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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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 (S.C. Ct. App. Refiled April 16, 2025)

Erin Burns Anderson…….Petitioner,

v.

Rudy Lamar Pearson……..…….....Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certify that the Petition for Rehearing was timely made and finally ruled on by the Court of Appeals on April 16, 2025.

QUESTIONS PRESENTED

I. **IS THE COURT OF APPEALS' HOLDING IS IN CONFLICT WITH FAULKNER V. MILLAR, 319 S.C. 216, 460 S.E.2D 378 (1995), WHERE THE SUPREME COURT FOUND THAT A SELLER WAS ESTOPPED FROM ENFORCING A DEADLINE TO SELL REAL PROPERTY WHERE THE SELLER ALLOWED THE BUYER TO BELIEVE THAT A DEADLINE WOULD NOT BE STRICTLY ENFORCED?**

II. **DID THE COURT OF APPEALS INCORRECTLY ANALYZE AND MISAPPLY THE REASONABLENESS AND DETRIMENTAL RELIANCE REQUIREMENTS OF THE DOCTRINE OF EQUITABLE ESTOPPEL?**

III. **DID THE COURT OF APPEALS ERRONEOUSLY FAIL TO FIND THAT DR. ANDERSON'S PART PERFORMANCE TOOK THIS CASE OUT OF THE STATUTE OF FRAUDS?**

IV. **DID THE COURT OF APPEALS' DISCUSSION OF THE "TIME IS OF THE ESSENCE CLAUSE" IGNORE APPLICABLE LAW?**

V. **IS THE COURT OF APPEALS OPINION AS TO THE DUTY TO TENDER PERFORMANCE CONFLICTS WITH THIS COURT'S OPINION IN INGRAM V. KASEY ASSOCIATES, 340 S.C. 98, 531 S.E.2D 287 (2000) AND IS IN CONFLICT WITH DR. ANDERSON'S UNDISPUTED TESTIMONY THAT SHE COULD HAVE FULLY PERFORMED ON THE DATE OF THE CLOSING DEADLINE?**

VI. **DID THE COURT OF APPEALS ERRONEOUSLY APPLY THE MERGER CLAUSE AND THE NON-RELIANCE CLAUSE IN THE CONTRACT AS WELL AS THE PAROL EVIDENCE RULE TO STATEMENTS MADE AFTER THE CONTRACT HAD BEEN ENTERED INTO AND WHERE THE STATEMENTS DID NOT ALTER, VARY, OR EXPLAIN THE CONTRACT?**

STATEMENT OF THE CASE

Dr. Anderson filed her complaint on April 18, 2018, seeking specific performance of a contract between herself and Respondent, Rudy Lamar Pearson, for the purchase and sale of real

property located in the Town of Wellford, County of Spartanburg, South Carolina. (R. 43-44). Mr. Pearson answered the complaint. (R. 58-60).

On September 26, 2019, Mr. Pearson filed a motion for summary judgment. (R. 582-583). On October 29, 2019, Dr. Anderson filed a motion for summary judgment. (R. 562-581). On November 12, 2019, the case was referred to the master-in-equity for Spartanburg County, the Honorable Gordon G. Cooper. By order dated March 11, 2020, Judge Cooper granted Mr. Pearson's motion for summary judgment. (R. 37-41). On March 20, 2020, Dr. Anderson filed a motion to alter or amend. (R. 423-442).

Judge Cooper retired prior ruling on Dr. Anderson's motion to alter or amend. Therefore, the Honorable Shannon M. Phillips, having been appointed as the master-in-equity for Spartanburg County, heard Dr. Anderson's motion to alter or amend and granted it by order dated May 22, 2022, finding that there were genuine issues of material fact as to whether Mr. Pearson's actions had impeded Dr. Anderson's ability to complete the purchase of the property by the closing date set forth in the contract. (R. 32-36).

Mr. Pearson then moved to alter or amend Judge Phillips's order granting Dr. Anderson's motion to alter or amend. (R. 386-405). Judge Phillips denied Mr. Pearson's motion on October 28, 2022. (R. 29-31).

This matter was tried before Judge Phillips on August 30, 2023. On October 3, 2023, Judge Phillips issued an order granting specific performance to Dr. Anderson. (R. 6-28). On October 9, 2023, Mr. Pearson filed a motion to alter or amend. (R. 386-405). On December 5, 2023, Judge Phillips issued an order denying Mr. Pearson's motion to alter or amend. (R. 4-5). On December 6, 2023, Mr. Pearson timely served his notice of appeal. (R. 384-385).

