statute of Frauds, all Appellant allegedly 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. (R. p. 194). Finally, Dr. Anderson also did not bring to closing the actual required cash of \$100,000.00. She did not present the lower court with any documentation that the \$100,000 was in her account, her lawyer's account, an escrow account, or brought to the closing.

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 loan 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. (R. pp. 323-331, 355-358). 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. (R. pp. 323-331, 355-358).

Dr. Anderson testified that she could've obtained the money, could've obtained the title insurance policy, could've obtained the appraisal, and could've obtained it by closing. "Could've" doesn't count when time is of the essence. As the Court of Appeals stated, under Ingram, to be entitled to specific performance, Dr. Anderson **must've** obtained the items by the closing date or five business days thereafter to

prevail in specific performance of a "time is of the essence" contract.

D. As Dr. Anderson, Respondent, failed to satisfy the conditions precedent to the Contract, this case is dissimilar to Champion v. Whaley.

Champion v. Whaley was a breach of contract action for failure to pay a brokerage commission, not a specific performance action. The Court in Champion v. Whaley held that in a conditional contract, the plaintiff must show that all conditions precedent to the seller having to pay the brokerage commission must have occurred unless the seller prevents a condition from occurring to pay the brokerage commission. Here, there is no evidence that the Seller prevented Dr. Anderson from getting her own survey of the collateral. The right-of-way did not reduce the collateral. Dr. Anderson should have obtained the survey of the collateral. Additionally, Dr. Anderson requests the Court to excuse her from compliance with other conditions in the conditional contract, to include obtaining an appraisal and title insurance policy. Further, Dr. Anderson did not bring \$100,000 cash to the table. As such, Dr. Anderson did not complete all the conditions precedent to the contract, and the Court of Appeals did address this case.

E. Commercial Credit Corp. v. Nelson Motors is inapplicable to this case.

Commercial Credit Corp v. Nelson Motors, 247 S.C. 360, 147 S.E.2d 481 (S.C. 1966) is inapplicable to this case for two main reasons. First, Commercial

Credit Corp. is factually distinct because in Commercial Credit Corp., the South Carolina Supreme Court deals with a contract for the repossession of vehicles under installment contracts between two commercial companies. Commercial Credit Corp., 247 S.C. 360, 147 S.E.2d 481 (S.C. 1966). The present case involves the one-time sale of land between two individuals. Secondly, the Supreme Court, in Commercial Credit Corp. indicates that "in absence of express provisions therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do to carry out the contract." Commercial Credit Corp., 247 S.C. at 367, 147 S.E.2d at 484. In the present case, there are express provisions in the contract and loan commitment letter for Doctor Anderson to get a survey, appraisal, and title insurance. There are also express provisions in The Contract that Dr. Anderson will bring \$100,000 cash to the closing. Dr. Anderson did none of the above. As such, Commercial Credit Corp. is inapplicable.

II. Respondent failed to argue Part Performance, as an exception to the Statute of Frauds, at any stage of the trial, and therefore the issue of Part Performance is not properly preserved for appeal. Even if preserved, which Appellant disputes, Part Performance is inapplicable to the present facts.

The Supreme Court of South Carolina in Wilder Corporation v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1998) held that "[i]t is axiomatic that an issue cannot

be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corporation v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733, citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). Further, Rule 210 (c), S.C. Appellate Court Rules, states that "the Record [on Appeal] shall not, however, include matter which was not presented to the lower court or tribunal."

Respondent, for the first time in this case, argues that the doctrine of Part Performance is applicable to remove the alleged oral modification to The Contract from the Statute of Frauds. A detailed review of the Record on Appeal reveals that the issue of Part Performance as an exception to the Statute of Frauds was not brought up to the lower court or ruled upon by the lower court. As such, Respondent has not properly argued the issue or presented it to the lower court, and the issue of Part Performance as an exception to the Statute of Frauds is not properly preserved for appeal.

Without waiving the Appellant's objection that the issue is not properly preserved for appeal, and in the event the Court of Appeals would find the issue of Part Performance to be properly preserved, Part Performance is still not applicable as an exception to the Statute of Frauds to relieve Respondent from compliance with her financial contingencies or other requirements to close by the contract expiration

date or grace period in this time is of the essence contract.

