

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

RECEIVED

FEB 18 2014

SC Court of Appeals

Randy A. Beverly, L.L.C. and Donald Godwin, L.L.C.....Plaintiffs

v.

Bucksville Farms, Inc..... Defendant & Third Party Plaintiff

v.

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

OF WHOM

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

and

Randy A. Beverly, L.L.C., Donald Godwin, L.L.C.,
Randy A. Beverly and Donald Godwin, are Respondents

RETURN TO PETITION FOR REHEARING

The Respondents respectfully make the following Return to the Appellants' Petition for Rehearing:

1. The Court Of Appeals Correctly Ruled That Bannon v. Knauss Is Inapplicable To This Case Because The Agreement's Language Is Clear Regarding The Seller's Exclusive Remedies

The unanimous hearing panel from the Court of Appeals correctly held that the language of the contract or Agreement was clear as to the exclusive remedies to the seller being return of the earnest money or specific performance. Randy Beverly, et al v. Bucksville Farms, et al, 2014-UP-028 (2014). The Appellants contend that the Court erred in so finding and that Bannon v. Knauss, 282 SC 589, 320 SE2d 470 (Ct. App. 1984), obligates the Court to conduct and to discuss a detailed analysis of the full language of the Agreement to determine the intent of the parties. This contention misapprehends the holding in Bannon.

Bannon holds that *if there is no clear language in a contract to the contrary*, a nonbreaching party can either seek a contractual remedy or sue for any other remedy. *Id.* In Bannon, one party asserted that a liquidated damages clause in a contract was an exclusive remedy but the Court held that there was no language in the contract making retention of the earnest money the seller's exclusive remedy. *Id.*

In this case, Bannon does not apply for two reasons. First, Bannon is inapplicable because there is clear language in the contract making the remedies provision exclusive. Second, Bannon is inapplicable because the Appellants are NOT nonbreaching parties, since the unappealed portion of the Trial Court's Order holds that all parties acted more in keeping with their longstanding and familial relationship than in strict compliance with the terms of the Contract. *Final Judgment, R. 3-9.*

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Where the contract's language is clear and unambiguous, **the language alone** determines the contract's force and effect." Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 SC 582, 703 SE2d 207 (2010).

Contrary to the Appellants' contentions, Bannon does not authorize Courts to ignore the plain language of a contract in order to rewrite a remedies provision.

2. Under the Two Issue Rule, The Trial Court's Decision Was Based On More Than One Ground And The Appellants Failed To Appeal On All Grounds. Therefore, the Unappealed Grounds Became The Law Of The Case

The Appellants' Petition expressly states that the "single issue" on appeal is whether the parties' Contract of Sale limits the seller to the remedies provided by the contract. *Petition For Rehearing*. However, the Order did more than construe the contract language. It also determined that neither party followed the strict terms of the contract for some time and it held that none of the breaches by the parties were willful or intentional. *Final Judgment, R. 3-9*.

The Order found that the parties had known each other for a number of years prior to this agreement and that Appellant Creel is Respondent's Beverly's nephew. *Final Judgment, R.5*. It also stated as follows: "In the way of people who know each other well, for quite some time matters were arranged and conducted with more regard to their personal circumstances than the terms of the agreement. The Court finds that neither the seller nor the buyer abided by the strict terms of the contract for quite some time." *Id*. Further, the Order found that "both parties were under certain constraints imposed by a dwindling economy and a very difficult real estate market." *Final Judgment, R.8*. Further, the Trial Court's Order grants the Declaratory Judgment sought by Respondents in their pleading initiating this action. *Final Judgment, R9*. The Order found no

actionable breach by the Respondents which would have entitled the Appellants to damages, absent the remedies clause. *Final Judgment, R. 3-9*.

As the above shows, the Trial Court's Order ruled on more than one ground and not all grounds were appealed from. The unappealed rulings, "right or wrong" are therefore the law of the case and consideration of the Appellants arguments should be barred by the two issue rule. Atlantic Coast Builders and Contractors, LLC v. Laura Lewis, 398 SC 323, 730 SE2d 282 (2012).