The Court of Appeals heard this case on November 7, 2024, and issued its published opinion on March 5, 2025. Dr. Anderson filed her Petition for Rehearing on March 20, 2025. On April 16, 2025, the Court of Appeals withdrew its published opinion and refiled its opinion as unpublished. Erin Burns Anderson v. Rudy Lamar Pearson, Op. No. 6104 (S.C. Ct. App. refiled April 16, 2025). Dr. Anderson now seeks a writ of certiorari from this Court to the Court of Appeals to review that decision.

STATEMENT OF FACTS

On July 25, 2017, Petitioner, Dr. Anderson, and Respondent, Mr. Pearson, entered into a contract for Dr. Anderson to purchase from Mr. Pearson a lot consisting of approximately 21.99 acres in the Town of Wellford, Spartanburg County, South Carolina. (R. 474-482). Though Mr. Pearson, as the owner of the property, was the party to the contract, his wife, Elnora Pearson ("Mrs. Pearson") completely handled everything regarding the contract on Mr. Pearson's behalf. (R. 229, lines 3-13; R. 278, line 24 – R. 279, line 12), and was found by the trial court to have been his agent (R. 19-20). This finding was not challenged on appeal.

Before the contract was executed, Mrs. Pearson told Katie Graves, the real estate broker acting on Dr. Anderson's behalf, that Mr. Pearson also owned an approximately 9-acre lot adjacent to the 21.99 acre lot that Dr. Anderson intended to buy and, if Dr. Anderson did not want to buy the 9-acre lot as well, Mr. Pearson needed a right-of-way across the approximately 21.99 acre lot so that the 9-acre lot would not be land-locked. (R. 339). Dr. Anderson agreed to Mr. Pearson's requested right-of-way. (R. 135, lines 14-25; R. 136, lines 1-4).

The parties met on July 25, 2017 to sign the contract for the purchase of the 21.99 acre lot. (R. 231, line 18- R. 232, line 2). The contract had an expiration date of September 29, 2017 (R. 323, par. 4), and contained a time-is-of-the essence clause. (R. 323, par. 1(G)).

When the contract was signed, Mrs. Pearson did not ask to include any language about the right-of-way. The contract merely states that Dr. Anderson was purchasing the lot identified on the deed, which was approximately 21.99 acres. Although, the parties did not memorialize Mr. Pearson's request for a right-of-way in the contract, at the meeting where the contract was signed, Dr. Anderson testified that Mrs. Pearson stated that the Pearsons were having the property surveyed and would have the survey prepared to show where the right-of-way would be. (R. 135, lines 14-25; R. 136, lines 1-4; R. 277, lines 6-19). Also, at the time the contract was signed, Dr. Anderson signed a document titled "Brokerage Statement," which included a description of the property acknowledging Dr. Anderson's agreement to allow the Pearsons to reduce the size of the property by almost two (2) acres depending on the survey. (R. 335).

After the contract was signed, the parties went about the usual tasks involved with purchasing property. Dr. Anderson applied for a loan with AgSouth and was pre-qualified for a loan in the amount of 75% of the $400,000.00 purchase price, (R. 354), with Dr. Anderson paying the remaining $100,000.00 of the purchase price in cash. Dr. Anderson also obtained the services of a closing attorney, William Wynn. (R. 178, lines 5-8). The Pearsons went about obtaining a survey on the property, which Dr. Anderson was aware of because she saw the survey stakes on the property. (R. 180, lines 5-16).

As part of her financing package to purchase the property, Dr. Anderson needed a survey of the lot so that the lender could obtain an appraisal of it. (R. 356, par. 12, line 2). As noted above. Mrs. Pearson said at the closing, and several times thereafter, that the Pearsons were obtaining a survey that would show where the right-of-way would be, and that the Pearsons would provide that survey to Dr. Anderson for her to give to Dr. Anderson's lender. (R. 234, line 19 – R. 236, line, 20; R. 237, lines R. 340, 341, 342; R. 345, lines 1, 3, 6, 9-17). Based upon

those representations, Dr. Anderson advised her lender that the Pearsons would have the survey prepared where the Pearson's right of way would be so that the appraisal could be performed. (R. 364-366).

