THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000580
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc.,

Respondent,

v.

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

Appellants.

RESPONDENT'S PETITION FOR REHEARING

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Respondent, The Grapevine of Riverwalk, Inc., ("Respondent" or "Grapevine") files this motion for reconsideration pursuant to SCACR 221(a) relating to two issues in the decision this Court of Appeals issued in this case. Respondent respectfully asserts this Court of Appeals correctly determined issues one, two, and four of the issues on appeal set forth in this Court's opinion. This petition for rehearing 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 this Court of Appeals erred in remanding for reconsideration the award of Respondent's attorney's fees.

I. This 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, this 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". This Court agreed and reversed the trial court. In reaching this decision, this Court of Appeals relied heavily on *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 531 S.E.2d (2000). This 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). This Court determined Grapevine's letter 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 fails to address the issue (noted in this Court's *C.J.S.* reference and applicable case law) that the Optionor made compliance with the Option impossible, thus allowing the trial court to order specific performance.

Further, the following key legal principles relating to options and the remedy of specific performance were not considered or addressed by this 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 (Respondent), but the Optionor (Appellants) as well. Facts were ignored which establishes 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 Respondent's attempts to close on the property.
2. The specific performance section of this Court's opinion fails to address these applicable equity maxims, much less apply them to the facts of this case.
3. The specific performance section of this Court's 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 making technical compliance of the Option impossible.
4. This Court failed to address or apply the undisputed facts which established the Optionor's admitted actions made compliance impossible.
5. This Court erred in finding the parties did not have a meeting of the mind 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 this Court's strong reliance on *Ingram*, Respondent asked that this 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*. Respondent had the funds needed and 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 below that Respondent in any way had unclean hands.

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

- Consistent with the terms of the Lease, 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.)
- 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 Respondent sent a letter in which it exercised its rights to purchase the Premises. (R. pp. 795-798).
- 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 Respondent'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. (R. p. 701.)
- The drafts of the condominium documents had been approved by the Respondent and its counsel for some time. (R. pp. 701-702, 704-708, 711-712; R. pp. 1369-1376.)
- Respondent 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 Respondent 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. As noted in Respondent's brief, 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 this Court of Appeals failed to address this issue in its ruling on specific performance.

In 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 its own specific facts and circumstances. In this case, this 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 principles of equity. It is no answer to say Respondent could have unilaterally selected a random escrow agent in light of Appellants' conduct set forth above[1]. Likewise, that provides no basis for overturning the trial court's grant of the remedy of specific performance.

More importantly, the Court of Appeals failed to address the fact that the Appellant purposefully failed to perform its portions of the Lease Agreement and Option and then attempted to (and this Court of Appeals allowed it to successfully do so) prevent specific performance when it was clearly the appropriate remedy.

A similar issue was presented to this very 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

[1] Appellants would have argued Respondent had no such right.

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.

This Court of Appeals affirmed that part of the master's order which required Benton to obtain an appraisal of the property. This Court 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 this Court 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 this Court of Appeals failed to consider or address this vital issue in its opinion.

Like the Court's ruling in this case, 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.) this Court 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 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 *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 the case at hand never disavowed the option, their actions became inconsistent with closing on the transaction in a timely manner. This was done for pecuniary gain. Under these specific facts, it strains all logic to deprive Respondent of the remedy of

specific performance for its alleged failure to engage in acts which were clearly "vain or useless."

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 Respondents 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. There was a meeting of the minds. Optionor determined it could gain more financially by frustrating or ignoring the requirements of the Option. Under these circumstances, the trial court's award of specific performance should be affirmed upon reconsideration.

II. This 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.

In issue five of this Court's opinion, this Court ruled **all** of the issues raised by Appellants regarding attorney's fees awarded to Respondent were **not preserved for review**. Specifically, this 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. This Court cited multiple cases in support of the error preservation requirement. This Court went on to say in a footnote, however, that it was "troubled" by the redacted billing statements. Accordingly, they 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).

Respondent most respectfully asserts that if an issue is not preserved, then this Court 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 has this power under circumstances similar to those at hand. To do so would negate the long-standing requirements of issue preservation established both by our Supreme Court and this 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, our 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 this Court and the Supreme Court repeatedly state they cannot review[2]. *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).

[2] In some cases our appellate courts will find an issue not preserved, but will indicate even if it was preserved, it would still not be reversable error. Trial attorneys are always grateful for such action by our appellate courts, but that is not the case here.

In addition, the trial court's award of attorney fees comes to this 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 this Court's specific ruling that this issue is not preserved, the reduced award of attorneys' fees made by the trial court cannot and should not have been reversed. It should be reinstated on rehearing.

Respectfully submitted,

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September 15, 2025