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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Court of Appeals Case No. 2022-000580
Supreme Court Case No. 2026-001324
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc.,

Petitioner,

v.

Riverwalk River District Building 6, LLC, Mark S. Mather, GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATION OF COUNSEL....1

QUESTIONS PRESENTED....1

STATEMENT OF THE CASE....1

STANDARD OF REVIEW....4

FACTUAL BACKGROUND....5

ARGUMENT....10

I. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing the trial court's grant of specific performance. 10

II. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing and remanding the trial court's award of attorney's fees when the issue was not preserved for appellate review.....21

CONCLUSION....23

CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, The Grapevine of Riverwalk, Inc. ("Petitioner"), certifies that the Court of Appeals filed its opinion in this matter on July 30, 2025 (the "Subject Opinion"), affirming in part, reversing in part, and remanding the circuit court's orders; that Petitioner timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed May 14, 2026. Petitioner respectfully asserts the Subject Opinion presents "special and important reasons" allowing this Supreme Court to grant review of the two issues set forth below.

QUESTIONS PRESENTED

I. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing the trial court's grant of specific performance.

II. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing and remanding the trial court's award of attorney's fees when this issue was not preserved for appellate review.

STATEMENT OF THE CASE

This action arises from a dispute between Petitioner, The Grapevine of Riverwalk, Inc. ("Grapevine"), and its landlord, Riverwalk River District Building 6, LLC ("Building 6"), over Grapevine's lease ("Lease") and Option to Purchase ("Option to Purchase") commercial space in the "River District" section of the Riverwalk Development in York County, South Carolina. Grapevine alleges that Building 6 failed to honor and purposefully avoided the Option to Purchase provision of the Lease. Grapevine also alleges that Building 6 never intended to honor the Option to Purchase and Respondents in this petition (who were Appellant in the Court of Appeals as Grapevine prevailed on all but one issue which it choice not to appeal) made negligent misrepresentations regarding whether their bank required a two-year lease from Grapevine before

it could purchase the Premises and further as to the right of customers of Grapevine and others to use patio common area adjacent to its Premises. [1]

Grapevine filed this lawsuit in December 2018, naming Building 6 as the only defendant and asserting claims for specific performance of the Option to Purchase, breach of contract, breach of contract accompanied by fraudulent act, and several tort claims. (R. pp. 39-51). Building 6 answered. (R. pp. 82-94.) Grapevine and Building 6 both demanded a jury trial. (R. pp. 39-51, 82-94.) In March 2020, Grapevine amended its complaint to name four additional parties[2] and to assert additional claims. (R. pp. 96-118.) Grapevine and Appellants once again all demanded a jury trial. (R. pp. 96-132.)

In January 2021, Grapevine filed a second amended complaint, adding a claim for negligent misrepresentation against all Appellants. (R. pp. 134-157.) For the first time, Building 6 sought to strike Grapevine's demand for a jury trial. (R. pp. 158-177.) After fully briefing the issue and conducting a hearing via electronic means, the trial court issued an order denying Building 6's motion to strike Grapevine's jury demand. (R. pp. 1-7.)

Once our courts were able to go back into operation following the worst of the COVID-19 crisis, this case was tried before the Honorable William McKinnon and a jury on August 23-27, 2021. After the presentation of evidence and motions by the parties, the jury responded as follows to the four questions presented to it on the verdict form:

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[1] In that Appellants from the action below have filed an extension to file their petition for writ of certiorari and for clarity, they are simply referred to as Appellants in this petition.

[2] The additional corporate Appellants are affiliated entities of Building 6: GRH Development Services, LLC ("GRH"); The Greens of Rock Hill, LLC ("Greens"); and Assured Administration, LLC ("Assured"). In addition, Grapevine added Mark Mather, alleging that Mr. Mather "has the ultimate decision-making authority for all the corporate Defendants." (R. p. 141- 52.) He was dismissed as a party by the grant of a JNOV which is not on appeal.

1. Did Building 6 breach its lease agreement with Grapevine in regards to the lease's option to purchase?

Yes, resulting in damages in the amount of $221,700.00

2. Did Building 6 breach its lease agreement with Grapevine in regards to the lease's use of the patio/common space?

Yes, resulting in damages in the amount of $146,124.00

3. Did any Appellant(s) make any negligent misrepresentations to the plaintiff?

Yes as to all Defendants, resulting in damages in the amount of $96,800.00

4. Did the defendants Riverwalk River District Building 6, LLC and GRH Development Resources, LLC conspire to harm the Plaintiff?

No.

