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S.C. SUPREME COURT

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. 2025-000944
Case No. 2018-CP-42-01222

Erin Burns Anderson……..Petitioner,

v.

Rudy Lamar Pearson…….Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

J. Andrew Smith
S.C. Bar No. 14086
THE LAW OFFICE OF CLIFFORD BUSH, III, LLC
28 Old Jericho Road
Beaufort, SC 29906
Tel. (843) 379-9500
Fax (843) 379-9550
Email drew@lawofficeofcbushiii.com

Clifford Bush, III
S.C. Bar No. 17026
THE LAW OFFICE OF CLIFFORD BUSH, III, LLC
28 Old Jericho Road
Beaufort, SC 29906
Tel. (843) 379-9500
Fax (843) 379-9550
Email cbush@lawofficeofcbushiii.com

Attorneys for Respondent, Rudy Lamar Pearson

Other Counsel of Record:

Bernie W. Ellis
BURR & FORMAN LLP
Post Office Box 447
Greenville, SC 29602
Tel. (864) 271-4940
Fax (864) 271-4015
bellis@burr.com
Attorney for Petitioner

William A. Darwin, Jr.
HOLCOMBE BOMAR, P.A.
101 W. St. John St., Suite 200
Spartanburg, SC 29306
Tel. (864) 594-5300
Fax (864) 585-3844
kdarwin@holcombebomar.com
Attorney for Petitioner

Duane Alan Lazenby
Lazenby law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304
Attorney for Respondent

Steven Edward Buckingham
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, SC 29609
Attorney for Respondent

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INTRODUCTION

The unanimous decision of the South Carolina Court of Appeals is consistent with prior decisions of the Supreme Court of South Carolina. For this reason, Respondent, Rudy Lamar Pearson, respectfully requests the Supreme Court of South Carolina to deny Petitioner Dr. Erin Burns Anderson's Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

a. The Land Sale Contract

On July 25, 2017, Petitioner, Erin Burns Anderson, M.D. ("Dr. Anderson") and Respondent, Mr. Rudy Lamar Pearson ("Mr. Pearson") signed a written real estate sales contract, entitled "Agreement/Contract: To Buy and Sell Real Estate" ("The Contract"). (R. 323 - 331). In The Contract, Mr. Pearson agreed to sell approximately 21.99 acres of waterfront and interior land located on Lake Cooley to Dr. Anderson for a purchase price of $400,000.00. (R. 323).

b. The Closing Date

Dr. Anderson and Mr. Pearson expressly agreed in clear and unambiguous terms in The Contract to close by September 29, 2017, with a five-business day grace period, under paragraph 4. of The Contract:

> 4. **CONVEYANCE/CLOSING/POSSESSION:** "Closing" occurs when Seller conveys Property to Buyer and occurs no later than 5PM on or before September 29, 2017 ("Closing Date") with an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party. (R. 323)

c. Time is of The Essence

According to Paragraph 1 G. of The Contract, Dr. Anderson and Mr. Pearson expressly agreed in writing that time was of the essence:

> 1. (G) "Time" - all time stated shall be South Carolina local time. **Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance period.** (R. 323)

d. Cash and Financing

Dr. Anderson's duty under The Contract was to tender the required cash to the Closing Attorney and secure financing by the date and time for Closing specified in The Contract. (R. 125, 132-133). Pursuant to Paragraph 2 of The Contract, Dr. Anderson agreed to pay Four Hundred Thousand and 00/100 Dollars ($400,000.00) in a combination of Finance and Cash USD. (R. 323). Pursuant to Paragraph 7 of The Contract, The Contract was expressly contingent upon Dr. Anderson obtaining financing of a 15-year purchase money loan. (R. 324). The financing contingency expired at Closing ("Financing Period"). (R. 324). Under The Contract, final loan approval occurs when the lender funds the loan. (R. 324). Finally, **in the event that Dr. Anderson was unable to obtain financing prior to closing, "either Party may terminate this Contract by Notice and Earnest Money shall be returned to Buyer."** (R. 325).