3. Despite Appellants' Contentions To The Contrary, The Opinion Shows that the Court of Appeals Hearing Panel Properly Analyzed And Discussed The Terms Of The Contract

Appellants' Petition for Rehearing repeatedly claims that the Court of Appeals failed to analyze or discuss the terms of the subject contract. While the Court's opinion does not include a lengthy discussion or analysis of the contract terms, it does find that "the Agreement's language is clear as to the exclusive remedies available to the seller." Randy Beverly, et al v. Bucksville Farms, et al, 2014-UP-028 (2014).

The Appellants contend that the Court of Appeals "overlooked the fact that there is no such clear language" because the Opinion did not "analyze or discuss the terms of the contract." *Id.* However, there is no dispute that the subject contract or agreement appeared in the Record on Appeal (R.663-679) nor is there a dispute that the agreement was extensively briefed and extensively argued by both parties. The Record and briefs were considered by the Court of Appeals and the ruling panel conducted and heard oral argument.

The Court's finding that the language is clear conveys the assurance that the Court analyzed the full record, including this agreement. The Court is under no burden or duty to analyze or discuss the terms of the contract at length in its opinion to establish that it considered them fully. The lower

Court presided over the trial, then considered comprehensive proposed Orders and it determined that the language of the remedies provision is clear. The hearing panel had before it the full Record, briefs and hear oral argument, and it ruled unanimously that the language of the remedies provision was clear.

The Court of Appeals has the discretion to issue rulings of any length. If the Court finds unanimous agreement as to all matters pertinent to a ruling, then it may choose to issue a brief "*per curiam*" opinion, as it did in this case. The fact that a ruling is *per curiam* does not indicate that the Court failed to fully consider the matter at hand. This opinion from the Court of Appeals found the language of the agreement clear so there is no support for Appellants' contention that "in failing to analyze or discuss the terms of the contract the Court overlooked the fact that there is no such clear language."

The fact that a unanimous, *per curiam*, ruling is brief does not indicate a lack of analysis or discussion by the Court. In this case it indicates that the hearing panel unanimously agreed that the language of the agreement "is clear as to the exclusive remedies available to the seller" and that the panel did not deem it necessary to issue an expansive opinion to support the ruling.

4. The Court of Appeals Correctly Ruled That The Language Of The Remedies Provision Is Clear As To the Exclusive Remedies Available To The Seller And That Since The Language Is Clear, Plain And Capable Of Legal Construction, The Language Alone Determines The Provision's Force And Effect

A. The Court of Appeals held that the language of the remedies provision is clear and that when contract language is clear, plain and capable of legal construction, the language alone determines the provision's force and effect. Ecclesiastes Prod. Ministries v. Outparcel Assocs, LLC, 374 SC 483, 649 SE2d 494 (Ct. App. 2007). When language is clear, the parties' intentions are

deduced from the language. *Id.* The Court held that the clear language of this contract limited the (Appellant) seller's remedies to forfeiture of the earnest money and specific performance. Randy Beverly, et al v. Bucksville Farms, et al, 2014-UP-028 (2014). The parties agreed to transfer the earnest money to the seller as part of an earlier closing (R.8) and Mr. Creel chose to sell the remainder of the property to a third party after the commencement of the present litigation(R.117, 1.7-21; R.8)

B. Although the clear language makes such unnecessary, consideration of the Agreement as a whole supports the conclusion that the remedies provision was intended to be exclusive.

(1) The remedies provision, Paragraph 20's, exclusivity is shown by that provision incorporating the seller's Paragraph 11 right to sue for indemnification after listing the seller's remedies for breach as being the earnest money or specific performance. If the remedies provision wasn't intended to be exclusive, there would be no reason for it to incorporate the seller's Paragraph 11 right to sue for indemnification for any damages associated with the buyer's testing during the inspection period. Paragraph 11 already provided that the right to indemnification would survive the closings or termination of the agreement, so the only reason to bring Paragraph 11 up in Paragraph 20 is that Paragraph 20 is intended to provide the exclusive remedies so it had to refer back to and incorporate Paragraph 11 because indemnification is a remedy. R.666¶11, 671¶20

(2) In the event of the seller's breach, the remedies provision gives the buyer the right to terminate the agreement and receive a refund of the earnest money, to sue for specific performance and to pursue any other remedy at law or in equity in the event of a willful or intentional breach. The fact that the provision speaks to all of the otherwise available common law remedies and then only gives them to the purchasers, and then conditions the conditions the availability of those remedies on a breach being "willful or intentional" means that the remedy provision is intended to be exclusive. R 671 ¶20

