THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAEL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master in Equity

Case No. 2010-CP08-4140

Marion Creel, Appellant

v.

Douglas Creel, Respondent.

FINAL BRIEF OF RESPONDENT

RECEIVED
OCT 08 2014
SC Court of Appeals

Respectfully Submitted,

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Attorney for the Respondent
105 Carolina Avenue
Moncks Corner, South Carolina 29461

Michael H. Murphy, III
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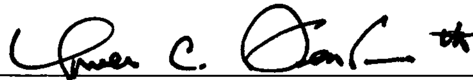

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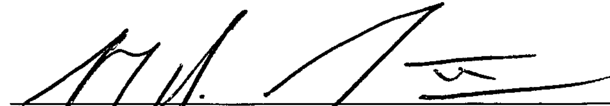

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STATEMENT OF ISSUES ON APPEAL

1. THERE IS NO ERROR IN THE TRIAL COURT'S DECISION WHEN THE TRAIL COURT FOUND DR. HAMMET WAS NOT PROPERLY QUALIFIED AS AN EXPERT BY APPELLANT

2. THE TRIAL COURT PROPERLY FOUND THAT APPELLLANT FAILED TO MEET THE BURDEN OF PROOF TO SHOW UNILATERAL MISTAKE ON APPLENAT'S PART

3. THE TRIAL COURT DID NOT ERR FINDING APPELLANT FAILED TO PROVE UNILATERAL MISTAKE IN ALL OF ITS FORMS

4. THE TRIAL COURT PROPERLY FOUND THAT THE PARTIES AGREEMENT SHOULD BE UPHELD AND APPELLANT'S COMPLAINT BE DISMISSED WITH PREJUDICE

STATEMENT OF THE CASE

This action is a dispute between a father and son. The subject of the dispute is property located at 1730 North Main Street, Summerville, South Carolina 29483 (hereafter "Property").

This action was filed by the Appellant, approximately 20 months after the closing on the property, on November 19, 2010, and subsequently served on the Respondent. Appellant set forth three causes of action: Mutual or unilateral mistake, a breach of the covenants of good faith and fair dealing, and breach of fiduciary duties owed the Appellant. Appellant seeks reformation of the promissory note or, alternatively, a rescission of the transaction. Various damages and attorney's fees were requested by Appellant.

Respondent Answered and Counterclaimed on February 1, 2011. The Respondent asserted the Statute of Frauds as an affirmative defense to any application plead by the Appellant for alteration, modification or revocation. Further, Respondent asserted

Appellant failed to state a claim pursuant to Rule 12(b)(6) of the Rule of Civil Procedure and that the action is frivolous in nature under the Frivolous Sanctions Act, Title 15-36-10, et. seq., Code of Laws of South Carolina, 1976, as amended. As Appellant, Respondent requested various damages and attorney fees. The Honorable Kristi Harrington, Circuit Court Judge of the Ninth Judicial Circuit, through a consent order of reference, refereed the matter to the Master-in-Equity for Berkeley County.

The matter was tried in front of the Honorable Robert E. Watson, Master-in-Equity, in Berkeley County South Carolina. Testimony was heard on January 11, 2012, May 9th, 2013 and September 30, 2013. The Court issued interim orders on May 9, 2013 and September 4, 2013.

After the close of testimony on September 30, 2013, the Court requested the parties submit briefs outlining their positions as to the facts and relevant law before a decision is render by the Court. After submitting the briefs, the Court notified that parties of his decision in favor of the Respondent by email on February 10, 2014. On April 4, 2014, the Court filed a written decision in favor of Respondent.

FACTS

The Court took testimony from five witnesses. All witnesses were called by Appellant. Robin Creel Chavis and Suzette Creel testified on January 11, 2012 for the Appellant (hereafter referred to a Transcript 1 (T1) and Record of Appeal ("R.") (R. pgs. 29-61)). Testimony was stopped in an attempt to resolve the case. The case did not resolve and testimony continued. (Record of Appeal Appendix 9-10 ("ROA A")). Dr. David H. Hammet testified by deposition. His deposition[1] was taken on May 3, 2013 (hereafter referred to as Deposition 1 (D1) and (R. pgs. 134-154). The Appellant, Marion

[1] Dr. Hammet's deposition was admitted into evidence on May 9, 2013.

Creel, Jr., was the next to testify for the Appellant on May 9, 2013 (hereafter referred to as Transcript 2 (T2) and (R. pgs. 62-106). The remaining two witnesses, Attorney Peter Wycoff and Respondent, were called on September 30, 2013 (hereafter referred to as Transcript 3 (T3) and (R. pgs. 110-154).

Respondent believes it will be beneficial to the Appellate Court to address each witness's relevant testimony. The Respondent will do so in Chronology order with occasional overlaps.

