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
Case No. 2018-CP-42-01222

Opinion No. 6104
Heard November 7, 2024- Filed March 5, 2025

Erin Burns Anderson……..……...…Respondent,

v.

Rudy Lamar Pearson…….....Appellant.

RESPONDENT'S REPLY TO RETURN FOR PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 240(f), SCACR, Respondent respectfully submits this Reply to Appellant's Return to Respondent's Petition for Rehearing.

ARGUMENTS

I. Appellant's Return Does not Address the Fact that Mr. Pearson, though Mrs. Pearson, Misled Respondent About Providing the Survey Which Caused Respondent Not To Perform Timely.

In this case, the Court of Appeals found "there was evidence that Pearson represented the survey would be provided to Anderson prior to closing," and that "Mrs. Pearson created an expectation in Anderson that Pearson would have a survey prepared and sent to her before the closing date." **(**Opinion, p. 8). This Court did not disagree that Respondent relied on the statements of Mrs. Pearson, regarding the survey, but found that her reliance was not reasonable. *Id.*

In her Petition for Rehearing, Respondent noted that this Court had overlooked or misapprehended cases in South Carolina where a party's having not performed a contract on a timely basis was excused where the conduct of the other party contributed to the lack of a timely performance: *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381 (1995), and *Low Country Open Trust v. Charleston Southern University*, 376 S.C. 399, 405, 656 S.E.2d 775, 778 (Ct. App. 2008). Like this case, those cases involved sales of real property which were subject to the Statute of Frauds.

Appellant did not respond to the Court's findings of fact on this point and, thus, did not acknowledge what this Court found, and what is obvious: Appellant's agent (and wife), Mrs. Pearson, actively misled Respondent about the survey for the purpose of running out the clock on Respondent's time limit to obtain her financing before the deadline set forth in the contract. Instead, Appellant attempts to argue facts that this Court did not set forth as reasons for its findings

pursuant to Rule 220(b), SCACR, including, without limitation, that Respondent tried to shift the burden of obtaining financing to Appellant as Appellant alleges. Even if that argument were now before the Court, it is absurd. Respondent had all she needed to close, except the survey.[1] Had Respondent known in time that Mrs. Pearson was not going to let Respondent have the survey that Mrs. Pearson had obtained, Respondent could have obtained one herself.

While Appellant attempts to distinguish the above-cited cases, his attempts fail because Mrs. Pearson, having knowingly misled Respondent, attempted to prevent Respondent from timely complying with the contract. As such, the above-cited cases are not distinguishable on the law, and Respondent's facts actually improve her position over the facts in those cases.

The biggest issue to address about Appellant's attempts to distinguish *Faulkner* and *Low Country* is the argument that *Faulkner* and *Low Country* were not "time-is-of-the-essence" contracts. Appellant, in his Return, relies on 61 Am.Jur. 3d *Proof of Facts*, § 325 (2001) for the quote: "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."[2] **Amazingly, Appellant leaves out the rest of the quotation which is**:

> "This general rule is, however, subject to the limitation that such a contract may nevertheless be specifically enforced if the failure to perform within the designated time results from the act or fault of the party against whom specific performance is demanded. This exception is supported by the well-recognized principle that a person should not profit by his or her own wrong, and thus no person can defend against contractual liability on grounds of a condition precedent when he or she is responsible for that condition precedent not being complied with**.** For example, under circumstances where the purchaser's delay in performance was caused by the conduct of the seller, the courts have noted that

[1] As discussed in Respondent's petition, the appraisal was to be ordered by the lender, and mortgage title insurance is purchased at closing.

[2] The actual text of the sentence Appellant indicates he is quoting is "**Ordinarily,** 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." (Emphasis added). The word "Ordinarily" indicates an exception is coming, but Appellant left that word out.