Mrs. Pearson obtained the survey on or about August 17, 2017, and told Dr. Anderson's broker, Katie Graves[1], that Mrs. Pearson had the survey and would record it. (R. 237, lines 4-13). When the survey did not arrive right away, Dr. Anderson, through Katie Graves, continued to ask about receiving the survey showing where the right-of-way would be. (R. 345). Mrs. Pearson continued to promise to send it, and offered reasons as to why it had not been sent. (R. 340-344; R. 345). The last time Mrs. Pearson promised to provide the survey was September 12, 2017, a little less than two weeks (12 business days) before the closing date. (R. 345, line 15). Mrs. Pearson said that the survey would be recorded on the following Monday (id.), which was September 18, 2017 - 9 business days before the closing deadline.

Dr. Anderson continued to check on the status of receiving the survey, believing that Mrs. Pearson would do what she said because it was the Pearsons who wanted the right-of-way. (R. 147, lines 2-4; R. 103, line 4 - R. 103, line 13; R. 106, lines 2-18; R. 109, lines 1-10; R. 110, lines 6-19). Under the contract, before Dr. Anderson was required to pay for the property, Mr. Pearson was required to prepare a deed and deliver it to the closing attorney. (R. 323-324, par. 4). Mr. Pearson did not do so. (R. 214, lines 3-6; 311, lines 6-10).

On October 4, 2017 within the 5-business-day extension period for closing provided in the contract, (R. 323, par. 4), Ms. Graves advised Mrs. Pearson that the contract needed to be extended (R. 345, line 18). Mrs. Pearson did not object. She just did not respond.

[1] The contract provides that notice to/from the broker for a party is deemed notice to/from the party. (R. 329, par. 34).

On October 10, 2017, two (2) business days after the five-business day extension period expired, Mrs. Pearson recorded the survey showing the right-of-way. (R. 369). Mrs. Pearson then declared the contract terminated. (R. 346, lines 20-21). She refused to extend the contract (though she had not objected when that idea had been suggested before the deadline expired (R. 345, lines 7-8).). At first, Mrs. Pearson responded that the Pearsons had decided to build on the land themselves, but then, on December 26, 2017, she offered to sell the lot plus the approximately 9 acres to Dr. Anderson for $900,000.00, which, on a price per acre basis, was significantly more than the price in the contract.[2] (R. 346, lines 20 - 36). Mrs. Pearson's text revealed what had caused her change of heart. She had received an offer from a developer who wanted the entire 30 acres for an obviously higher price than the Pearsons would have received under the contract from Dr. Anderson. (R. 346, line 35).

Dr. Anderson brought this suit for specific performance, and prevailed before the master-in-equity for Spartanburg County. That decision was reversed by a published opinion of the Court of Appeals, Opinion 6104. Following the Court of Appeals' review of Dr. Anderson's petition for rehearing, the Court of Appeals withdrew the published opinion and substituted it with an unpublished opinion, Op. No. 6104 (S.C. Ct. App. refiled April 16, 2025), for which Dr. Anderson seeks a writ of certiorari to review that decision.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING IS IN CONFLICT WITH FAULKNER V. MILLAR, 319 S.C. 216, 460 S.E.2D 378 (1995), WHERE THE SUPREME COURT FOUND THAT A SELLER WAS ESTOPPED FROM ENFORCING A DEADLINE TO SELL REAL PROPERTY WHERE THE SELLER ALLOWED THE BUYER TO

[2] $29,069.77 per acre as opposed to the price equal to $18,190.00 per acre in the contract. Mrs. Pearson's text appears to have a typographical error because she intially referred to 33.96 acres, then later referred correctly to 30.96 acres. (R. 346, line 35).

BELIEVE THAT A DEADLINE WOULD NOT BE STRICTLY ENFORCED.

The Court of Appeals' found that Mrs. Pearson created an expectation in Dr. Anderson that Mrs. Pearson would provide the survey of the subject property to Dr. Anderson prior to the closing showing where the right-of-way would be, but then stalled in doing so until the closing deadline in the contract expired. (Opinion 6104, p. 25).[3] The Court of Appeals found, however, that in the context of the elements of equitable estoppel that Dr. Anderson's reliance was not reasonable. (Opinion 6104, pp. 24-25).

