THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Ralph P. Stroman, Special Referee

Case No. 2009-CP-26-1909
Appellate Case No. 2012-212984

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM

Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and

Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

PETITION FOR REHEARING

The appellants respectfully petition for a rehearing on the following grounds:

1. The single issue presented by the appeal is whether the contract of sale contains clear language limiting the seller to the remedies expressly provided by the contract. *Bannon v. Knauss,* 282 S.C. 589, 592–93, 320 S.E.2d 470, 472 (Ct. App. 1984). In failing to analyze or discuss the terms of the contract, the Court overlooked the fact that there is no such clear language.

2. In failing to analyze or discuss the evidence, the Court overlooked the fact that not only is there no clear language in the contract limiting the seller to the remedies expressly provided by the contract, but moreover the evidence affirmatively proves that the parties could not possibly have intended to limit the seller to the remedies identified in the contract. This is shown by the following evidence:

A. The agreement expressly contemplates an action by either party for money damages as an alternative to specific performance. Paragraph 27(ℓ) provides:

> Should *either party* hereto institute any action or proceeding in court to enforce any provision hereof *or for damages by reason of any alleged breach of any provision of this Agreement or for any other judicial remedy,* the prevailing party shall be entitled to * * * attorney's fees * * * .

Def. Exh. 33, ¶ 27(ℓ), R. 675 (emphasis added.) *Either party* may institute an action for damages. In the case of *First Trust & Savings Bank v. Pruitt,* 121 S.C. 484,113 S.E. 469 (1922), the court made this logical deduction from a similar provision:

> The contracts must be considered as a whole. They provide at length for the enforcement of the rights of the respective parties under the contracts by legal proceedings, and the payment of the attorney's fees by the parties who fail to carry out their part of the contract. It is manifest that, if the contract contemplated that the buyer had the right to terminate the contract by a forfeiture of the initial payment, then no legal proceedings would be had, and no attorney's fees to be paid.

Id. at 498. *First Trust* was cited with approval in *Bannon v. Knauss, supra.* This paragraph 27(ℓ) is further evidence that the seller is not limited to forfeiture of the earnest money as its sole damages remedy.

B. The remedy provision of the agreement, Paragraph 20, deals only with a breach by the purchasers occurring before the *first* of the four takedowns. Paragraph 20 states that if the purchasers are in default "by the Closing Date," the seller is entitled to retain the earnest money. There were four closing dates, not one. The purchasers' earnest money was to be applied toward the purchase price at the closing of the *first* takedown. Agreement, Def. Exh. 33, ¶ 4(a), R. 664. This was done. [Def. Exh. 7, lines 201 and 506, R. 632.] If the purchasers defaulted *after* the first takedown, the seller could

have no right to forfeiture of the earnest money since the earnest money had already been applied to the purchasers' credit at the first closing. The earnest money was gone. The purchasers' breach did not take place until two years after the earnest money had been applied to their credit in this manner. *Limiting the seller to a forfeiture of the earnest money would leave the seller with no damages remedy at all for a breach occurring after the first takedown.* By contrast to the remedies expressly identified to the seller, the remedies expressly granted *to the purchaser* are available for a breach by the seller occurring before "***any*** Closing Date". [Agreement, Def. Exh. 33, ¶ 20, R. 671 (emphasis added).] Thus, the parties recognized that there were multiple closing dates, and that forfeiture of the earnest money could only be an option for the seller if the purchasers' breach occurred before the *first* of the four closing dates. It would make no sense for the parties to grant the seller a damages remedy for a breach occuring before the first takedown, but not the second, the third, or the fourth. This would make the remedy provision arbitrary and capricious. No contract should be construed in such a way. For a breach occurring *after* the first takedown, the seller must possess the usual common law remedies or else is entirely deprived of a damages remedy after the first closing.

C, The agreement limits *the purchasers'* right to sue for damages to a case of intentional or willful breach by the seller. No such limitation is imposed upon *the seller's* right to sue the buyers for damages. [Agreement, ¶ 20, Def. Exh. 33, R. 671.]

3. The Court observed that any ambiguity in the agreement would be construed against the appellants. The Court thereby overlooked the fact that because no party contends that any provision of the agreement is ambiguous, this observation is inappropriate dictum. Moreover, the Court overlooked the fact that the maxim favoring construction against the drafter would not apply in any event. This maxim "is usually viewed as the 'last resort,' ' tie-breaker' rule of interpretation . . . ." *Fire Ins. Exchange v. Oltmanns,* 2012 Ut.App. 230, 285 P.3d 802, 805 (2012).

> After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade,

> and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. If . . . the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is less favorable in its legal effect to the party who chose the words.

3A CORBIN, CORBIN ON CONTRACTS § 559 (1960). The confinement of this maxim's use to the role of tie-breaker of last resort is especially appropriate where, as here, the parties' bargaining strength was equal. *Rehmar v. Smith,* 555 F.2d 1362, 1369 (9th Cir. 1976).

CONCLUSION

The Court should rehear the case and analyze the evidence on the issue of whether the parties intended to limit the seller to the remedies expressly identified in the agreement.

Respectfully submitted,

James P. Stevens, Jr.
Stevens Law Firm, P.C.
Post Office Drawer 127
Loris, SC 29569
(843) 756-7652

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

by: James B. Richardson, Jr.
James B. Richardson, Jr.

Attorneys for Appellants.

February 4, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

M1262

Ralph P. Stroman, Special Referee
Case No. 2009-CP-26-1909
Appellate Case No. 2012-212984.

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

CERTIFICATE OF SERVICE

I certify that I served a copy of the appellants' petition for rehearing upon the attorney for the respondents by first class mail, first class postage prepaid, addressed to him at his address of record, namely:

J. Dwight Hudson, Esq.
Hudson Law Office
1203 48th Avenue North, Suite 111
Myrtle Beach, South Carolina 29577

on February 4, 2014.

James B. Richardson, Jr.

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorney for Appellants.

February 4, 2014.

Law Office of
James B. Richardson, Jr.

1229 LINCOLN STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE 803/799-9412
FAX 803/799-9628

February 4, 2014

Honorable Jenny A. Kitchings
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Beverly v. Bucksville Farms
Appellate Case No. 2012-212984

Dear Ms. Kitchings:

Enclosed for filing is appellants' petition for rehearing.

Thanking you, I remain

Yours very truly,

Jim Richardson

James B. Richardson, Jr.

cc: J. Dwight Hudson, Esq.
James P. Stevens, Jr., Esq.