> the **seller should not be permitted to rely on the time of the essence clause** to cancel the contract and thereby take advantage of an appreciation in real estate values**.** A party's failure to comply with the time limit specified in a real estate contract is excused **in spite of a time of the essence clause** where the delay **is the result of the other party's bad faith or lack of due diligence.** Accordingly, where a contract expressly states that time is of the essence—such that performance by the purchaser within a specified time is a condition precedent to the seller's duty to perform his part—and the purchaser has been caused to delay his performance beyond the specified time by the request or agreement or other conduct of the seller, the purchaser can enforce the contract in spite of the seller's delay. However, this rule assumes that the nonperformance of the condition was not caused by purchaser's own inability to perform, and that but for the seller's request, agreement, **or other conduct, the purchaser would have performed the condition.**

61 Am. Jur. *Proof of Facts* 3d § 325 (2001). (Emphasis added). Appellant should have included the remainder of that passage.

Appellant also insists that the discussion of option contracts in *Faulkner*, which are time-is-of-the-essence contracts, is dictum. It is not. In *Faulkner,* the seller argued that the contract at issue was an option contract, and the buyer had not exercised the option by the deadline, which operated as a time-is-of-essence clause. Although the court rejected that factual argument, it still addressed the facts as presented by the appellant in that case. *Faulkner*, 319 S.C. at 221, 460 S.E.2d at 381. Even if the Supreme Court's ruling on appellant's argument in that case were, technically, dictum, there should be a high degree of confidence that it is a correct statement of law.

Appellant also argues that *Faulkner* is distinguishable because the buyer asked for an extension before the contract expired, and, according to Appellant, in this case, the Respondent did not. So what? Appellant has never explained why that point is important. Further, in the case before this Court, Respondent, through her broker, told Appellant that Respondent needed the survey that Appellant had prepared well before the deadline in the contract had passed, and Appellant told Respondent's broker, close to the deadline for the closing that Appellant was going

to file (i.e., record) the survey. (R. 345). Respondent's position in this case is far stronger than the buyer's in *Faulkner*. Mrs. Pearson was not just silent. She actually said she would provide the survey.

The point in these cases is that the buyer believed that the seller had implicitly granted an extension based upon the seller's conduct, or that the seller would not call time based upon the seller's own conduct. *Id.*, 319 S.C. at 221, 460 S.E.2d at 381; *Low Country*, 376 S.C. at 410, 656 S.E.2d at 781. In any event, the trial court found that Ms. Graves did seek an extension before the additional 5-day period set forth in the contract had expired. (R. 25). Respondent's belief that Appellant would still provide the survey and the sale would close is reflected in Ms. Graves's texts to Mrs. Pearson in October of 2017 after the original deadline of September 29, 2017, (R. 345-46). Under the contract, notice from Ms. Graves to Mr. Pearson's agent was notice from Dr. Anderson to Mr. Pearson's agent. (R. 53, ¶ 34).

Appellant argues that in *Faulkner*, the buyer was asking for more time to do what he needed to do, but that, in the present case, Respondent did not perform the other requirements of her loan commitment. Appellant has no standing to raise that point. The other requirements of Respondent's loan commitment were not contractual duties owed to Appellant. As discussed in Respondent's Petition, it was Appellant's burden to prove that that Respondent could not have delivered the funds by the termination date if Appellant had timely sent her the survey, or had not misled Respondent that Appellant was going to send the survey. *Champion v. Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404, 406 (Ct. App. 1984). Also, it is black-letter law that a party seeking specific performance does not have to tender performance on the due date of the contract to seek specific performance where the other party has not performed. *Ingram v. Kasey Associates*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000).

Appellant makes the argument that that in *Faulkner*, the court was not dealing with the forfeiture of a contract, but only the forfeiture of a security deposit. That argument cuts in favor of Respondent's position. Forfeiting a contract is a far bigger deal than forfeiting a security deposit, and the entire point of the holding in *Faulkner* is limiting the right of a seller to cause a buyer to forfeit his or her rights under a contract. *Faulkner*, 319 S.C. at 221, 460 S.E.2d at 381 (1995).