Dr. Anderson applied with AgSouth Farm Credit, ACA, to secure the $300,000.00 loan. Pursuant to a "Commitment Letter" sent from AgSouth Farm

Credit to Dr. Anderson, the $300,000.00 loan was conditionally approved. (R. 355). Paragraph 12 of the Commitment Letter listed special conditions of approval. (R. 356). Paragraph 12 of the Commitment Letter required Dr. Anderson to obtain:

1) A **mortgage title insurance policy**, and
2) A **survey and appraisal <u>of the proposed real estate collateral</u>**

(R. 356). Paragraph 10 of The Contract stated that Brokers recommend Buyer (Dr. Anderson) have the property surveyed and title examined. (R. 325). The Contract and loan commitment letter placed the responsibility on Dr. Anderson to secure the mortgage title insurance policy, a survey of the collateral, and an appraisal of the collateral. (R. 325, 355 and 356).

e. <u>Survey of the Collateral (21.99 acres) vs. Right-of-Way (.65 acres)</u>

Mr. and Mrs. Pearson did not sign a written agreement to perform Dr. Anderson's duty to secure <u>the survey of the collateral (21.99 acres) for Dr. Anderson's financing</u>. (R. 323 - 331). The Contract contained no written language placing the onus on Mr. Pearson to obtain a survey of the collateral or to perform any other of Dr. Anderson's responsibilities to secure her financing to close. (R. 323-331).

Dr. Anderson knew that the Pearsons only discussed a <u>right-of-way</u> and that the Pearsons never agreed to survey <u>the collateral</u>. (R. 366). Dr. Anderson texted Lynne Christiansen, the loan officer, as follows:

> The sellers did not have a survey from 2015. The realtor was mistaken. I believe the last one that exists is the one that you showed me in your office. **They met with a surveyor when they were down here who will be working on carving out enough of a piece for the adjoining 9 acres that they still own <u>to have road access</u>**. So the overall acreage will be less than 21.99. **<u>I'm not sure if they will need to do an entire new survey when they do this (I would think they would need to????).</u>** (R. 366).

Even though Dr. Anderson was unsure if the Pearsons were surveying the collateral, she still did not obtain a survey of the collateral required by her loan commitment letter. There was no evidence presented that the Pearsons ever agreed to obtain a survey of the collateral required by Dr. Anderson's loan. The only evidence presented was that the Pearsons were going to obtain a survey of a right-of-way over the existing collateral to access an adjoining nine acres.

Dr. Anderson confused her loan agent that the right-of-way would reduce the size of the collateral. However, Dr. Anderson testified that she never heard Mr. Pearson indicate that the right-of-way would reduce the size of the collateral. (R. 206-207). Dr. Anderson then speculated by testifying, "maybe it was Mrs. Pearson. I don't know." (R. 206-207).

f. <u>Merger Clause</u>

The Parties expressly agreed to a Merger Clause in The Contract. Paragraph 25 of The Contract includes a Merger Clause. (R. 328). The Merger Clause states as follows:

> **25. ENTIRE AND BINDING AGREEMENT (MERGER CLAUSE):** 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, heirs, personal representatives, successors, and assigns. (R. 328).

Pursuant to Paragraph 25, The Contract contains the entire agreement. (R. 328).

Dr. Anderson contended that she relied on oral statements made by Mrs. Pearson, through text messages between Mrs. Pearson and Dr. Anderson's agent, Katie Graves. However, Dr. Anderson, signed a Non-Reliance Clause. (R. 328).

g. <u>Non-Reliance Clause</u>

Paragraph 29 of The Contract contained a Non-Reliance Clause, which stated:

> **29. NON-RELIANCE CLAUSE (NOT A MERGER CLAUSE NOR EXTENSION OF A MERGER CLAUSE):** 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. 328).

Additionally, Paragraph 33 of The Contract entitled ATTACHMENTS, OTHER CONTINGENCIES, TERMS, AND/OR STIPULATIONS, contained a provision to The Contract for the most recent agreed to changes, amendments, contingencies, stipulations, additions, or writings, agreed to by the Parties, specifically including easements, that may affect use. (R. 329). The lines were left blank. (R. 329).