Faulkner v. Millar, 319 S.C. 216, 221, 460 S.E.2d 378, 381(1995), and a subsequent case from the Court of Appeals, Low Country Open Trust v. Charleston Southern Univ., 376 S.C. 399, 405, 656 S.E.2d 775, 778 (Ct. App. 2008), make clear that where the seller of real property misleads, even innocently, the buyer into believing that a closing deadline can be extended, and thus contributes to another party's untimely performance of the contract, that fact alone is sufficient to estop the seller from enforcing the contract's deadline. Neither of those cases discussed a reasonableness requirement or whether the detrimental reliance was sufficiently onerous. Faulkner held that this is true even where the contract operates as a "time is of the essence" contract:

> Moreover, even were we to find the present contract to create an option [which operates as a "time is of the essence" contract,] the Sellers are estopped to complain. We have previously recognized that a seller will not be permitted to declare a forfeiture of the rights of the buyer for nonperformance of any of the vital terms or conditions of the contract where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller. *General Motors Acceptance Corp. v. Herlong*, 248 S.C. 55, 149 S.E.2d 51 (1966). Silence, when it has the effect of misleading a party, may operate as equitable estoppel. *Southern Development Land and Golf Company, Ltd. v. S.C. Public Service Authority,* 311 S.C. 29, 426 S.E.2d 748 (1993).

[3] Page numbers are a reference to Anderson v. Pearson, Op. No. 6104 (S.C. Ct. App. withdrawn, substituted, and refiled April 16, 2025) (Howard Adv. Sh. No. 15). The opinion is also available at Anderson v. Pearson, No. 2023-001897, 2025 WL 1167035 (S.C. Ct. App. April 16, 2025).

Faulkner, 319 S.C. at 221, 460 S.E.2d at 381.

In addition to the quotation above, this Court has also observed: "The rule formulated in Restatement of the Law, Contracts, Section 300, raises a bar, in appropriate cases, where one party has been lulled into the belief that his imperfect performance of the contract is satisfactory." Gen. Motors Acceptance Corp. v. Herlong, 248 S.C. 55, 63, 149 S.E.2d 51, 54-55 (1966).

The Court of Appeals opinion is also inconsistent with the well-established equitable principle that:

> A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628, 25 L.Ed. 1030 (1879). Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice. *Lane v. N.Y. Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928). The court has the power in equity to deny or delay forfeiture when fairness demands. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002).

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011).

In her brief to the Court of Appeals, in oral argument, in her petition for rehearing and in her reply to Mr. Pearson's return to Dr. Anderson's petition for rehearing, Dr. Anderson asked the Court of Appeals to consider these cases and apply them to the facts of this case, but it did not do so.

This was error. In Dr. Anderson's case, the Court of Appeals found that Mrs. Pearson created an expectation in Dr. Anderson that Mrs. Pearson would send the survey to Dr. Anderson prior to the closing. The undisputed evidence was that Mrs. Pearson knew that Dr. Anderson needed the survey to give to her lender so that the bank could complete its appraisal to allow Dr. Anderson to close her loan. (R. 345, line 12). The Court of Appeals found that Dr.

Anderson continued to seek request updates about the survey (Opinion 6104, p. 25), Mrs. Pearson continued to promise to provide it, even within 9 business days before the scheduled closing date. Mrs. Pearson did not object when Ms. Graves told Mrs. Pearson before the contract expired that the contract could be extended. Mrs. Graves advised Mrs. Pearson within the five business days following September 29, 1997 that an extension was necessary. The facts show, certainly by a preponderance of the evidence, that Dr. Anderson and her broker fully expected Mrs. Pearson to act in good faith and provide the survey in time for the lender to have the property appraised before seeking to enforce the deadline for closing the sale. Under Faulkner and Low Country, Mr. Pearson should be estopped to terminate the contract by the words and conduct of his agent, Mrs. Pearson.

II. THE COURT OF APPEALS INCORRECTLY ANALYZED AND MISAPPLIED APPLIED THE REASONABLENESS AND DETRIMENTAL RELIANCE REQUIREMENTS OF THE DOCTRINE OF EQUITABLE ESTOPPEL.

The trial court and the Court of Appeals both viewed this as a case of contract modification in which the issue was whether Mrs. Pearson should be estopped to rely upon the Statute of Frauds to avoid her clear representation that she would provide the survey to Dr. Anderson. As noted above, there are at least two cases where our appellate courts have held that the trial court did not have to go that far in a real estate contract dispute where there is clearly a contract and the seller lulled the buyer into missing the closing deadline.

Nevertheless, even if Dr. Anderson were required to prove that she satisfied the elements of equitable estoppel, Dr. Anderson submits that she did and that the Court of Appeals erroneously reversed the trial court on this issue.