II. ***Ingram v. Kasey Associates* Supports Respondent's Position.**

Both this Court and Appellant discuss *Ingram v. Kasey Associates* as though it supports Appellants position. It does not. In *Ingram*, the Supreme Court held that Ingram had to demonstrate that he was ready, willing and able to perform his part of the contract on February 28, 1994, the date the lease in that case expired **OR** on March 14, 1994, the date he brought the action for specific performance. *Id.* at 106, 531 S.E.2d at 291 (emphasis added).

Yet this Court stated in its opinion that Respondent "did not come forward with $100,000.00, which was the unfinanced portion of the purchase price." ***Ingram* holds that you have to be ABLE to perform at the time set forth in the contract OR when you file the action. It does not say that you have to have actually performed on the date set forth in the contract where the other party has not performed. It even says that you only have to have the money on the date you file the action.**

In any event, Dr. Anderson's duty to pay $400,000.00 would not have arisen under the contract until Mr. Pearson delivered a general warranty deed to the property at the office of the closing attorney. (R. 323-24) (¶ 4 of the contract). He was supposed to do that on or before 10:00 a.m. on the Closing Date. He did not. Appellant clearly repudiated the contract, actually, he

breached it, thus, under no circumstances did Dr. Anderson's duty to perform arise. *Maccaro v. Andrick Development Corp.*, 280 S.C. 96, 101-102, 311 S.E.2d 91, 94 (Ct. App. 1984).

In any event, Dr. Anderson testified under oath that she had the ability to pay $100,000.00 or even the $400,000.00 at the time of closing. She also testified that she has remained and still remains ready, willing and able to perform the contract. Sworn testimony is evidence. *Jones v. Leagan*, 384 S.C. 10, 681 S.E.2d 6 (Ct. App. 2009). People testify to their own personal knowledge, and such testimony is evidence in the case. Even when documents are admitted, it is typically because a witness testifies of his or her personal knowledge of what the document are. Evidence of a witness's personal knowledge of a matter can be the witness's own testimony. SCRE 601.

Dr. Anderson testified that she had $100,000.00 at the time of closing and intended to pay it. (R. 182-83). Dr. Anderson testified that she could have paid for the property without a loan if she had had to. (R. 170). The trial court found that Dr. Anderson had the ability to perform under the contract even if the appraisal had come back lower than necessary to obtain her loan, "which was her right to do." (R. 23). The fact that Dr. Anderson could have performed under the contract without having obtained a loan and that she had the right to do so was not challenged on appeal. In fact, counsel for appellant argued at the appellate hearing that because Dr. Anderson could have closed the transaction with cash, she acted inequitably.

The burden of proof in a case arising in equity is preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). The trial judge, who heard Respondent's testimony and observed her demeanor, believed her. "Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. However, an appellate court still affords a degree of deference to the trial court

because it was in the best position to judge the winesses' credibility." *Matter of the Estate of Kay*, 423 S.C. 476, 480, 916 S.E.2d 542, 545 (2018) (internal citations omitted).

Apparently, Appellant believed Dr. Anderson as well. He did not argue to the trial court that it should not believe her. He did not argue to this Court that it should not believe her. In Appellant's brief to this Court he acknowledged her testimony that she had the ability to pay, and did not raise any lack of evidence on that point to this Court. (Appellant's Final Brief, p. 13). Even today, he does not argue she did not have the money. There is nothing unusual about a doctor or many other types of professionals or business people having immediate access to $400,000.00, nor was there in 2017.

This Court is simply wrong in stating Respondent did not present evidence of her ability to pay. This Court's finding of fact that Dr. Anderson did not present evidence that she had $100,000.00 on the date of closing is so clearly wrong, even Appellant does not try to defend it. (Return, p. 10). The most Appellant can do is to argue that Dr. Anderson's testimony is "speculative." (Return, p. 29). That argument was not made below, was not previously made by the Appellant in this appeal, and is not a part of this Court's opinion. Even if it were, a witness's testimony as to facts of which they have personal knowledge is not speculative.