(R. pp. 19-20.)[3]

Post-trial motions were filed by Appellants and a request for election of remedies made by Grapevine on issue one (requesting specific performance over the damages relating to the Option to Purchase) as well as pre-judgment interest and attorneys' fees. (R. pp. 244-260; R. pp. 232-243; R. pp. 328-333.) After careful consideration of the briefing and arguments on the issue, the trial court granted specific performance on issue one, affirmed the remainder of the verdict and awarded attorney fees in an amount reduced to reflect an appropriate amount under the verdict rendered, as well as pre-judgment interest. (R. pp. 8-14, 21-35.) The trial court also entered orders designed to protect the Premises and the use of the patio common area and the parties pending appeal. (R. pp. 8-14, 21-35.) This appeal then followed in the Court of Appeals.

[3] The verdict form was shortened slightly in the interest of space. An exact copy is included in the Record on Appeal. (R. pp. 19-20.)

This case was argued on December 4, 2024. On July 30, 2025, the Court of Appeals issued the subject opinion finding in favor of Grapevine on all appealed issues (except specific performance as awarded by the trial court and attorneys' fees as discussed below). The Court of Appeals found for Grapevine on all other issues, determining that many of the issues raised were not properly preserved for appeal. Oddly, even though it specifically found the issue of an award of attorneys' fees to Grapevine was not preserved for appeal by Appellants, the Court of Appeals remanded the unpreserved issue for the trial court to reexamine. A petition for rehearing was filed by Grapevine on September 15, 2025. The Court of Appeals did not rule on the petition until May 14, 2026. None of the issues raised in the petition for rehearing were addressed by the Court of Appeals even though it had eight months to consider the matter. Rather, a form order was issued finding no issues of law or fact were overlooked.

STANDARD OF REVIEW

An action for specific performance is one in equity. *Campbell v. Carr*, 361 S.C. 258, 262–63, 603 S.E.2d 625, 627 (Ct. App. 2004). In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence. *Greer v. Spartanburg Technical College*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses. *Id*. The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." *Guignard v. Atkins,* 282 S.C. 61, 66, 317 S.E.2d 137, 140 (Ct.App.1984)

When a contract exists, the award of attorney fees is left to the sound discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Smith v. Smith*, 264 S.C. 624, 216 S.E.2d 541 (1975).

While Rule 242(b), SCACR sets forth five factors which may be considered by this Supreme Court in determining whether to grant review, such factors are "neither controlling nor fully measuring [this Court's] discretion or power to grant review in general. . . ." As set forth in this petition, grants of specific performance must take into consideration the case specific facts and equities of the case. As our state continues to grow at a record pace, more and more options to purchase property will find their way into our judicial system. As such, clarifying the crucial fact that a party cannot agree to an option to sell, make performance impossible and then hide behind such inequitable conduct to avoid an award of specific performance presents a "special or important reason" as required by Rule 242(b) SCACR for this Supreme Court to grant the petition for writ of certiorari and reverse the Court of Appeals on the two issues presented in this petition. All other determinations made by the trial court and the Court of Appeals should be affirmed.

FACTUAL BACKGROUND

Grapevine is a wine and craft beer shop and bar. (R. pp. 624, 628-630.) The principals of Grapevine, David and Melanie Sills, are also the owners of two other "Grapevine" locations in Fort Mill and York Market Place. (R. pp. 624-625.) In approximately 2010, the Sills began exploring the possibility of opening a location in Rock Hill's Riverwalk Development. (R. p. 626.)

David Williams, who was then an employee of Building 6's lead developer, Appellant GRH, served as the Sills' primary point of contact. (R. p. 634.) The Sills met and spoke with David Williams. They provided him with a list of their desired criteria, including approximate square footage, kitchen requirements, and access to "patio space." The Sills explained to Mr. Williams that they "would be most interested" in owning, as opposed to renting, space. Between 2010 and 2014, the Sills explored two potential opportunities with David Williams, but neither of those culminated in a deal, primarily due to the desire of the Sills to own their own space. Absent the

right to purchase the property being offered, the Sills were unwilling to enter any deal with Appellants. No one has disputed this crucial fact.

In early 2014, Mr. Williams again contacted the Sills to inform them of a new opportunity. Riverwalk's developer was planning to build a mixed-use building in the Riverwalk's "River District." (R. pp. 1324-1340; R. pp. 644-649.) After learning that the developer intended to develop the building referred to in this appeal as Building 6 as "leasable space," and still not for sale, the Sills declined to become involved. (R. pp. 651-652.) A few weeks later, Mr. Williams called the Sills with a proposal. Mr. Williams proposed that Grapevine consider entering a lease, with an option for Grapevine to purchase its space after leasing it for two years. (R. pp. 1341-1348; R. pp. 653-654.) Although the Sills wanted to purchase their own space, they were informed the Appellants' banker required the two-year lease.[4] As will be discussed in response to Appellants' petition for writ of certiorari, the Sills also made inquiries and were provided documents from Appellants showing the wine shop having use of the patio common area space adjacent to the proposed Premises. This was consistent with the Sills' understanding of the use of Common Space in Section 15 of the Lease. Based upon this scenario and representations about the Option to Purchase after two years of leasing, the Sills ultimately agreed and entered the Lease with the Option to Purchase the Premises. (R. pp. 655-656, 658, 723-724; R. pp. 1247-1297.)