TESTIMONY OF ROBIN CREEL DAVIS

Ms. Chavis is the daughter of the Appellant and step-sister of the Respondent. T1 pg. 6 lines 22-25 (R. pg. 29). She testified that her father had a stroke in September 2008 and as a result had a lot of short term memory loss initially. T1 pg. 7 line 6 (R. pg. 30); pg. 8 line 11 (R. pg. 31). Yet after he returned home to recuperate there was "some" short term memory loss. T1 pg. 9 lines 1-2 (9R. Pg. 32). Around November 2009, Appellant called Ms. Chavis and the Respondent concerning the Property. Appellant executed a power of attorney appointing Ms. Chavis and Respondent as his attorney-in-fact. It appears Respondent was limited to making repairs (if needed) while Ms. Chavis handled contracts that needed to be prepared, showing units, depositing rent, and collecting rent[2]. T1 pgs. 9 line 23 to pg. 10 lines 1-7 (R. pgs. 32-33.) Ms. Chavis would call Respondent on limited occasions regarding the Property. id.

Regarding the sale of the property, Ms. Chavis did not know about the sale until after it happened. T1 pg. 13 lines 14-17 (R. pg. 36). She testified during this time that

[2] Appellant argues that the power of attorney evidences a trust relationship with the Respondent. Although this may be true to a limited extent, who did Appellant give greater trust to? Who collected rent, deposited rent, etc..? Of further note, the power of attorney was limited not general. T1 pg. 12 lines 3-9 (R. pg. 35). Which shows greater trust?

Appellant "could remember short-term things." T1 pg. 13 lines 18-25 (R. pg. 36). Although the date is not certain the Appellant revoked the power of attorney naming Respondent and Ms. Chavis attorneys-in-fact. T1 pg. 18 lines 18-21 (R. pg. 41).

Regarding the contract of sale drawn up and executed by the parties, Ms. Chavis was not present. T1 pg. 9 lines 22-25 (R. pg. 32). She did not prepare the contract or attend the closing of the Property[3]. T1pg. 20 lines 1-7 (R. pg. 43).

Ms. Chavis testified that she knows of no documents that would declare her father mentally incompetent and incapable of handling his own affairs. He brought this lawsuit without a guardian and has a South Carolina driver's license. T1 pg. 20 lines 14-20 (R. pg. 43). Ms. Chavis testified she did not know anything about the drafting of the document of sale[4], the terms of the document, the Appellant and Respondent's agreement, or who paid what to whom. T1 pg. 21 lines 10-13 (R. pg. 44).

TESTIMONY OF SUZETTE MARIE CREEL

Mrs. Creel is the wife of the Appellant, Marion Creel. At the time of her testimony they had been married for nineteen years. T1 pg. 23 lines 12-15 (R. pg. 46).

She testified that her husband had a stroke in September 2008 and his left side was paralyzed. Yet, she testified "he got that back totally" two or three months later. T1 pg. 23 lines 20-25 (R. pg. 46) and pg. 24 lines 1-10 (R. pg. 47). There was no testimony regarding her husband suffering short-term memory loss as a result of the stroke. Tl pg 23 line 12 to pg. 41 line 20 (R. pgs. 46-59 and ROA A 1-7).

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[3] Appellant is no stranger to loan closings. He was in construction for 45 years and house building for 20 years. Ms. Chavis testified that the Appellant probably closed numerous loans. See T1 pg. 17 lines 22-25 (R. pg. 40) and pg. 18 lines 1-10 (R. pg. 41).

[4] T2, Plaintiff's/Appellant's Exhibit 1 and Defendant's/Respondent's Exhibit 1, "OFFER TO PURCHASE REAL ESTATE" (R. pg. 169).

She was not at the meeting between Appellant, Ms. Chavis and the Respondent regarding the Property. T1 pg. 24 lines 16-18 (R. pg. 47). She knew of the sale of the Property to the Respondent but was not negotiating the terms. T1 pg. 24 lines 19-22 (R. pg. 47.). After the closing of the property and upon reviewing the documentation, the first thing that "jumps out at us" was the handwritten late fee and not the interest rate. T1 pg. 27 lines 20-21 (R. pg. 50). The late fee and interest rate are on the same document with the late fee subsequent. She never had direct communications with the Respondent or Attorney Peter Wyckoff regarding the interest rate. T1 pg. 32 lines 3-11 (R. pg. 55).

After the closing, Mrs. Creel testified she and her husband went to two attorneys regarding this issue. T1 pg. 33 lines 14-19 (R. pg. 56). The first attorney was Reynolds H. Blankenship, Jr. Mr. Blankenship did write a letter to Respondent addressing the interest rate. The letter is dated May 5, 2009. id. and T3 Plaintiff's/Appellant's Exhibit 2-3 (R. pg. 170). Yet, approximately five months later, the second attorney, Ned Dennis, writes two lengthy letters to Respondent and nowhere is the interest rate mentioned. Attorney Dennis only addressed the late fee and an insurance issue. T1 pg. 35 lines 4-25 (R. pg. 58) and pg. 36 lines 1-21 (R. pg. 59); T1 Defendant's/Respondent's Exhibit 1 and 2 (R. pg. 161-163).