h. No mortgage title insurance policy, appraisal, or cash to close

Dr. Anderson, a young and wealthy local physician, blamed her failure to perform the other conditions of her financing commitment letter, and her failure to tender the required cash to close, in this time is of the essence contract, on Mr. Pearson, an elderly man, whose physical and mental health is failing, and Mr. Pearson's wife, who takes care of Mr. Pearson, both of whom live in Maryland. Dr. Anderson did not obtain a mortgage title insurance policy, an appraisal, or tender any of the $100,000.00 cash to close to the Closing Attorney. Dr. Anderson provided a check to Katie Graves of Century 21 of $3000.00 for the earnest money which Dr. Anderson received back from Century 21 when the contract expired.

i. Contract expiration and return of earnest money

The Contract expired. Dr. Anderson never communicated directly with the Pearsons to request a contract extension. After The Contract expired, Dr. Anderson's agent, Katie Graves, requested an extension of The Contract through a text message to Mrs. Pearson. (R. 345-346). Katie Graves did not send Dr. Anderson's written and signed extension of time request to Mr. Pearson until October 23, 2017, several weeks after the September 27, 2017, closing deadline, and the five-business day grace period. The text from Katie Graves, dated October 23, 2017, stated,

> Mrs. Pearson, I hope all is well with you and your family. I'm sending you the extension to your email that you sent me earlier. I just received another text this morning from Mrs. Anderson wanting an update on the

> survey. Please let me know if you are going forward with this transaction so I can let her know. Thank you. KG. (R. 346 - text 19)

The Contract expired by its own terms and no extension was granted. Mr. Pearson terminated The Contract. (R. 346 - text 21). Century 21, Dr. Anderson's agent, returned Dr. Anderson's earnest money, $3,000.00, by placing the earnest money into the State of South Carolina Treasury Unclaimed Property Division for Dr. Anderson's claim. Dr. Anderson therefore received her security deposit back and was made whole.

ARGUMENT

I. IN RESPONDING TO QUESTION I OF THE PETITION FOR CERTIORARI, THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH FAULKNER V. MILLAR.

The Court of Appeals' holding is consistent with Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995) for four main reasons. First, in Faulkner, time was not of the essence in the contract. The Supreme Court of South Carolina in Faulkner affirmed the Master in Equity's finding that the Sellers must refund the Buyer's security deposit because time was expressly not of the essence in the contract. Faulkner, 319 S.C. at 220. Contrary to the case before the Supreme Court of South Carolina in Faulkner, in the present case, time was expressly of the essence in Paragraph 1 (G) of The Contract. (R. 323).

In Faulkner, The Supreme Court of South Carolina laid out the general rule that "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)). In Faulkner, the Court held that since time was not of the essence as an express term, a reasonable time to perform would be allowed. Faulkner, 319 S.C. at 219. In the present case, time was made expressly of the essence as a contract term. Therefore, Dr. Anderson had to perform her contractual obligations by the time in The Contract, which she did not.

Secondly, in Faulkner, the buyer 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 Faulkner, within ten days of Seller's acceptance of the offer, Buyer notified, in writing, Sellers' realtor and attorney that he needed more time to perform an inspection. Faulkner, 319 S.C. 218-219. Unlike Faulkner, Dr. Anderson's agent did not request an extension of time until **after expiration of The Contract**. Katie Graves sent Dr. Anderson's written and signed request for an extension of The Contract to Mr. Pearson by email on October 23, 2017, weeks after The Contract expired. (R. 346). The Pearsons were not silent to the request for extension. The Pearsons immediately responded to the late extension request, declining the extension and stating, "We are building on the property ourself. We no longer want to sell. We are no longer offering the 21 acres for sale." (R. 346). Katie

Graves, Dr. Anderson's agent, acknowledged the Pearsons' refusal of the untimely extension request and then indicated that Dr. Anderson had a new offer. (R. 346).

Third, in Faulkner, the Buyer was merely trying 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, Dr. Anderson, tries to shift her obligation to Seller, Mr. Pearson, a non-resident senior citizen, struggling with mental and physical health issues, and his wife, who is trying to care for Mr. Pearson, to complete Dr. Anderson's financing contingencies by closing. Dr. Anderson requested the Court of Appeals to shift the burden of the collateral survey on the Pearsons but, as the Court of Appeals pointed out, Dr. Anderson did not perform the other requirements of her loan commitment letter (mortgage title insurance, appraisal) or tender the cash to close ($100,000.00) to the Closing Attorney, or even prove that she had the cash, by the termination date of The Contract.