On February 24, 2014, Mr. Williams sent the Sills a Letter of Intent. From March–June 2014, the parties negotiated the specific terms of the Lease, including the terms of the Option to Purchase. David Williams was Building 6's lead negotiator, and Melanie Sills handled the matter for Grapevine. Melanie Sills reviewed schematic diagrams depicting the location of a proposed

[4] The evidence offered by the Appellant's lending institution indicated this statement was false. The jury likewise found this constituted a negligent misrepresentation.

"Wine Shop" and adjoining outdoor space. (R. pp. 649-652; R. pp. 1328-1340.) The Sills suggested and/or requested modifications to the drawings including having doors, which opened upwards similar to garage doors, to allow unimpeded access between the store and the patio common areas. (R. pp. 630-632, 653, 660; R. pp. 1320-1322.)

On June 20, 2014, Melanie Sills, as Grapevine's president, signed the Lease, which contained the Option to Purchase. Mark Mather signed the Agreement on June 23, 2014, on behalf of Building 6's managing member, The Greens of Rock Hill, LLC, and Assured Administrators. (R. pp. 1247-1297.) As is often the case when closing a deal with an option to purchase, the Lease did not contain all referenced exhibits but rather had "place holders" to be provided by Appellants. (R. pp. 662-663; R. pp. 670-671.) This is not uncommon in such a transaction.

Construction of the mixed-use building (i.e. Building 6) was essentially completed by early 2016. Grapevine took possession of its Premises on February 2, 2016. In that Grapevine intended to purchase its Premises at the first opportunity allowed under the Lease and the Option to Purchase, it did all it could to promote Building 6 and the Riverwalk Development generally. This not only reflected well on its store, but helped increase the value of its investment.[5]

Consistent with the terms of the Lease, Grapevine timely and promptly gave the required notice of its intent to purchase as soon as the right to exercise such option became operational. (R. pp. 648, 674-675; R. p. 1262 ¶ 33.) On July 26, 2017, Brian Wilson, an attorney representing Grapevine with regard to the Option to Purchase, sent a letter to Building 6, "Attn: David Williams," titled "Exercise of Option to Purchase." That letter constituted notice of Grapevine's intent to exercise the Option to Purchase and specified a proposed closing date of February 2,

[5] The record reflects somewhere between $200,000 and $300,000 dollars were spent up fitting the space for their store in Building 6. (R. pp. 688-717.)

2018. (R. pp. 688-690; R. p. 1298.) The letter also pointed out that the attorney's "review of records filed with the South Carolina Secretary of State and with the York County Clerk of Court does not reveal the existence of [a] condominium project, yet." *Id*. The lawyer requested that Building 6 "take the necessary steps to create [a] horizontal property regime and provide me with a copy of such documentation." (R. p. 1298; R. pp. 690-691.)[6]

Building 6 did not immediately respond to attorney Wilson. He sent two or three follow-up emails before Travis Hege, an employee of the developer, GRH, responded on October 13, 2017:

> Good morning, sorry for the delay. I have been in and out of the office lately. Slight correction, I am the Development Director; non-the-less **I look forward to working with you to get this completed. I will let you know once I determine what we need to do on our end and will touch base to get this completed.**

(R. pp. 1391-1402.)(emphasis added).

On October 26, 2017, Grapevine's attorney responded to Mr. Hege, "Please confirm we will be able to close on this condo unit on February 2nd. Please advise if I can assist you in any fashion, I have experience in setting up horizontal property regimes." (R. pp. 1391-1402.) Mr. Hege replied: "We are working on the condo documents. I will give you an update once I hear back from the lender and our attorney. Sorry for the delay." (R. pp. 1391-1402.) In November 2017, Attorney Todd Brockman contacted Grapevine's attorney, presenting himself as Building 6's attorney and requesting that Grapevine's attorney "please direct any future emails to my attention." (R. pp. 693-694.) Nothing changed regarding any progress in the efforts to close.

Over the next several months, the parties and their attorneys communicated with one another concerning various aspects of the proposed establishment of the Premises as a condominium under the Horizontal Property Regime Act and the sale of that condominium to

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[6] The Horizontal Property Regime Act is found at S.C. Code Ann. § 27-31-10 *et seq.*

Grapevine as agreed in the Lease and the Option to Purchase. (R. pp. 693-701; R. pp. 1358-1361.) **On April 12, 2018, Mark Mather sent a text message proposing a closing date of April 17, 2018.** That proposed date was never utilized by Building 6 and no other closing date was set by it. (R. pp. 701-707, 709-712; R. pp. 1305, 1363-1387.) (emphasis added).