(3) Appellants' claim that the Attorney's Fee provision shows an intention that the remedies provision not be exclusive is incorrect. The Attorney's Fee provision of the contract discusses either party instituting an action for damages for breach because both parties had the right to sue for breach to obtain the earnest money and/or contract termination. It references "any other judicial remedy" because the buyer's could sue for any other remedy at law or in equity if the seller committed an intentional or willful breach and the seller could sue for indemnification if a mishap occurred during the buyer's testing period. R.675 ¶27; R.671¶20; R.666¶11

(4) Appellants' claim that the remedies provision was limited to a breach by the buyers before the first of the four takedowns is refuted by the contract itself. The agreement refers to

multiple closings on multiple dates R.663 ¶2, 669-670 ¶16; 671-671 ¶22. In fact, it is titled: "Agreement to Buy and Sell Real Estate in Multiple Closings". R.663. Appellants claim that the remedies provision's limits applied to the seller only as to purchaser defaults by the first closing date and claims that the earnest money was to be applied toward the purchase price of the first closing, which was done. The earnest money was applied towards the first closing because Mr. Creel was in dire financial straits and needed the money and, as the Order finds, all these people knew each other well, Mr. Creel is Mr. Beverly's nephew and through much of the contract the parties acted in keeping with their personal relationship rather than strictly according to the contract. The contract actually called for the earnest money to be applied to the LAST CLOSING and the header for that paragraph so reflects. The body of the paragraph says the earnest money would be applied to the first closing. This appears to be a drafting error. If this is an ambiguity, it is not in the remedies provision and it would be construed against the drafter of the agreement - Mr. Creel. Actually, not only did Mr. Creel's attorney draft the agreement, Mr. Creel himself is an attorney who has dealt with many real estate matters for himself, for his father and for his father's estate. R.95, 1.17-22; 140, 1.20-141, 1.5; R499-500, 503, 322, 1.2-323, 1.19.

5. The Court of Appeals Correctly Found That Any Ambiguities In the Agreement Would Be Construed Against The Appellants as Drafters And This Determination Was A Finding And Was Not "Inappropriate Dictum" as Appellants Now Contend

The Appellants would prefer that the Court overlook the fact that they drafted the Agreement and the remedies provision at issue, and they would similarly prefer not to emphasize the fact that Appellant Creel is himself a licensed attorney. R.95, 1.17-22; 140, 1.20-141, 1.5; R499-500, 503, 322, 1.2-323, 1.19. Despite this preference, in a contract construction case, the Trial Court's and Court of Appeal's finding as to the identity of the drafter is relevant, particularly when the drafter is attacking or asking the Court to re-write the language of his agreement.

The Court of Appeals was following general principals of contract construction in finding the identity of the drafter and holding that any ambiguity in the contract would be construed against the drafter. Davis v. KB Home of SC, Inc., 394 SC 116, 129 n.4, 713 SE2d 799 (Ct. App. 2011). The principal goes further than ambiguities, and actually holds that any ambiguity, doubt or uncertainty as to the meaning of a contractual provision should be resolved against the party who prepared the contract or is responsible for its verbiage. Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3; 274

S.E.2d 423 (1981), Ward v. West Oil Co., 379 S.C. 225; 665 S.E.2d 618 (Ct. App. 2008).

Absent an ambiguity, the meaning of a contractual provision is to be determined from the plain language of the contract. Ecclesiastes Prod. Ministries v. Outparcel Assocs, LLC, 374 SC 483, 649 SE2d 494 (Ct. App. 2007). In this case, it is the Appellants who ask the Court to overlook the plain language of the remedies provision so the finding by the Court of Appeals noting that ambiguities would be construed against the Appellants was not "inappropriate dictum" but was rather necessary to the consideration of the case. This is especially true since, as noted above, the term "ambiguities" is essentially shorthand for the full meaning of the principal - which is that any ambiguities, doubts or uncertainties as to the meaning of a contractual provision get resolved against Appellants Creel, the seller, being party who drafted the contract and is responsible for the verbiage. Myrtle Beach Lumber Co. v. Willoughby and Ward v. West Oil Co., *supra*.