III. The Return Does Not Address the Court's Reasonableness Finding.

Appellant does not at all address this Court's finding that Respondent was unreasonable in relying on Mrs. Pearson's statements that she would provide the survey because Respondent should have figured out that Mrs. Pearson was stalling and watching the calendar for the termination date.

IV. Appellant's Argument Regarding Detrimental Reliance Continues to Overlook that Respondent Lost the Value of a Pre-Existing Contract.

Appellant argues, and this Court agrees, that the parties entered into a contract for the purchase and sale of property and that altering, explaining or varying that contract by prior or contemporaneous statements is not permitted under the parol evidence rule, the non-reliance clause and the merger clause. Respondent agrees with that. Appellant argues, and this Court agrees that all Respondent lost was the value of that contract. But then Appellant argues, and this Court agrees, that *Collins Music, Co. v. Cook,* 281 S.C. 580, 316 S.E.2d 580 (1984) applies, which holds that detrimental reliance does not arise where one would not lose the value of a contract that he or she had already entered into. *Id.* at 584, 316 S.E.2d at 420-21.

Appellant argues that all Respondent lost was the benefit of the bargain. That is actually the entire basis of all breach of contract actions. That is why a party can sue to enforce a contract that has been entered into. *Collins* did not involve losing the value of a contract.

Dr. Anderson did have a contract, as this Court found (Opinion, p. 2). The definite, substantial, detrimental change of position in reliance on the agreement was that Dr. Anderson did not get her own survey in reliance on the statements of Mrs. Pearson which, had Mrs. Pearson not been deceiving Dr. Anderson, would have allowed her to close the contract on a timely basis. Because of her reliance, she lost the value of the contract she had. Despite the fact that the contract had not closed, it was still a contract upon which either party could sue if the other party did not fulfill its obligations under that contract.

Florence v. Parnell, 178 S.C. 119, 182 S.E. 313, 316 (1935) is exactly on point here, and though it was discussed in Respondent's brief, neither this Court nor Appellant attempted to distinguish it. The Court in *Florence* held "Equity will not allow the statute of frauds to be used as an instrument of fraud, and where a party to a contract within the statute induces the other to waive some provision thereof upon which he is entitled to insist and to change his position to his

disadvantage with respect thereto, the party so acting will be estopped to claim the benefit of the statute." *Id.*

That is what happened in *Faulkner* and *Low Country* as well. What the Court and Appellant misapprehend is that if a party is only going to lose the value of the contract they are trying to prove exists, then that party has not experienced detrimental reliance. However, if the party will lose the value of a contract they already have based upon relying on the words or the conduct of the other party, that is detrimental reliance.

V. Respondent's Part Performance Argument is Properly Before the Court.

The fact is the "Transaction Brokerage Agreement" stating that the property Dr. Anderson would receive pursuant to the contract was "20 Acres or contingent on new survey" and the fact that she signed it (R. 335) has always been before the trial court and this Court. The fact that Mrs. Pearson obtained a survey dated August 17, 2025 showing the portion of the property that Dr. Anderson had agreed to give up has always been before the Court. (R. 134). The fact that the Pearsons asked and Dr. Anderson agreed to modify the lis pendens in this case to reflect that Dr. Anderson had agreed to give up that portion of the property for a right-of-way has always been before the Court.

Appellant's success in the appeal has hinged mightily on the standard of review for equity cases allowing the appellate court to find facts in accordance with its own view of the evidence. By the same token, the Appellate Rules specifically provide that this Court may affirm a trial court based upon any ground(s) appearing in the record. Rule 220(c), SCACR. Therefore, Appellant's complaining that Respondent seeks to have the trial court affirmed on an additional theory based upon facts clearly presented to and ruled on by the trial court – **unlike Appellant's argument that all Respondent lost was the value of the contract –** should be given no consideration.