As time went on and Building 6 purposefully made no progress towards the closing, the parties' relationship became increasingly acrimonious. In late August 2018, Mr. Mather (essentially the developer of Riverwalk) came into the Grapevine store to complain about the way certain cars had double parked. (R. p. 712.) Mr. Mather threatened the Sills that if they got "on the wrong side of this contract … you will never use the patio again." (R. p. 713.) The Sills attempted to calm Mr. Mather even though no one was sure if the cars were Grapevine customers. (R. pp. 714-715; R. p. 1378.) Mr. Mather never responded to their attempt to address the issue. (R. p. 715.) At the time Grapevine exercised its option, a large pile of dirt appeared and blocked Grapevine's view of the river. (R. p. 721.) Letters of default came from Building 6 on numerous petty or improper issues. (R. p. 721.)[7] On November 1, 2018, the property manager for Building 6 sent Grapevine a letter, informing Grapevine that its Lease gave it no right to use the outdoor patio common areas adjacent to its Premises, and declaring that Grapevine's continued use of those areas was a default of its Lease. (R. pp. 722-723; R. pp. 1379-1380.) Even after receiving that letter, Grapevine was allowed (or not stopped) from continuing to use the patio common areas until March 2019, when Appellants' prior counsel demanded that Grapevine cease using the patio "until and unless a formal agreement can be reached" for Grapevine's use of that area. (R. pp. 721-722; R. pp. 1379-1380.) Interestingly this was the very day Building 6 had to file an answer in this

[7] Due to the failure of Building 6 to close, Grapevine also declared a notice of default. (R. pp. 1299-1301.)

lawsuit. Since Building 6 never closed on the Option to Purchase, this litigation ensued.[8] **Mr. Mather could never explain why he nor his attorney could not agree to proposed closing dates**. (R. pp. 1090-1094.)(emphasis added). All essential terms had been agreed to by the parties. Appellants simply decided it would generate more profits by misleading Grapevine and making technical compliance with the Option to Purchase impossible.

ARGUMENT

Petitioner, The Grapevine of Riverwalk, Inc., ("Petitioner" or "Grapevine") files this Petition for Writ of Certiorari pursuant to Rule 242, SCACR relating to two issues in the decision the Court of Appeals issued in this case. Petitioner respectfully asserts the Court of Appeals correctly determined issues one, two, and four of the issues on appeal set forth in the Court of Appeals' opinion. This petition for writ of certiorari specifically relates solely to issues three and five. Issue three relates to the reversal of the trial court's grant of specific performance. Issue five is whether the Court of Appeals erred in remanding for reconsideration the award of Petitioner's attorney's fees when that issue was, per the Court of Appeals, not preserved for appellate review.

I. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing the trial court's grant of specific performance.

In overturning the trial court's award of specific performance, the Court of Appeals stated "Appellants argue the option could not be fulfilled without execution of a PSA [Property Sale Agreement also known as the "Option"], including a contemporaneous escrow deposit. Appellants argued that because Grapevine never tendered the PSA or the deposit referenced therein, "it had no purchase contract for the court to specifically enforce". The Court of Appeals agreed and reversed the trial court. In reaching this decision, the Court of Appeals relied heavily on this

[8] An outdoor seating area was always important to the Grapevine business model. (R. p. 632.)

Supreme Court's opnion in *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 531 S.E.2d (2000). The Court of Appeals also cited 92 *C.J.S.* Vendor and Purchaser section 172 (2025) for the proposition that "an option must be accepted according to its terms, thus if the option prescribes certain conditions for its acceptance, those conditions must be performed while the option is still outstanding **unless** they are waived **or the optionor makes compliance impossible."** (emphasis added). The Court determined Grapevine's letter and communications to Appellants providing notice of exercising its intent was insufficient to exercise the Option and absent the exercise of the Option, there was nothing to specifically enforce. This ruling condones inequitable behavior and more importantly fails to address the issue (noted in the Court of Appeals' *C.J.S.* reference and applicable case law) that the Optionor made compliance with the Option impossible. "When the accompanying incidents are inequitable and show bad faith, such as concealment, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit… [such] may easily induce a court to grant relief, defensive or affirmative." *Holly Hill Lumber Co. v. McCoy,* 201 S.C. 427, 442, 23 S.E.2d 372, 378 (1942). As such, the trial court can and properly did order specific performance. Certiorari should be granted and the Court of Appeals ruling reversing the trial court on specific performance should be reversed.