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.

> Essential elements of estoppel as related to the party claiming the 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 (Ct. App. 2003). In addition, the reliance upon conduct of the party estopped 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).

As to the elements applicable to the party estopped, the Court of Appeals found completely in Dr. Anderson's favor. The Court of Appeals found "…Mrs. Pearson created an expectation in Anderson that Pearson would have a survey prepared and sent to her before the closing date[.]" (Opinion 6104, p. 25).

Where the Court of Appeals found against Dr. Anderson was with respect to the elements as to the party claiming estoppel. The Court of Appeals decided that in light of the fact the Mrs. Pearson was stalling, seeking legal counsel and requesting confirmation of the expiration date (which after the fact appeared to have been done so that she argue the contract had expired before she released the survey), it was unreasonable for Dr. Anderson not to have figured that out and obtained her own survey. (Opinion 6104, pp. 24-25). The Court of Appeals also erroneously found that she had not detrimentally relied on Mrs. Pearson's promise because all Dr. Anderson had lost was the value of the contract. (Opinion 6104, p. 26).

A. Reasonableness

The Court of Appeals' decision as to the reasonableness of Dr. Anderson's reliance goes beyond what the courts in South Carolina have previously required and creates a new standard that gives a wide path for dishonest sellers to get out of a contract. See, Rushing v. McKinney, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (ruling plaintiff's reliance on defendant shareholders' alleged promise if plaintiff made loans to the corporation, then defendants would

assume personal liability for their pro rata share of the loans was unreasonable, as relations between plaintiff and defendants were tense, and the alleged promise was ambiguous); S. Dev. Land & Golf Co., 311 S.C. at 31-34, 426 S.E.2d at 749-51 (finding that petitioner sharing his hesitancy of exposed power lines being on the property and respondent not disclosing to petitioner plans to construct transmission powers over the property justifiable reliance by petitioner).

The Court of Appeals' reasoning is completely at odds with what Mr. Pearson argued at trial and in the Court of Appeals. Dr. Anderson pointed this fact out in its Petition for Rehearing. (Pet. for Rehearing, p. 3, n.2). Mr. Pearson did not argue reasonableness of reliance at all, and argued that there was no evidence to show that Mr. Pearson had delayed in recording the survey for any nefarious reason. (Pearson Final Brief, p. 24). Thus all of the clues that were so obvious to the Court of Appeals as to Mrs. Pearson's wrongful conduct were not apparent even to the Pearsons.

It was unquestionably reasonable for Dr. Anderson to rely on Mrs. Pearson to provide the survey in the first instance, and the Court of Appeals did not find otherwise. Mrs. Pearson said she would provide the survey, and she had the ability and authority to make that representation. The survey stakes on the property indicated that Mrs. Pearson was in fact obtaining a survey, and, in fact, she did obtain a survey when she told Dr. Anderson's broker that she had – on or about August 17, 2017.

The Court of Appeals, however, found that as Mrs. Pearson continued to stall and confirm the expiration date for the contract, Dr. Anderson should have realized what Mrs. Pearson was doing and obtained her own survey.[4]

[4] The Court of Appeals found that Ms. Graves indicated to Dr. Anderson that Mrs. Pearson was stalling. (Opinion 6104, p. 25). Mrs. Graves never said that or otherwise indicated it, as pointed out in the Petition for Rehearing.

After the contract deadlines expired, Mrs. Pearson revealed her true motives for continuing to say she would provide the survey and then not doing so. She wanted to sell the property for more money. The fact was apparently not lost on the Court of Appeals. (Opinion 6104, p. 21). However, the Court of Appeals offers no reasoning as to why in real time, Mrs. Pearson's saying she wanted to show the survey to a lawyer, but afterwards saying she would provide the survey, should have tipped Dr. Anderson off that Mrs. Pearson was stalling. Again, that is not what Mr. Pearson argued at the trial. (R. 284, lines 7-11), or on appeal (Pearson Final Brief, p. 24). Further, why would Mrs. Pearson's asking about the expiration date in the contract not indicate that she wanted to know the date so that she could send the survey on time?

As noted above, the point in Faulkner and in Low Country is that a seller will not be allowed to create an expectation that the deadline will not be enforced, and then enforce it. Thus, holding that a buyer should have changed course during the due diligence period because there is a looming deadline is contrary to those cases. The point of those cases is that if the seller acts as though the deadline is not critical, the buyer is entitled to act accordingly. Also, Dr. Anderson respectfully submits that the benefit of the doubt as to reasonableness should to go the one who is keeping her word, and not to the deceiver.