In order to successfully prove the doctrine of Part Performance in a contract for real estate as an exception to the Statute of Frauds, the Respondent must demonstrate 1) clear evidence of an oral contract; 2) the agreement had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral agreement. Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009)

A. No Clear Evidence of an Oral Contract Modification

First, there is no clear evidence that Appellant entered into an oral agreement to relieve Respondent of her need to obtain a survey of the collateral for loan purposes. The only evidence on the record indicated that the Pearsons would survey a .65 acre right of way. The loan letter still placed the onus on Respondent to obtain the survey of the collateral. At no point did Appellant agree to relieve the survey burden of Respondent. Additionally, there is no clear evidence of an agreement. As noted above, Respondent did not know whether the Pearsons should get a whole new survey or just of the right of way. Contrary to the assertion of Respondent, the Pearsons only surveyed a right of way, which remained part of the overall collateral. Appellant pointed out that the survey **did not take the .64 acres out of the control of Respondent.** (R. 0369). As per the survey, **the .64 acre expressly remained part of**

Tract 1, which was the overall collateral. (R. 0369). As such, there cannot be a clear agreement if Respondent indicated to her loan officer that she did not know what the Pearsons should survey. In any event, this argument is a total red herring. It was always Dr. Anderson's responsibility to survey the collateral for Dr. Anderson's financing.

While there may have been evidence allowed, over the objection of Appellant, that Appellant would survey a right of way, there is no evidence that the Pearsons/Appellant agreed to relieve Respondent of her financing contingencies. As noted above, the right-of-way would traverse over the collateral, not take therefrom. On cross-examination, Dr. Anderson confirmed that she never heard Mr. Pearson discuss reducing the collateral. (R. 0204, lines 18-25, R. 0205, lines 1-25, and R. 0206, lines 1-9). As such, while the Pearsons were surveying a right-of-way, Dr. Anderson could have surveyed the collateral (the whole property) as the right-of-way did not take away therefrom. There was no clear oral agreement.

B. No Acts of Performance or Part Performance on Behalf of Dr. Anderson; Inaction is insufficient.

Secondly, the party (Dr. Anderson) seeking to rescue the alleged oral modification from the Statute of Frauds, must show acts of performance or part performance on her part. Fesmire v. Digh, 385 S.C. 296, 311, 683 S.E.2d 803, 811 (Ct. App. 2009). **Mere inaction by Respondent is not sufficient to prove Part**

Performance. Pursuant to Graham v. Prince, to get partial performance, Dr. Anderson would have to "do some **act essential to the performance of the agreement resulting in loss to himself [herself/Anderson] and benefit to the other [Pearson].**" Graham, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987). Additionally, according to Graham, "**inaction** by one party **which results in no loss to him** or benefit to the other **will not remove a parol agreement from the Statute of Frauds.**" 293 S.C. at 81, 358 S.E.2d at 717. Dissimilar to Graham, in the present action, Respondent's inaction/forebearance in obtaining a collateral survey would not result in any personal loss to her. She received her security deposit back and was in the exact same position as she was prior to The Contract.

C. Dr. Anderson demonstrated no willingness to complete The Contract.

Finally, Dr. Anderson demonstrated no willingness to complete The Contract in this time is of the essence contract. She did not bring cash to close. She did not get the title insurance policy. She did not get the appraisal. She did not get her own survey. The collateral never changed. The Contract that Dr. Anderson signed had a time is of the essence provision disallowing late performance by Dr. Anderson. Similar to Larry Fesmire in Fesmire, Dr. Anderson abandoned The Contract. Fesmire, 385 S.C. at 313, 683 S.E.2d at 813.

III. The Court of Appeals properly analyzed the Respondent's burden to prove that the Respondent's reliance was reasonable.

Respondent attempted to overcome the Statute of Frauds by arguing the doctrine of equitable estoppel. Respondent's argument before the Master in Equity was built on estoppel. At the hearing before the Master in Equity, Respondent's counsel argued in open court, **"Our [Respondent's] case is dependant [sic] largely on the document [sic] of equitable estoppel."** (R0078-0082). Respondent further argued, **"the Doctrine of Equitable Estoppel from that case supplants the statue [sic] of frauds. You can't come in and claim the statute of frauds on something when you made a promise to somebody and caused them to rely on it. And that's the evidence we are going to present on this."** (R0081).