The following key legal principles relating to options and the remedy of specific performance were not considered or addressed by the Court of Appeals.

1. Specific performance is an equitable remedy which should be determined by the specific facts and circumstances of each case. This applies not only to actions of the Optionee (Petitioner), but the Optionor (Appellants) as well. Facts were ignored which establish the Optionee came before the trial court with clean hands and was always ready, willing and able to

exercise the Option and close on the property but could not do so because the actions of the Optionor (i.e. Appellant) deliberately frustrated Petitioner's attempts to close on the property.

2. The specific performance section of the Court of Appeals' opinion fails to address these applicable equity maxims, much less apply them to the facts of this case.

3. The specific performance section of the Court of Appeals' opinion fails to address the actions of the Optionor (Appellants) which were inequitable, deliberate, done solely for financial gain, and made for the sole purpose of attempting to make technical compliance of the Option impossible.

4. The Court of Appeals failed to address or apply the undisputed facts which established the Optionor's admitted actions made compliance impossible.

5. The Court of Appeals' opinion erred in finding the parties did not have a meeting of the minds on all essential terms because the PSA was a placeholder which could not be completed in the most technical sense due solely to the actions of the Optionor-Appellants.

Specific performance is an equitable remedy, and it must be viewed in light of the fact that the jury determined that Building 6 LLC (Appellant-Optionor) breached its lease agreement with Grapevine regarding the lease's option to purchase. (R. A. 19-20). Considering the Court of Appeals' strong reliance on *Ingram*, Petitioner asked that this Supreme Court specifically review it carefully, as it in fact clearly supports an award of specific performance in this case.

Ingram establishes that in order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) 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 her part of the contract.** See also *Gibson v. Hrysikos,* 293 S.C. 8, 358 S.E.2d 173

(Ct.App.1987) (citing *Thomson v. Scott,* 6 S.C. Eq. (1 McCord Eq.) 32 (1825)). (emphasis added). As noted, the *Ingram* court determined that the tenant, as the party seeking to compel specific performance, acted inequitably and with unclean hands by misleading the landlord, had an improper ulterior motive, and never had the funds available to exercise an option in issue. None of those facts are remotely present in the case at hand. In fact, the facts of this case are exactly the opposite of *Ingram*. Petitioner had the funds needed, essential terms were agreed to, and as the trial court determined, was ready, willing and able to do all which was required to exercise the Option. Timely notice was given. There was no evidence presented nor any findings by the trial court that Petitioner in any way had unclean hands.

The same cannot be said for Optionor (Appellants). The testimony established:

- Consistent with the terms of the Lease and Option to Purchase, Grapevine gave the required notice of its intent to purchase. (R. pp. 648, 674-675; R. p. 1262 ¶ 33.) On July 26, 2017, Brian Wilson, an attorney representing Grapevine with regard to the Option to Purchase, sent a letter to Building 6, "Attn: David Williams," titled "Exercise of Option to Purchase." That letter constituted notice of Grapevine's intent to exercise the Option to Purchase and **specified a proposed closing date of February 2, 2018**. (R. pp. 688-690; R. p. 1298.)(emphasis added).
- The letter pointed out that the attorney's "review of records filed with the South Carolina Secretary of State and with the York County Clerk of Court does not reveal the existence of [a] condominium project, yet." *Id*. The lawyer requested that

Building 6 "take the necessary steps to create [a] horizontal property regime and provide me with a copy of such documentation." (R. p. 1298; R. pp. 690-691.)[9]

- Travis Hege, an employee of Appellant GRH Development, responded on October 13, 2017 "Good morning, sorry for the delay. I have been in and out of the office lately… I am the Development Director; nonetheless I look forward to working with you to get this completed. I will let you know once I determine what we need to do on our end and will touch base to get this completed. (R. pp. 1391-1402.)
- On October 26, 2017, Grapevine's attorney responded to Mr. Hege, "Please confirm we will be able to close on this condo unit on February 2nd. Please advise if I can assist you in any fashion, I have experience in setting up horizontal property regimes." (R. pp. 1391-1402.) Mr. Hege replied: "**We are working on the condo documents. I will give you an update once I hear back from the lender and our attorney. Sorry for the delay.**" (R. pp. 1391-1402.) (emphasis added).
- In November 2017, Attorney Todd Brockman contacted Grapevine's attorney, presenting himself as Building 6's attorney and requested that Grapevine's attorney "please direct any future emails to my attention." (R. pp. 693-694.)
- On April 12, 2018, Mark Mather sent a text message proposing a closing date of April 17, 2018. (R. pp. 701-707, 709-712; R. pp. 1305, 1363-1387.)
- Appellants acknowledged Petitioner sent a letter in which it exercised its rights to purchase the Premises. (R. pp. 795-798).