Unlike Faulkner, in which the contract contained an express agreement for a buyer inspection, in the present case, nowhere in The Contract, Loan Commitment letter, or text messages did Mr. or Mrs. Pearson ever agree to obtain Dr. Anderson's survey of the collateral. There is a clear and obvious difference between a survey of a .65-acre right-of-way of an access easement, over the top of the existing collateral, and a survey of 21.99 acres of real estate collateral, required for Dr. Anderson's financing. Dr. Anderson wrote to Lynne Christensen, her loan officer, "I am not sure

if they [the Pearsons] will need to do an entire new survey when they do this (I would think that they would need to????)." (R. 366). The Pearsons never agreed in writing to survey the collateral, and The Contract did not contain any writing that the Pearsons would survey the collateral.

Finally, in Faulkner, the Supreme Court of South Carolina simply required the return of the security deposit to the Buyer after the inspection contingency fell through. Faulkner, 319 S.C. at 221. In the present case, Dr. Anderson did receive her security deposit back. Dr. Anderson's security deposit was submitted by Dr. Anderson's agent to the South Carolina Treasury Department's unclaimed funds waiting for Dr. Anderson's claim. Unlike the buyer in Faulkner who merely sought the return of a security deposit, in the present case, Dr. Anderson tries to force Mr. Pearson to sell his inherited property even though she did not complete her financing conditions or tender the cash to close. Thus, there was no forfeiture in the present case. Dr. Anderson received her security deposit back.

II. IN RESPONDING TO QUESTIONS IV AND V OF THE PETITION FOR CERTIORARI, THE COURT OF APPEALS OPINION IS CONSISTENT WITH INGRAM V. KASEY'S ASSOCIATES, 340 S.C. 98, 531 S.E.2D 287 (2000), AND THE COURT OF APPEALS PROPERLY APPLIES SUPREME COURT OF SOUTH CAROLINA PRECEDENT ON "TIME IS OF THE ESSENCE" CLAUSES.

In Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000), the Supreme Court of South Carolina evaluated a contract where time is of the essence.

In Ingram, the Supreme Court of South Carolina 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 Supreme Court of South Carolina held that written notice of intent to exercise an option to purchase **without tendering the purchase money** prior to the end of the lease was insufficient to fulfill the terms of the option contract. Ingram, 340 S.C. at 105-106, 111. The buyer, Ingram, did not tender the required cash or prove that he had the money. Ingram, 340 S.C. at 105-106, 111. Ingram did not show that he had the money in a depository account under his control, in his attorney's account, or in an escrow account. Ingram, 340 S.C. at 106.

Similar to Ingram, with regard to the cash required for closing, Dr. Anderson presented no bank depository account statements that she had the remaining $97,000.00 of purchase money in a depository account under her control, nor did she tender the $97,000.00 of purchase money to the escrow agent, Century 21, or the closing attorney, Bill Wynn. She testified that the money was "not in my checking account" and produced no statements to show which account the money was in. (R. 182). Dr. Anderson further testified that she was aware that The Contract required her to tender the $100,000 US Dollars. (R. 132-133). All that Dr. Anderson proved was that she tendered $3,000.00 of earnest money to the escrow agent, Century 21.

(R. 360).

In the present case, similar to Ingram, Dr. Anderson also failed to complete all her conditions precedent to the $300,000.00 financing. First, Dr. Anderson did not obtain a policy of title insurance. (R. 184). According to the loan commitment letter, securing a policy of title insurance is Dr. Anderson's number one condition to obtain financing. (R. 356). Second, Dr. Anderson did not obtain a survey of the collateral. (R. 197). Dr. Anderson tries to shift the burden to the seller, Mr. Pearson, an elderly nonresident, to obtain the survey of the entire collateral.

All Mr. Pearson allegedly discussed was obtaining a survey of a right-of-way. (R. 339). Dr. Anderson's agent, Katie Graves, wrote "I spoke with the Pearsons a few times last week in reference to the property. They were checking with an attorney about **the right-of-way** for the 9 acres next the parcel they are selling." (R. 339). Dr. Anderson knew that **Mr. Pearson never agreed to obtain a survey of the collateral.** Dr. Anderson wrote to Lynne Christiansen "I am not sure if they [Mr. Pearson and his wife] will need to do an **entire new survey** when they do this (I would think that they would need to????)." (R. 366). Third, Dr. Anderson did not obtain an appraisal. (R. 194). In sum, Dr. Anderson did not complete her conditions for financing in this time is of the essence contract.