The Court of Appeals did not overlook Respondent's estoppel argument. The Court of Appeals' Decision and Order fully considered all elements and facts bearing on the Respondent's estoppel argument. Being that Respondent indicated that her case depended on the doctrine of equitable estoppel, the Court of Appeals laid out the legal standard for equitable estoppel and fully addressed how the doctrine of equitable estoppel applied to the facts of the case. The Court of Appeals noted that "the doctrine of equitable estoppel may be invoked to prevent a party from asserting the [S]tatute of [F]rauds." Collins Music Co. v. Cook, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984).

The Court of Appeals further stated in the order,

With regard to the party estopped, the elements of equitable estoppel are (1) conduct amounting 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) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Southern Dev. Land & Golf Co., v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). "As related to the party claiming estoppel, the essential elements are: (1) lack of knowledge and of means of knowledge of the truth as to facts in question; **(2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.** Rushing v. McKinney, 370 S.C. 280, 293-294, 633 S.E.2d 917, 924 (Ct. App. 2006). "[R]eliance by the party seeking to assert estoppel must be reasonable." S.Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993).

Additionally, Appellant points out that **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).

The Court of Appeals, applying its own view of the facts as per the appropriate standard of review, determined that the facts indicated that Respondent's reliance was not reasonable. The Court of Appeals held that Dr. Anderson's failure to obtain a survey herself was not reasonable. As noted above, when Dr. Anderson spoke with

her loan officer, she indicated that she was unsure of what type of survey was needed. Dr. Anderson wrote to Lynne Christiansen, her loan officer, "**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). If Respondent, Dr. Anderson, a very bright physician, was unsure of the type of survey needed from Appellant, it is very unreasonable of her to rely on Appellant to figure that out.

IV. The Court of Appeals properly analyzed the Respondent's burden to prove substantial detrimental change of position and that loss of a benefit of the Contract is not enough to show substantial detrimental change of position. Pursuant to precedent, the one asserting estoppel must prove a pecuniary or financial loss other than a benefit to the contract.

Dr. Anderson failed to prove detrimental reliance. In asserting the doctrine of equitable estoppel, it was Dr. Anderson's burden to prove all of the essential elements. Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 7 (S.C. App. 2009). The Court of Appeals noted,

"pursuant to the principles of equitable estoppel, including the doctrine of part performance, courts of equity may declare an oral land contract exempt from strict application of the [S]tatute of [F]rauds, and order specific performance or other equitable relief, upon proof of sufficient actions undertaken by the purchaser in reliance on the oral agreement. Whether particular actions of the purchase show such reliance on the oral agreement as to warrant equitable relief requires a case-by-case analysis of the facts and circumstances, but the court's determination is most

often based on the purchaser's evidence of some combination of several strong indicators of reliance-payment toward the purchase price, taking possession of the property, and making of substantial improvements thereto. 63 Am. Jur. 3d Proof of Fact § 105 (2001)."

The Court of Appeals found that Anderson, the Respondent, did not demonstrate any detrimental change of position.

The Court of Appeals correctly decided Dr. Anderson did not show a substantial, detrimental change of position. Dr. Anderson produced no evidence that she lost anything. The transaction broker submitted the security deposit to the S.C. Treasury, unclaimed property division, in Columbia for Dr. Anderson's claim. Therefore, Dr. Anderson did not even lose her security deposit.

The Court of Appeals cited Collins Music Co., Inc. v. Cook, which stated, "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).

Restoring Respondent's security deposit fully returned Dr. Anderson to her former position. In Collins Music Co., Inc. v. Cook, 281 S.C. 580 (S.C. App. 1984),

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 current case is consistent with Collins and distinguishable from Atlantic Wholesale.³ Like the Plaintiff in Collins, Dr. Anderson only lost the benefit of the bargain. Dr. Anderson suffered 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 have any losses incidental to the contract. Dr. Anderson received her earnest money back and

³ 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.

remains in her former position. Dr. Anderson has suffered no detrimental change of position.

V. The Court of Appeals properly ruled that 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 clause.

It is fatal to Dr. Anderson's case that she did not satisfy all the loan requirements, bring cash to close, and close The Contract in a timely fashion. "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).

Ingram is the controlling law, not Faulkner. 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.