[9] This document is a mere formality. Mark Mather described the closing on the Option to Purchase as essentially "nothing more than a home closing." (R. p. 1305).

- Mark Mather acknowledged the ease of closing on the agreement was an easy task, "not anything more than a home closing." (R. p. 1305).
- Todd Brockman, an attorney for Appellants, wrote the land surveyor for the property "where do we stand on getting the condo plat for the building completed [?] **we have a contract that requires selling the space in a couple of weeks, so we need to get this done as soon as possible**." (R. p. 694; R. p. 1304) (emphasis added).
- On January 30th Mark Mather sent an email to Petitioner's attorney Brian Wilson. Mr. Mather sent draft forms of the master deed, bylaws, and architectural plans, all of which needed to be filed with the Register of Deeds for York County before any closing could take place. Mather never mentioned a closing date in response. (R. pp. 695-696.) **Likewise, he nor anyone asserted non-compliance with the PSA or Option until this litigation was filed.**
- Grapevine was ready, willing, and able to purchase the premises on February 2, 2018, the closing date proposed by their attorney and which satisfied the Option to Purchase. (R. p. 696.)
- Building 6, through Mather, proposed a closing date April 17, 2018, but was still not willing to close on that date for unknown reasons. (R. p. 701.)
- The drafts of the condominium documents had been approved by the Petitioner and its counsel for some time. (R. pp. 701-702, 704-708, 711-712; R. pp. 1369-1376.)
- Petitioner was never the hold up in this matter at any time.

Although Appellants used every excuse and even untruths to avoid closing, the record establishes Petitioner was always ready, willing and able to close on the transaction from its first proposed closing date through the trial of this case. In fact, Melanie Sills testified had Appellants

closed on the transaction even up to the time of the lawsuit, they would have dropped the litigation and purchased the property in accordance with the terms of the Lease. (R. p. 719.) This shows Grapevine's commitment to its right to purchase and its compliance with its obligations except for those which could not be finalized as Appellants ignored them in order to avoid having to close. The Optionor made the closing impossible and did so willfully for financial gain. Such action(s) cannot and should not be held against Grapevine, nor should Appellants be rewarded for this misconduct. Yet the Court of Appeals failed to address these issues in its ruling on specific performance, even after they were brought to its attention by way of a Petition for Rehearing.

Determining whether specific performance is appropriate is a matter of sound judicial discretion. Our courts are required to rely on the equity maxim: "He who seeks equity must do equity." *Norton v. Matthews,* 249 S.C. 71, 152 S.E.2d 680 (1967). Such cases must be determined based on their own specific facts and circumstances. In this case, the Court of Appeals failed to give any consideration to the undisputed testimony cited above. Its discussion of specific performance is devoid of any analysis of these facts. Likewise, it does not address or apply applicable principles of equity. It is no answer to say Petitioner could have unilaterally selected a random escrow agent in light of Appellants' conduct set forth above[10]. Likewise, that provides no basis for overturning the trial court's grant of the remedy of specific performance.

> [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.

[10] Appellants would have argued Petitioner had no such right.

Maccaro v. Andrick Dev. Corp., 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct.App.1984) (internal citations omitted). The trial court heard the evidence, viewed the witnesses and carefully ruled on the grant of specific performance.

More importantly, the Court of Appeals failed to address the fact that the Appellant purposefully failed to perform its obligations of the Lease Agreement and Option and then attempted to (and the Court of Appeals allowed it to successfully do so) prevent specific performance when it was clearly the appropriate remedy. The Court of Appeals appeared to misconstrue or conflate the rules applicable to a simple option and those found in a lease. Regardless of which is applied, Grapevine did all it could do and was ready, willing, and able to close on the date called for in the Option to Purchase (and other dates proposed by Appellants). If a party can void specific performance by simply not performing simple tasks such as filing an agreed to Master Deed or naming an escrow agent, specific performance becomes a meaningless remedy.

A similar issue was presented to the Court of Appeals in *Mullins v. Benton*, 309 S.C. 85, 419 S.E.2d 838 (Ct. App. 1992). *Mullins* was an action for specific performance of an option contract. The contract provided the option would expire sixty days from the date of execution. The consideration expressed was "One Dollar ($1.00) paid by the Optionee to the Optionor." As to the purchase price, the agreement stated:

> The total purchase price shall be determined by independent fee appraisal of the property. Both the Optionor and the Optionee shall obtain, separately and individually, each at his own expense, an appraisal of the entire parcel including land and buildings by a reputable, competent, certified fee appraiser. The appraised values from the two appraisal reports shall then be averaged to arrive at the total purchase price.

The agreement also provided that if the option was exercised, the parties would enter into an Agreement to Buy and Sell premised upon the provisions as set forth therein.