III. IN RESPONDING TO QUESTION II OF THE PETITION FOR CERTIORARI, THE COURT OF APPEALS PROPERLY APPLIED THE REASONABLE RELIANCE AND DETRIMENTAL RELIANCE ELEMENTS OF THE DOCTRINE OF EQUITABLE ESTOPPEL

Mr. Pearson asserted the Statute of Frauds as a defense to this specific performance action, arguing that under the Statute of Frauds, "no action may be brought" on land sale contracts, or modifications thereof, "unless the agreement upon which such actions shall be brought" are (1) in writing and (2) signed by the person against whom enforcement is sought or their agent. S.C.Code Ann. § 32-3-10 (4) (2007). Mr. Pearson and Mrs. Pearson did not sign a written agreement, modifying this land sales contract, to shift Dr. Anderson's burden to the Pearsons to obtain a survey of the collateral for Dr. Anderson's financing. Additionally, Mr. and Mrs. Pearson did not sign a written extension to allow Dr. Anderson additional time to perform her requirements under this time is of the essence contract.

Dr. Anderson attempted to overcome the Statute of Frauds by arguing the doctrine of equitable estoppel. At the hearing before the Master in Equity, Dr. Anderson argued that her case is dependent largely upon the doctrine of equitable estoppel. (R. 78-82). The Court of Appeals' Decision and Order fully considered and analyzed all elements and facts bearing on Dr. Anderson's estoppel argument. The Court of Appeals stated, "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 explained the elements of estoppel in the order,

> "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).

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 (Ct.App. 2009).

The Court of Appeals determined that the facts indicated that Dr. Anderson'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 [Mr. Pearson and his wife] will need to do an entire new survey when they do this (I would think that they would need to????).**" (R. 366). If Dr. Anderson, a bright, young physician, was unaware of what type of survey was needed (right-of-way or collateral), it was very unreasonable for her to rely on an elderly, non-resident couple, one of failing body and mind, to determine what type of survey Dr. Anderson needed for financing. Further, the Court of Appeals

indicated that it was clear to Dr. Anderson and Katie Graves that the Pearsons would not have the right-of-way survey completed by closing and that it was not reasonable for Dr. Anderson to obtain her own survey. Dr. Anderson knew the closing date and the conditions of her loan required a collateral survey. On August 24, 2017, Dr. Anderson's loan officer followed up with Dr. Anderson to "see if you have received the survey." (R. 364). She advised Dr. Anderson that "borrowers are experiencing long delays in getting surveys back from surveyors." (R. 364). It was unreasonable for Dr. Anderson to wait for a right-of-way survey that she was unsure would even satisfy the conditions of the loan.

The Court of Appeals also found that Dr. Anderson failed to prove **detrimental** reliance. It is fatal to Dr. Anderson's equitable estoppel argument that Dr. Anderson failed to prove that she had a detrimental change of position. The Court of Appeals found that Dr. Anderson did not suffer a detrimental change of position in reliance on the alleged promise to provide a survey. "Dr. Anderson did not present evidence of any expenditures or other actions she took to her detriment in reliance on Pearson's promise." Erin Burns Anderson v. Rudy Lamar Pearson, Op. No. 6104 (S.C.Ct.App. refiled April 16, 2025). Dr. Anderson had the burden to prove all of the essential elements of equitable estoppel. Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct.App. 2009).

The Court of Appeals found that Dr. Anderson produced no evidence that she

lost anything. Dr. Anderson presented no evidence that she took a financial out of pocket loss or paid incidental expenses. Dr. Anderson is made whole. She received all her earnest money back. Century 21 submitted the earnest money to the S.C. Treasury, unclaimed property division, in Columbia for Dr. Anderson's claim. Therefore, Dr. Anderson did not even lose her earnest money.

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 (Ct.App. 1984).