Again, Respondent's reliance on Faulkner is misplaced. 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. Respondent asserts dicta regarding option contract of the Court as a controlling ruling of the Court. Second, even assuming the dicta was

the ruling, Faulkner is still distinguishable from the current case. 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. In the present case, **Katie Graves sent Dr. Anderson's written and signed request for an extension of the Contract weeks after the contract expired.** (R. p. 346). Finally, in Faulkner, the Buyer sought an extension to complete his own obligations (inspection), not trying to burden shift his obligations to Seller.

In the present case, paragraph 1. (G) of the Contract clearly and unequivocally contains a time is of the essence provision. (R. p. 323). 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.”** (R. p. 323). Dr. Anderson 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. (R. p. 323).

Additionally, the Contract clearly expired well prior to Anderson ever asking for an extension. 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. (R. p. 323). At the time of the expiration of the Contract, even including a five-business day grace period, Dr. Anderson still had not performed her obligations under the contract and her loan commitment letter. (R. pp. 184, 194, 197). Dr. Anderson failed to secure a policy of title insurance. (R. p. 184, lines 13-14). Dr. Anderson failed to secure a survey of the proposed real estate collateral. (R. p. 197, lines 14-20). Also, Dr. Anderson failed to secure an appraisal of the proposed real estate collateral. (R. p. 194, lines 7-11). 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. (R. pp. 182-184).

Finally, Respondent cites Dudek v. Ferro, Unpublished Op. No. 2020-UP-151 (S.C.App. filed May 20, 2020). Pursuant to Rule 268, SCACR, unpublished opinions have no precedential value and should not be cited except in proceedings in which they are directly involved. Even if Dudek contained precedential value, Dr. Anderson was never prevented from getting a survey of the collateral by the Pearsons. Dr. Anderson knew the right-of-way traversed over the collateral and did not take away from it. At any point she wanted, Dr. Anderson could have obtained the survey of the collateral, which never changed during the contract period. The Pearsons did not prevent Dr. Anderson from doing so. The survey was Dr.

Anderson's responsibility for Dr. Anderson's loan.

VI. The Court of Appeals correctly ruled that the parol evidence rule, merger clause, and non-reliance clause exclude evidence of extraneous oral modifications to The Contract.

The Court of Appeals correctly ruled that the parol evidence rule, merger clause, and non-reliance clause prevent specific performance of The Contract. Any modification to the terms of The Contract should have been incorporated into the actual contract. Additionally, any oral statements by Agents and Parties, not incorporated into The Contract, are void as if they didn't exist under the non-reliance clause.

A. The Parol Evidence Rule and Merger Clause of the Contract prevent 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." (R. p. 328). 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. **It is key to note here that the only time that Dr. Anderson and Mr. and Mrs. Pearson met in person to discuss the Contract was before and at the signing of The Contract. No conversation between Dr. Anderson and Mr. Pearson took place regarding the right of way after The Contract other than alleged texts of Katie Graves discussing the alleged oral conversation at the contract signing.**

Further, **there is an specific area in the The Contract for modifications specifically regarding "easements that affect desired use."** The provision of The Contract is paragraph 33 on page 7 of The Contract. There was nothing written into The Contract in paragraph 33 regarding a right of way easement. Therefore, any pre-contractual discussion of a survey of a right of way not incorporated into The Contract are void under the Parol Evidence Rule and the Merger Clause.

B. 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. (R. p. 328). 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.**” (R. p. 328).

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. (R. p. 328). 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 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.** (R. p. 329). 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 conversations 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.

VII. The Court of Appeals properly ruled that Dr. Anderson failed to prove that she had the ability to perform her part of the contract at the time of the closing or within the five-business day grace period.

The Court of Appeals correctly ruled that Dr. Anderson had not obtained all of the items that she needed to obtain her loan. Dr. Anderson elected to finance the contract with a \$300,000.00 loan. Dr. Anderson chose AgSouth to finance the loan. Dr. Anderson clearly knew AgSouth's requirements for the loan because she read the loan commitment letter. Per Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000), it was Dr. Anderson's responsibility to show the Court that she had the \$300,000.00 loan at the time of the end of the grace period in time is of the essence contracts. The Court of Appeals correctly noted and it is undisputed that

Dr. Anderson testified that she did not get a policy of title insurance or an appraisal. The Court of Appeals noted and it is undisputed that Dr. Anderson also did not show that she had come forward at the end of the grace period with \$100,000.00. Dr. Anderson failed to produce any bank records that showed that she had the money at the time of closing or the end of the grace period. It is speculative to believe her self-serving statements without documentary evidence of such a critical element of proof. Dr. Anderson argues that she could have paid cash and didn't need the financing. Despite her self-serving and unsubstantiated statement, the actual evidence is that Dr. Anderson did not pay cash by closing or the grace period.