Mullins, the Optionee, obtained an appraisal valuing the property at $745,000. On March 25, 1988, Mullins and his real estate agent went to the Optionor's (Benton) home to advise him of the amount of the appraisal. Mr. Mullins had prepared in advance a letter indicating he was exercising the option to purchase. However, the purchase price was left blank because Mullins did not know the amount of the Benton's appraisal. Benton advised Mullins he had not secured an appraisal and the appraisal obtained by Mullins was too low. Mullins testified he offered to extend the period for obtaining the appraisal, but Benton continued to refuse to name an appraiser as required in the Option contract. At that point, Mullins completed the letter with the value of $745,000 as the purchase price and left it with Benton. Benton refused to sell the property. An action for specific performance ensued.

The master found the parties entered into the agreement knowingly and for valid consideration. He also found Mullins performed his obligation to obtain an appraisal, but Benton did not and ordered specific performance of the agreement.

The Court of Appeals affirmed that part of the master's order which required Benton to obtain an appraisal of the property. The Court of Appeals noted the parties agreed to use the appraisal method to determine the purchase price of the property. As such neither side, including the optionor, would be allowed to refuse to obtain an appraisal and thereby invalidate the option based upon their own nonperformance. The same holds true in this case. The record is replete with evidence of the refusal of the Appellant-Optionor to perform its obligations in an effort to render the option meaningless. Even the *C.J.S.* provision cited by the Court of Appeals recognizes the conditions of an option must be performed while the option is still outstanding "**unless** they are waived **or the optionor makes compliance impossible."** There can be no doubt the Optionor did so in this case, yet the Court of Appeals failed to consider or address this vital issue in its opinion.

Benton also argued specific performance should not be ordered because all the material terms of the contract were not clear and definite. The Court of Appeals noted while the issue was not yet ripe, the option defines the property, provides a method for determining the price, and specifies the downpayment, interest rate, and length of the purchase money mortgage. While there is no specification of the timing of the periodic payments (i.e. monthly, quarterly, yearly, etc.) the Court of Appeals did not believe this omission would be fatal to a decree of specific performance because reasonable terms could be implied by the court. In doing so the *Mullins* court relied on *Davis v. Cordell,* 237 S.C. 88, 115 S.E.2d 649 (1960) (contract not void for failure to designate time for payment of all or any part of purchase price). The same reasoning is applicable in this case.

The failure to consider an optionor's refusal to take the necessary actions to allow a closing to occur and the non-payment of a deposit (in light of the failure of the optionor to perform his responsibilities) is an issue that has long been known in the law. In *Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009), the seller argued on appeal the trial court erred in finding the buyers entitled to specific performance because the buyers wrote a check to the seller's attorney's trust account and not the seller, **even though there was no plan to put the funds in escrow**. *Id.* at 426, 679 S.E.2d at 531 (emphasis added). The Court of Appeals, however, affirmed the specific performance award to the buyers. *Id.* at 428, 679 S.E.2d at 532. The court provided:

> We find the [buyers] satisfied the elements of the *Ingram* test: there is evidence of a valid agreement, the [buyers] performed their part of the contract with [seller's] consent, and the [buyers] remain able and willing to buy the real estate. Additionally, the [buyers] substantially performed their part of the contract and gave [seller] substantially all that he bargained for even if we assume the contract required the [buyers] write the earnest money check directly to [seller] rather than to [the attorney's] trust account. Furthermore, the express provisions of the contract do not make strict compliance essential; therefore, substantial compliance is sufficient.

Id. at 427, 679 S.E2d at 531.

In *Thomas v. Johnson*, 186 P. 437 (Utah 19919) the Utah Supreme Court, in reversing a case where specific performance was not allowed, held:

> According to the undisputed evidence, [optionee] offered to comply with the terms of the contract, and that [optionor] then and there denied the existence of the alleged contract. [Optionee] did exactly that for which the contract provided. The proper course for the parties to pursue was for [optionee] to express his willingness and readiness to proceed with the agreement, or, in the language of the contract, to "comply or offer to comply with the terms of payment above specified," and it then became the duty of [optionor] to furnish an abstract of title, and, upon receiving the abstract of title, the payment of the purchase money and delivery of the deed were to be concurrent. Why should [optionee] have made an actual tender of the first installment of the purchase money when …[optionor] had furnished no abstract of title to his land and had repudiated his contract and stated there was no contract? After that announcement by …[optionor], a tender by the [optionee] would have been an idle ceremony. The law never compels a person to do that which is vain or useless.

Id.

While Appellants in this case never disavowed the option during the relevant time period(s), their actions became inconsistent with closing on the transaction in a timely manner. This was done solely for pecuniary gain. The value of the property in issue had appreciated considerably based upon market conditions, Grapevine's investments in the property and running a successful business in the property. Under these specific facts, it strains all logic to deprive Petitioner of the remedy of specific performance for its alleged failure to engage in acts which were clearly "vain or useless" while allowing Appellants to profit off of their own purposeful delay and refusal to close on the option.