Further, the Court of Appeals essentially applies a fraud standard of reasonableness, but the remedy Dr. Anderson seeks is an equitable contract remedy. South Carolina case law teaches that it is reasonable to rely upon the covenant of good faith and fair dealing, Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966), and to expect that a person who speaks with the authority to do so will do what he or she says, or will at least not cheat the person who relied. S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 32, 426 S.E.2d 748, 750 (1993).

Further, Dr. Anderson has not found a case in which a court held for purposes of equitable estoppel, something that was reasonable to believe can become unreasonable over time because of what is later revealed to have been the wrongful actions of the party to be estopped. Dr. Anderson submits that such a holding as appears in this case is entirely inconsistent with the point of an equitable remedy.

B. Detrimental Reliance

The Court of Appeals held that Dr. Anderson did not detrimentally rely on Mrs. Pearson's statement that she would provide the survey because all Dr. Anderson lost was the value of the contract. (Opinion 6104, pp. 25-26). Mr. Pearson's argument on which this holding was based was not raised at trial. (Pet. For Rehearing, p. 9, n.5). The Court of Appeals' holding is decidedly contrary to the case law in this State. It would be correct if all Dr. Anderson had lost was the value of the obligation for Mrs. Pearson to send the survey, but Dr. Anderson lost the value of an existing contract that was enforceable as to its own terms, with or without a survey, because she relied on Mrs. Pearson's commitment to provide the survey, which Mrs. Pearson had asked to provide – so that the Pearsons could obtain the right-of-way they wanted.

Respectfully, the Court of Appeals misreads Collins Music Co. v. Cook, 281 S.C. 580, 316 S.E.2d 418 (Ct. App. 1984). In that case, Collins Music argued that it had detrimentally relied upon an oral promise of defendants to assume a prior contract between Collins and a third party where Collins had not sued the third party in reliance on the defendants promise to assume the contract. The Court of Appeals rejected that argument because Collins Music had not given up that right, and, in fact, could still sue under the prior contract. Id. at 584, 316 S.E.2d at 420-21.

In this case, in reliance on Mrs. Pearson's statements that the Pearsons would provide the survey, Dr. Anderson did not take steps to obtain her own survey excluding the right-of-way that the Pearsons wanted. (R. 143, line 20 – R. 144, line 7). That is a change of position in reliance upon the statements of Mrs. Pearson, and, as such, the Court of Appeals' decision, as it now stands, caused Dr. Anderson to lose her rights under the contract she had with Mr. Pearson.

In Faulkner, all the buyer stood to lose were his rights under the contract as written because he gave up those rights in reliance on the silence of the seller when the buyer asked for more time. Faulkner, 319 S.C. at 219, 460 S.E.2d at 380. The same occurred in Low Country – the Plaintiff had given up its rights under the contract in reliance on the conduct of the Defendant, which made the Plaintiff believe it had more time to close. 376 S.C. at 408, 656 S.E.2d at 775. What made that reliance detrimental was that Plaintiff already had a contract with Defendant, and all it stood to lose was its right to purchase Defendants interest in real property under the terms set forth in the contract. Such was not the case in Collins Music. The Court of Appeals opinion as to this issue is erroneous.

III. THE COURT OF APPEALS ERRONEOUSLY FAILED TO FIND THAT DR. ANDERSON'S PART PERFORMANCE TOOK THIS CASE OUT OF THE STATUTE OF FRAUDS.

The Court of Appeals correctly noted in its opinion that Dr. Anderson signed a document called "Transaction Brokerage Agreement" stating that the property she would receive pursuant to the contract was "20 Acres or contingent on new survey." (Opinion 6104, p. 21) (R. 335).

Under the Statue of Frauds, the Transaction Brokerage Agreement was enforceable against Dr. Anderson to allow the parcel to be reduced to 20-acres because Dr. Anderson had signed it. (See, Opinion 6104, p. 21). As shown by the survey, prepared on August 15, 2017, Mr. Pearson took 0.64 acres out of the control of Dr. Anderson and the contract. (R. 369). When Mr. Pearson sold the adjoining 9.32-acre property, while this action was pending in the trial

court, it was with 0.64 acres that had been a part of the contract that Dr. Anderson had agreed to release in reliance on Mrs. Pearson's promise to provide a survey to Dr. Anderson. Thus, Mr. Pearson, through his counsel, asked Dr. Anderson to amend her lis pendens to show that the subject of the property was only 21.00-acres as set forth on the survey which Mrs. Pearson had, but did not provide to Dr. Anderson, and Dr. Anderson amended the lis pendens accordingly. (R. 168, 373).