VIII. The Court of Appeals Statement of the Facts indicating that "Anderson signed a release of contract, which she gave to Graves; however, Pearson did not sign it" is supported by the Record of Appeal. Dr. Anderson's testimony and Dr. Anderson's Trial Exhibit 4, summary of Katie Graves' texts support the finding of fact.

Respondent, in her Petition for Rehearing, takes issue with The Court of Appeals putting in the Facts section of the Decision and Order that Respondent signed a Release of the Contract and submits that the Order should not refer to it in any way. However, Dr. Anderson, in questioning by her own counsel, read the provisions of the Release into the record, under oath, and presented evidence of a summary of text messages of her agent, Katie Graves, that support the statement of fact in the order. (R0213 - 0214, R0346-0347). The Court of Appeals committed no

error by placing the fact that Respondent signed a Release of the Contract in the Facts because the record supports that Dr. Anderson did sign the Release.

CONCLUSION

The Court of Appeals correctly reversed the Decision and Order of the Master in Equity. The Court of Appeals correctly ruled that Respondent failed to prove that Appellant was equitably estopped from asserting the Statute of Frauds as Respondent failed in her burden to prove the following essential elements: 1. reasonable reliance and 2. substantial, detrimental change of position in reliance. Furthermore, the Court of Appeals correctly ruled that oral modifications to a contract for the sale of land are subject to the Statute of Frauds. Additionally, the Court of Appeals correctly ruled that the Appellant did not sign anything indicating that he would assume any financial contingency assigned to Respondent Anderson, and nothing was located in The Contract to indicate Appellant was responsible for the survey as would be required by the Parol Evidence Rule and Merger Clause. The Court of Appeals correctly noted that under the Non-Reliance Clause Anderson's action for specific performance must fail because it is dependent on an alleged oral statement of a Party and/or Agent/Broker made outside The Contract. Finally, Dr. Anderson failed to demonstrate that she could perform her contractual obligations by the closing date or grace period in the time is of the essence contract.

As such, Respondent failed to state with particularity any points that were overlooked or misapprehended by The Court of Appeals. The Respondent's Petition for Rehearing should be denied.

Respectfully Submitted,

The Law Office of Clifford Bush, III, LLC

s/ J. Andrew Smith

J. Andrew Smith

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Beaufort, SC

March 31, 2025

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Mar 31 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBUG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master in Equity

Appellate Case No. 2023-001897

Erin Burns Anderson

Respondent,

v.

Rudy Lamar Pearson,

Appellant.

PROOF OF SERVICE

I certify that on March 31, 2025 I served the Appellant's Return to Respondent's Request for Rehearing on Respondent, Erin Burns Anderson, by depositing a copy of it in the United States Mail, postage prepaid, on March 31, 2025, addressed to her attorneys of record, Bernie W. Ellis, Burr & Forman, LLP, P. O. Box 447, Greenville, SC 29602 and William B. Darwin, Jr., Holcombe Bomar, PA, P.O. Box 1897, Spartanburg, SC 29304, and by sending an electronic copy to their respective email addresses as listed on Attorney Information System (AIS).

March 31, 2025

s/ J. Andrew Smith

J. Andrew Smith

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March 31, 2025

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

Mar 31 2025

SC Court of Appeals

RE: Erin Burns Anderson v. Rudy Lamar Pearson, Appellate Case No. 2023-001897

Dear Ms. Kitchings:

Enclosed for filing is the **Appellant's Return to Respondent's Request for Rehearing** in the above case.

Sincerely,

s/ J. Andrew Smith

J. Andrew Smith

28 Old Jericho Road

Beaufort, SC 29906

(843) 379-9500

Attorney for Appellant

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William B. Darwin, Jr.
Attorney for Respondent

Duane Alan Lazenby
Attorney for Appellant

Steven Edward Buckingham
Attorney for Appellant