In this case, the only alleged terms which prevented a meeting of the mind was Appellants' failure to file Horizontal Property Regime documents prepared by their counsel and agreed to by Petitioners as well as their failure to determine what the formal address of the unit would be and

who the Appellants wanted to act as the escrow agent to receive funds. These terms are not sufficient to make the PSA unclear or indefinite. The price, location, property description and payment terms were all known and agreed to by the parties. There was a meeting of the minds. Optionor simply determined it could gain more financially by frustrating or ignoring the requirements of the Option. There is nothing fair, just or equitable in the result reached by the Court of Appeals. Under these circumstances, the trial court's award of specific performance should be reinstated.

II. The Court of Appeals overlooked and misapplied South Carolina law and the facts of this case in reversing and remanding the trial court's award of attorney's fees when the issue was not preserved for appellate review.

In issue five of the Court of Appeals' opinion, it ruled **all** of the issues raised by Appellants regarding attorney's fees awarded to Petitioner were **not preserved for review**. Specifically, the Court of Appeals noted that the trial court did not rule on these arguments in its order granting attorney's fees and Appellant's motion to reconsider the attorney's fee award did not request a ruling on any of these arguments. As such, none were preserved for appellate review. The Court of Appeals cited multiple cases in support of the error preservation requirement. The Court of Appeals went on to say in a footnote, however, that it was "troubled" by the redacted billing statements. Accordingly, the Court of Appeals reversed the trial court's award of attorney's fees, which by their own ruling was not preserved for appellate review, and remanded the award of attorneys' fees to the trial court to reexamine in light of the factors set forth in *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993).

Petitioner respectfully asserts that if an issue is not preserved, then the Court of Appeals has no power or jurisdiction except "under the rarest and most compelling circumstances" to remand the issue and require the trial court to take actions relating to the unpreserved issue.

Counsel has found no appellate rule or authority which justifies or specifies that the Court of Appeals has this power under circumstances similar to those at hand, especially on an issue which is committed to the sound discretion of the trial court. To do so would negate the long-standing requirements of issue preservation established both by this Supreme Court and the Court of Appeals. Rather, such a remand is only allowed when to not do so would be "fundamentally contrary to the interest of justice". *Simmons v. State of South Carolina*, 416 S.C. 584, 788 S.E.2d 220 (2016) (holding that the extraordinary action of remanding a post-conviction relief based upon unpreserved error was warranted based upon indications that incorrect or false DNA evidence was presented which resulted in a murder conviction). In allowing the remand of an unpreserved issue, this Supreme Court cautioned such remands should be "granted sparingly and be reserved for the rarest of cases." *Id*. 418 S.C at 593, 788 S.E.2d 225.

Failure to preserve this attorneys' fee issue at trial is not fundamentally contrary to the interest of justice. It is simply an unpreserved issue of the type our appellate courts repeatedly state they cannot review. *See Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011)(addressing the importance of proper issue preservation for an appellate court to hear and determine that issue). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.' " *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

In addition, the trial court's award of attorney fees comes to this Supreme Court bearing the presumption of validity, and it is Appellants which had the affirmative burden of showing otherwise. Per the trial court's order, it is the law of the case "that the legal services rendered by [Grapevine's] counsel were substantial and complex." It is the law of the case that "the claims in this case shared

the same common facts and required combined efforts throughout the litigation process." And Appellants can neither complain about the trial court basing its award of attorney fees on Grapevine's redacted bills nor show that the trial court's award is unreasonable in light of "[w]hat was done in support of which claims against which parties." These are unpreserved findings and are the law of the case. Against this backdrop, Appellants' argument is wholly unavailing to upset the trial court's presumptively valid award of attorneys' fees. When viewed in concert with the Court of Appeals' specific ruling that this issue is not preserved, the remand for review was contrary to the laws of this state. The determination of the trial court should be reinstated.

CONCLUSION

In order to compel specific performance, a court must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) 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 her part of the contract. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). All elements are established in this case.

"In order to compel specific performance, a court of equity must find ... that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." *Shirey v. Bishop*, 431 S.C. 412, 430, 848 S.E.2d 325, 330-31 (Ct. App. 2020) (quoting *Gibson v. Hrysikos*, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987)). "Equity will not decree specific performance unless the contract is fair, just, and equitable." *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). "The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." *Id.* (quoting

Guignard v. Atkins, 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984)). This was not done by the Court of Appeals in this case.

Appellants have trifled and or shown a backwardness in performing their part of the contract. They should not be rewarded for such behavior.

Respectfully submitted,

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