"An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to other." Graham v. Prince, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987).

Where there is no writing, but part performance is alleged to remove an oral contract from the Statute of Frauds, a court of equity must find: 1) clear evidence of an oral contract; 2) the contract had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral contract. Fesmire v. Digh, 385 S.C. 296, 311, 683 S.E.2d 803, 811 (Ct. App. 2009).

Mr. Pearson, through his agent Mrs. Pearson clearly agreed to provide the survey to Dr. Anderson in consideration of her agreement to allow the right-of-way. (Opinion 6104, p. 27). Mrs. Pearson partially executed the contract by obtaining a survey showing the right of way, (R. 372), and by asking Dr. Anderson to amend her lis pendens to reflect that the right-of-way had been released to Mr. Pearson. (R. 168, lines 2- 15; R. 373). Dr. Anderson partially executed it by not obtaining her own survey and then just refusing to honor their request for the right-of way (which is apparently what the Court of Appeals thinks she should have done).

If Mrs. Pearson's promise, to provide a survey had to satisfy the Statute of Frauds, Dr. Anderson's performance by reducing in writing and signing a reduced amount of property she

would receive under the contract and Mr. Pearson's accepting such property reduction by having the property reduced on the survey he filed, was part performance by Dr. Anderson ("loss to [her]self and benefit to the other") which obligated Mr. Pearson to provide the survey in a timely fashion or be in breach of the contract.

IV. THE COURT OF APPEALS' DISCUSSION OF THE "TIME IS OF THE ESSENCE CLAUSE" IGNORES APPLICABLE LAW.

With no discussion of its reasoning, the Court of Appeals agreed with Mr. Pearson's argument that "Pearson argues the master erred in granting specific performance where the contract included a "time is of the essence" clause…."

However, controlling law provides:

> Moreover, even were we to find the present contract to create an option, [which operates as a time-is-of-the-essence contract] the Sellers are estopped to complain. We have previously recognized that a seller will not be permitted to declare a forfeiture of the rights of the buyer for nonperformance of any of the vital terms or conditions of the contract where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller.

Faulkner, 319 S.C. at 221, 460 S.E.2d at 381 (1995).

61 Am Jur. *Proof of Facts* § 325 (2001) provides:

> 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."); *id.* ("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."); *id.* ("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.

Even without cases completely contradicting the Court of Appeals' conclusion, Dr. Anderson respectfully submits that a "time is of the essence" clause should not be allowed to enhance one's efforts to cheat another out of a contract in the name of equity.

V. THE COURT OF APPEALS OPINION AS TO THE DUTY TO TENDER PERFORMANCE CONFLICTS WITH THIS COURT'S OPINION IN INGRAM V. KASEY ASSOCIATES, 340 S.C. 98, 531 S.E.2D 287 (2000) AND IS IN CONFLICT WITH DR. ANDERSON'S UNDISPUTED TESTIMONY THAT SHE COULD HAVE FULLY PERFORMED ON THE DATE OF THE CLOSING DEADLINE.

With respect to the elements of a specific performance case as applicable to the original contract, the Court of Appeals did not reverse the trial court's findings that (1) there was a contract between the parties as to the approximately 21.99 acres and (2) the contract had been partly carried in to execution on one side with the approbation of the other. (Opinion 6104, p. 27-28). Where the Court of Appeals disagreed with Dr. Anderson was with the third element: the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or part of the contract. Ingram v. Kasey Associates, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000).

In Ingram, the Supreme Court held that Ingram had to demonstrate that he was ready and willing to perform his part of the contract on February 28, 1994, the date the lease 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, the Court of Appeals stated in its opinion that "[Dr. Anderson] did not come forward with $100,000.00, which was the unfinanced portion of the purchase price." (Opinion 6104, p. 28).

In Ingram, this Court held that a plaintiff has to be able to perform at the time set forth in the contract OR when plaintiff files the action. Id. (Emphasis added). It does not hold that plaintiff has to have actually performed on the date set forth in the contract. Id., Shay v. Austin, 466 F. Supp. 2d 664 (D.S.C. 2006) (citing Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588, 593 (1948)).