Underlying this principal of contract construction is a code of personal responsibility that South Carolina jurisprudence considers of particular import, especially when the party asking the Court to insert "common law" remedies into a remedies provision is the party who drafted the provision; to wit: Had the Appellants wanted the remedies provision to provide the seller with "all common law remedies" or "all remedies available at law or in equity", the Appellants could have put that wording into the remedies clause. The Court of Appeals inclusion of the finding about ambiguities being constructed against the drafter is also a re-affirmation of the import of personal responsibility and a reminder that the Court does not re-write agreements for parties who could have written them differently in the first instance.

CONCLUSION

As the Court of Appeals essentially held, the Court's task is to construe the agreement that the drafter drafted and the parties signed and to do so according to its terms.

This Court should deny the Petition for Rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JDH', written over a horizontal line.

J. Dwight Hudson, Esquire

Hudson Law Offices

1203 48th Avenue North

Suite 111

Myrtle Beach, SC 29577

(843) 692-9889

Attorney For Respondents

Dated: February 14, 2014

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-26-12046

Randy A Beverly, LLC & Donald
Godwin, LLC ----- Plaintiffs
v.
Bucksville Farms, Inc. ----- Defendant & Third-Party Plaintiff
v.
Randy A. Beverly & Donald Godwin..... Third Party Defendants &
v. Fourth Party Plaintiffs
Benjamin J. Creel, individually & as surviving
director of Bucksville Farms, Inc..... Fourth Party Defendant

OF WHOM

Bucksville Farms, Inc. & Benjamin J. Creel,
individually & and as surviving director are..... Appellants

and

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

Appellate Case No: 2012-212984.

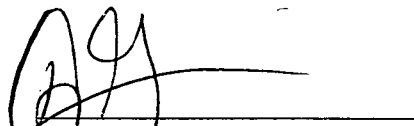
PROOF OF SERVICE RE
Return To Petition For Rehearing

I certify that I have served the FINAL BRIEF OF RESPONDENTS on the Appellant(s)
by depositing a copy of the same in the United States Mail, postage prepaid, on February 14,
2014, addressed to their counsel at the addresses noted below:

James B. Richardson, Jr. Esq.
Attorney at Law
1229 Lincoln Street
Columbia, SC 29201

James P. Stevens Jr. Esq.
Attorney at Law
PO Drawer 127
Loris, SC 29569-0127

Dated: February 14, 2014



J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889

Attorney For Respondents

HUDSON LAW OFFICES

1203 48th AVENUE NORTH
SUITE 111

MYRTLE BEACH, SOUTH CAROLINA 29577

TELEPHONE (843) 692-9889
TOLL FREE: 1-877- 874-5256
FAX (843) 692-9190
www.hudsonlawoffice.com

SHALLOTTE OFFICE:
5285 MAIN STREET, SUITE 21
SHALLOTTE, NORTH CAROLINA 28459
TELEPHONE: (910) 755-6543
FAX (843) 692-9190
TOLL FREE: 1-877- 874-5256

CONWAY OFFICE:
211 LAUREL STREET, PO BOX 7
CONWAY, SOUTH CAROLINA 29528
TELEPHONE: (843) 248-3620
FAX (843) 692-9190
TOLL FREE: 1-877- 874-5256

J. DWIGHT HUDSON*
MARY ANNE GRAHAM

EMAIL: hudsonlaw@hudsonlawoffice.com
OR: hudsonlaw@sc.rr.com

*ADMITTED IN S.C. AND N.C.

REPLY TO: MYRTLE BEACH OFFICE

February 14, 2014

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211
Fax: 18037341839

RECEIVED

FEB 18 2014

SC Court of Appeals

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

Dear Ms. Kitchings:

Per the Court's instructions, enclosed are the following:

- An original and six (7) copies of Return to Petition for Rehearing;
- An original and a copy of a Proof of Service of the same

I ask that you please return a clocked copy of the same in the postage paid envelope enclosed for that purpose.

By copy of this letter, and by the enclosed Proof of Service, I hereby serve a copy of the stated enclosures upon Appellant's counsel via US Mail.

Because of the constraints imposed by the weather, and to confirm timely receipt of this Return, I also forward it to the Court and to Counsel via Facsimile.

With best regards, I remain

J. Dwight Hudson, Esq.

J. Dwight Hudson, Esq.
Hudson Law Offices

JDH: mag

Enclosure(s): as stated

cc: James P. Stevens, Jr. (Fax - 7563785)
James B. Richardson, Jr. (Fax - 18037999628)