The clear agreement was that Mr. Pearson would provide a survey in exchange for Dr. Anderson's agreement to allow a right of way over the property. The fact that the survey was prepared showing the entire property and the right of way shows, by a preponderance of the evidence, that both parties understood what the agreement was. Appellant's reference to Dr. Anderson's discussion with her lender of an entirely new survey only reflects Dr. Anderson's new awareness that there was not a previously existing survey, and that she knew that in order to fulfill her promise, Mrs. Pearson would have to survey the entire property. Mrs. Pearson obviously knew that as well because that is what Mrs. Pearson did. Also, how and why would one survey just a small right of way on a piece of property without showing the entire property?

Dr. Anderson performed her part of the agreement, which is enforceable against her under the Statue of Frauds, because she had signed the Transaction Brokerage Agreement that allowed the parcel to be reduced to 20 acres. The fact that Mr. Pearson did not sign the Transaction Brokerage Agreement does not matter as to Dr. Anderson's obligation, and the Pearsons clearly accepted Dr. Anderson's performance, and benefitted from it by including it in the survey, and later selling the 9 acres with the right of way, which is why Dr. Anderson was asked to amend the lis pendens. (R. 168, 373).

The utter absurdity of the argument that Dr. Anderson was not willing to close is discussed above regarding the proper application of *Ingram*.

VI. The Return's Analysis of the Parol Evidence Rule, the Merger Clause and the Non-Reliance Clause Miss the Point of the Case.

Everybody, including Respondent and the trial judge, understands the fact that the parol evidence rule, the merger clause and the non-reliance clause prohibit prior or contemporaneous statements to alter or explain the contract unless the contract is ambiguous. Everybody

understands that the contract signed July 25, 2017 (R. 54) was a complete contract on its own. That is why losing the value of it matters.

What Respondent does not understand is why it is unclear to Appellant that Mrs. Pearson stated several times after the contract was entered that she would provide the survey to Dr. Anderson, and that under three theories, interference with performance, part performance, and equitable estoppel, none of which invade language of the original contract, the Pearsons should not be allowed to enforce the expiration date in that contract.

Further, everybody gets that the original contract did not obligate anybody to provide a survey to anybody. Dr. Anderson needed a survey to give to her lender to get the appraisal so that her loan could close, and everybody understood that in real time as well. Unquestionably, Mrs. Pearson said that she would provide that survey because Dr. Anderson had agreed to, and did, release a portion of the property subject to the contract to allow a right-of-way to be on the property. Admitting that testimony is not modifying the original contract. In addition to arguing that the facts support a conclusion that Mr. Pearson later did obligate himself to provide a survey, Respondent also takes the position that Mr. Pearson should not be allowed to enforce the contract as written when his agent did all that she could to make sure Respondent would not timely perform it.

CONCLUSION

The opinion in this case reflects this Court's awareness of the uncomfortable truth that Mrs. Pearson, acting on behalf of Mr. Pearson, used deception to get out of a contract. What is worse, Mrs. Pearson was able to do so because Dr. Anderson was kind and trusting of the intentions of an elderly couple who had said they wanted to sell a parcel of property in a remote location for a price

they had said was fair. According to this Court, because Dr. Anderson should have figured out that Mrs. Pearson was deceiving her, Dr. Anderson should lose and the deceiver should win.

Throughout this case, Respondent has submitted case law holding that one may not benefit by deceiving another into not performing a contract on a timely basis and that it is the burden of the deceiving party to prove that the non-performing party could not have otherwise performed. This Court did not even address those cases and set forth why they do not apply here. Respectfully, this Court misapplied other cases holding that they stand for principles which are quite inconsistent with what the cases actually say. Based upon the foregoing, and the matters set forth in Respondent's petition for Rehearing, Respondent prays that this Court grant a rehearing of this matter and amend its order to affirm the order of the trial Court.

April 7, 2025

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Respondent's Reply to Return to Petition for Rehearing on Counsel for the Appellant by emailing copies of the petition on April 7, 2025, to the following:

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