In Collins Music Co., Inc. v. Cook, 281 S.C. 580 (Ct.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. Collins, at 583-584. The Court held that all Collins could show is that Collins lost an expected benefit under the contract. Id. at 583. 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. Restoring Dr. Anderson's security deposit fully returned Dr. Anderson to her former financial position.

A case supporting a detrimental change of position is Atlantic Wholesale Co., Inc. v. Solondz, 283 S.C. 36, 320 S.E. 2d 720 (Ct.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 to Atlantic Wholesale when the buyer, Solondz, backed out of the contract. Id. at 37, 39-40. The Court held that the only way to restore Atlantic Wholesale to its former position was to require Solondz to purchase the silver. Id.

Like the Plaintiff in Collins, Dr. Anderson only lost the benefit of the bargain. Dr. Anderson suffered no out-of-pocket costs or incidental 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 remains in her same former financial position. Dr. Anderson has suffered no detrimental change of position.

IV. IN RESPONDING TO QUESTION III OF THE PETITION FOR CERTIORARI, DR. ANDERSON DID NOT PRESERVE THE ISSUE OF PART PERFORMANCE AS AN EXCEPTION TO THE STATUTE OF FRAUDS, AND EVEN IF DR. ANDERSON HAD PRESERVED THE ISSUE FOR APPEAL, DR. ANDERSON DID NOT PROVE THE ESSENTIAL ELEMENTS OF PART PERFORMANCE.

The Supreme Court of South Carolina in Wilder Corporation v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (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 (1998), citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). 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, the issue of Part Performance as an exception to the Statute of Frauds is not properly preserved for appeal.

Even if properly preserved, Part Performance is still not applicable as an exception to the Statute of Frauds in the present case. In order to successfully prove the doctrine of Part Performance in a contract for real estate as an exception to the Statute of Frauds, Dr. Anderson 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 Mr. or Mrs. Pearson entered into an oral agreement to relieve Dr. Anderson of her need to obtain a survey of the collateral for loan purposes. There is no clear evidence of an agreement. As noted above, Dr. Anderson did not know whether the Pearsons should get a whole new survey or just a survey of the right-of-way. The Pearsons only surveyed a right-of-way, which remained part of the overall collateral. The survey did not take the .64 acres out of the control of Dr. Anderson. (R. 0369). As per the survey, the .64 acre expressly remained part of Tract 1, which was the overall collateral. (R. 0369).

There is no evidence that Mr. Pearson agreed to relieve Dr. Anderson of her need to obtain the survey of the collateral. 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, there was no clear oral agreement regarding the survey.

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 Dr. Anderson 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. Dr. Anderson's inaction in obtaining a survey is not part performance. Dr. Anderson suffered no loss. She received her earnest money back and lost no out of pocket expenses or incidental costs.

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

Finally, as the Court of Appeals noted, Dr. Anderson demonstrated no willingness to complete The Contract in this time is of the essence contract. She did not bring cash to close, obtain the title insurance policy, obtain the appraisal, or obtain her own survey. Similar to Larry Fesmire in Fesmire, Dr. Anderson abandoned The Contract. Fesmire, 385 S.C. at 313, 683 S.E.2d at 813.

V. IN RESPONDING TO QUESTION VI OF THE PETITION FOR CERTIORARI, THE COURT OF APPEALS ACCURATELY APPLIED THE PAROL EVIDENCE RULE, THE MERGER CLAUSE, AND THE NON-RELIANCE CLAUSE OF THE CONTRACT.

The Parol Evidence Rule "prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or

explain the written instrument." Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000). Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Holden, 343 S.C. at 275-276. The parol evidence rule is a rule of substantive law, not a rule of evidence. Holden, at 276. Accordingly, admission of evidence violating the parol evidence rule is legally incompetent and should not even be considered even if no objection is made at trial. Id.

In the present case, paragraph 7 of The Contract, entitled "Finance", required Respondent, Dr. Anderson, to obtain a 15-year purchase money loan. (R. 324). The Contract also indicates that either party may terminate the Contract by Notice if Respondent could not obtain financing during the Financing Period, and the earnest money shall be returned to the Buyer. (R. 325). Nowhere in the four corners of The Contract does The Contract state that Mr. Pearson is required to or agrees to obtain the survey, title insurance, or appraisal needed by Dr. Anderson to obtain financing. Dr. Anderson did not complete any of her conditions for financing (mortgage title insurance policy, appraisal, or survey) and therefore did not obtain financing. As such, the Pearsons terminated The Contract after it expired, and Century 21 returned the earnest money to Dr. Anderson.