Also, Dr. Anderson testified that she had $100,000.00 at the time of closing and intended to pay it. (R. 182, line 11-R.183, line 1). Dr. Anderson also testified that she could have paid for the property on the date of closing without a loan if she had had to. (R. 170, lines 2-10). 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). 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 Mr. Pearson argued at oral argument appellate hearing that because Dr. Anderson could have closed the transaction with cash, she acted inequitably in not doing so.

As noted in Dr. Anderson's Reply to Return to the Petition for Rehearing, the Court of Appeals' finding that Dr. Anderson did not present evidence that she had the funds necessary to close on September 29, 2017 was so clearly wrong, even Mr. Pearson did not try to defend it. (Reply to Ret. to Pet. for Rehearing, p. 7).

Further, finding that Dr. Anderson did not show that she was ready, willing and able to close by presenting evidence that at the time of closing she had obtained other items necessary to close, such as an appraisal or mortgage title insurance[,]" and "did not come forward at the time of closing with the $100,000" is completely contrary to law.

As noted above, in Champion v. Whaley, the court held:

> It is sufficient for the plaintiff to present evidence that the defendant's prevention "substantially contributed" to the nonoccurrence of the condition. *See, Shear v. National Rifle Association, supra.* Once he has made such proof, the burden shifts to the defendant. If the defendant can show that the condition would not have occurred regardless of the prevention, then the prevention did not contribute materially to its nonoccurrence and the condition is not excused. This is the rule adopted in the Restatement (Second) of Contracts § 245 (1979), and we approve it as the proper rule in this jurisdiction.

280 S.C. 116, 122, 311 S.E.2d 404, 407.

As set forth in the record, the lender said it was waiting on the survey to order the appraisal. (R.365). The appraiser had to be hired by the lender. (R. 359). Also, mortgage title insurance is purchased at the closing, which is a completely routine matter. One does not buy mortgage title insurance until one obtains a mortgage. In accordance with Ingram, Dr. Anderson was not required to tender $100,000.00 just to show that she could.

Further, obtaining an appraisal and mortgage title insurance was strictly between Dr. Anderson and her lender. They were not conditions of the contract of sale. Mr. Pearson and the Court of Appeals speculated about the effects of not having the appraisal and mortgage title insurance. Mr. Pearson offered no evidence regarding when those had to be obtained or if they could have been waived by the lender. In fact, Dr. Anderson's loan commitment provides that if the borrower does not pay for mortgage insurance, the lender may do so and would add the cost to her principal balance. (R. 357, par. 12).

Also, Dr. Anderson, as the Buyer in the contract was not required pay anything until the Seller delivered a deed to the closing attorney, (R. 323-324, par. 4), which the Seller, Mr. Pearson never did. (R. 214, lines 3-6).

VI. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE MERGER CLAUSE AND THE NON-RELIANCE CLAUSE IN THE CONTRACT AS WELL AS THE PAROL EVIDENCE RULE TO STATEMENTS MADE AFTER THE CONTRACT HAD BEEN ENTERED INTO AND WHERE THE STATEMENTS DID NOT ALTER, VARY, OR EXPLAIN THE CONTRACT.

The Court of Appeals' opinion applying the merger clause, the non-reliance clause, and the parol evidence rules ignores the fact that the statements at issue in this case were made after the contract had been entered into. "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. Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502–03 (Ct. App. 2003) (emphasis added) (internal citations omitted).

The primary discussions at issue in this case took place after the contract was entered into. (R. 340-48). All of the discussions that the Court of Appeals' discuss in its opinion about the reasonableness of Dr. Anderson's reliance concern discussions after the contract had been entered into. (Opinion 6104, p. 25). Further, the contract as signed was a fully-formed, valid contract. (R. 323-330). Discussions between the parties about providing the survey did not contradict, vary, nor explain the written instrument. Had Mrs. Pearson said, in a timely fashion, that the Pearsons had decided not to change the extent of the property being conveyed and would not be providing a survey, Mr. Pearson offered no evidence that Dr. Anderson could not have closed the contract on a timely basis. Therefore, the parol evidence rule, the merger clause and the non-reliance clause do not apply to these facts in any event.

CONCLUSION

For the reasons stated, Dr. Anderson asks the Court grant this petition for writ of certiorari to the Court of Appeals and reverse the Court of Appeals' Opinion.

Respectfully submitted,

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