After The Contract expired and re-negotiations failed, Dr. Anderson, attempted to shift the burden to an elderly couple to satisfy her finance contingencies

by arguing that the Pearsons, **in pre-contractual discussions**, promised to secure a right-of-way survey. Dr. Anderson argued that the pre-contractual discussions of a right-of-way survey excused her from obtaining a survey of the collateral, an appraisal of the collateral, a mortgage title insurance policy, and an extension of the deadline of the contract. The parol evidence rule prohibits the Court from considering anything that the parties discussed prior to or contemporaneous with the formation of The Contract which would modify, contradict, or explain the terms of the Contract. Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000), See also Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (S.C. App. 2001). The express language of The Contract, in the present case, incorporating the terms of the finance commitment letter is clear, unambiguous, and controlling. (R. 323-331). The express language of The Contract does not require the Pearsons to obtain a survey or financing.

The Parties even agreed in The Merger Clause of The Contract that prior or contemporaneous oral modifications must be written into 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. 328). The Contract and loan commitment letter unambiguously places the burden on Dr. Anderson to obtain financing and

secure the survey. The Contract in no way relies upon Mr. Pearson to obtain financing or a survey for Dr. Anderson. To allow in evidence of pre-contract discussions of a right-of-way survey, and then, to expand the right-of-way survey to Dr. Anderson's duty under The Contract to obtain a survey of the entire collateral for her financing, is inconsistent to the Merger Clause in The Contract.

Dr. Anderson also attempts to excuse her noncompliance with her conditions of financing by arguing that she relied on statements of the Pearsons and Katie Graves that Mr. Pearson would obtain a survey to enable her to obtain financing. However, The Contract contains a non-reliance clause. (R.328). The Non-Reliance Clause of the Contract prevents reliance on statements by Agents or parties not incorporated into The Contract. 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. 328).

The non-reliance clause acts to void any reliance by Dr. Anderson on any statements by Katie Graves or the Pearsons 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.

The Contract contains a specific provision, requiring the Parties to incorporate into the Contract any agreed upon contract modifications affecting land use to include easements. (R. 329). Paragraph 33 of the Contract, "Attachments, Other Contingencies, Terms and/or Stipulations", states:

> there may be attachments to this Contract. The most recent changes, amendments, attachments, contingencies, stipulations, addendum, additions, exhibits, or writings, agreed to by the Parties; is evidence of the Parties' intent and agreement and shall control any Contract language conflicts. (Land issues may include: restrictions and easements that may affect desired use. . .). If any documents are attached as addenda, amendments, attachments, or exhibits considered a part of this Agreement, they are further identified or described here." (R 329).

The lines following paragraph 33 are blank. (R. 329). Therefore, the Parties never included the right-of-way survey oral discussions into the Contract as required by the provisions of the Contract.

CONCLUSION

The clear and unambiguous terms of The Contract require Dr. Anderson to secure $300,000.00 in financing and tender $100,000.00 cash. She did not. Time was expressly of the essence. The Contract expired. Dr. Anderson received her earnest money back and lost nothing. The unanimous ruling of the South Carolina Court of Appeals is consistent with the precedent of the Supreme Court of South

Carolina. Mr. Pearson respectfully requests the Supreme Court of South Carolina to deny Dr. Anderson's Petition for Certiorari.

Respectfully Submitted,

June 5, 2025

s/J. Andrew Smith
J. Andrew Smith (SC Bar No. 14086)
LAW OFFICE OF CLIFFORD BUSH, III, LLC
28 Old Jericho Road
Beaufort, SC 29906
Tel. (843) 379-9500 Fax (843) 379-9550
Email drew@lawofficeofcbushiii.com

s/Clifford Bush, III
Clifford Bush III (SC Bar No. 17026)
LAW OFFICE OF CLIFFORD BUSH, III, LLC
28 Old Jericho Road
Beaufort, SC 29906
Tel. (843) 379-9500 Fax (843) 379-9550
Email cbush@lawofficeofcbushiii.com

Attorneys for Respondent