TESTIMONY OF DAVID H. HAMMETT, MD.

Respondent contends that Appellant failed to properly qualify Dr. Hammett as an expert. Yet, Dr. Hammett's testimony serves some purpose.

At the time of his deposition, Dr. Hammet had been seeing the patient for about six months. D1 Hammet, pg. 11 lines 22-24 (R. pg. 139). This would mean he began

seeing the Appellant on or about October to November 2012[5]. He testified that there was not a lot of information that he saw how the stroke affected the Appellant in the first few months. D1 pg. 15 lines 16-19 (R. pg. 140) and pg. 18 lines 22-24[6] (R. pg. 143). He testified that the stroke did not make Appellant incompetent. D1 pg. 18 lines 8-12 (R. pg. 143). Dr. Hammet further testified that the stroke "***could've*** been playing a factor that day. D1 pg. 20 lines 16-17 (R. pg. 145).

During cross examination, Dr. Hammet confirmed that he had no medical opinion regarding Appellant's cognitive abilities "during any of the time periods [he] is talking about." D1 pg. 26 lines 22-25 (R. pg. 149) and pg. 27 line 1 (R. pg. 150). He further testifies:

> "I don't – I don't have an assessment of his neurologic function before I met him that is – that was ***personally*** obtained. And the statements about this type of stroke are ***based on neuroscience*** and in – and, thus, in ***general*** regarding this area of the brain." D1 pg. 27 lines 14-19 (R. pg. 150). Emphasis added.
>
> And
>
> "What I'm prepared to do about that day[7] is outline, based on the injury and his brain, ***potential deficits***. ***I'm not prepared to confirm what his exam showed that day.*** " D1 pg. 29 lines 10-13 (R. pg. 152). Emphasis added.

TESTIMONY OF MARION CREEL, JR

The offer to purchase the Property was Appellant's idea. Respondent initially said he couldn't afford it. T2 pg. 15 lines 12-13 (R. pg. 68).

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[5] More than *four years after* the stroke.
[6] Dr. Hammond states, in part, "I wasn't there at the times that he's most concerned about to examine him or see him..." D1 pg. 18 lines 23 (R. pg. 143).
[7] The Property closing date: April 9, 2009.

The parties met on March 10, 2009. An "OFFER TO PURCHASE REAL ESTATE" was executed by Appellant and Respondent. T2 pg. 31 lines 6-12 (R. pg. 84). Appellant testified he does not recognize the documents because it does not have his original signature on it. T2 pg. 18 lines 4-9 (R. pg. 71). He has to see the original signature on the document he signed. He further states that "signature is not my original signature. When I give him (Respondent) that to take straight back to Wyckoff's office, it went back to Georgia and was faxed back[8]." T2 19 lines 21-23 (R pg. 72). During cross, Appellant testifies that's "a copy of my signature, but that's not my original signature on that document." T2 pg. 58 lines 9-10 (R. pg. 100). Although, Appellant's position is that he did not sign the "OFFER TO PURCHASE REAL ESTATE," this position is not on solid ground. T2 pg. 19 lines 18-21[9] (R. pg. 72)

Also, it would be fair to say that the Appellant was paying attention during the closing because he noticed that the late payment penalty was blank on the promissory note. T2 pg. 28 lines 8 -25 (R. pg. 81) and pg. 29 line 1 (R. pg. 82). He testified that they argued over the late fee. T2 pg. 29 line 8 (R. pg. 82). Although he testified that he could not concentrate during the closing, his concentration was good enough to notice a blank space among, and one could imagine, copious sheets of paper. T2 pgs. 28-29 (R. pgs. 81-82).

Appellant states his custom is to add the call feature to all of his contracts. T2 pgs. 40 to 41 to line 18 (R. pgs. 91-92). Yet, how many contracts does he have with family members? Would it be reasonable to believe that he would change his customary practice for someone he loved dearly and could not afford the Property in the first place?

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[8] Appellant's/Plaintiff's exhibit 1 "went back to Georgia and was faxed back" as Appellant testified.
[9] See T2 pg. 46 lines 6-13 for more signature testimony (R. pg. 93).

Appellant testified that "I called these people before the closing. Eight days before the closing I called every one of them, told them the terms of the contract. Eight days. I told Wyckoff. Called Karen in his office. Mr. Wycoff called me back, I told Mr. Wycoff what them terms was in that thing..." T2 pg. 48 lines 2-7 (R. pg. 95). Appellant did tell them the terms and those terms are accurately reflected in the Promissory Note. T2 Plaintiff's/Appellant's Exhibit 2 and 3 (R. pgs. 166-167).

Appellant testified that he believes Respondent and Attorney Wycoff did not do the closing correctly. Yet, Attorney Wyckoff is not named as a Defendant is the lower action. T2 pg. 60 lines 19-22 (R. pg. 102) and pg. 61 lines 6-11 (R. pg. 103).

TESTIMONY OF ATTORNEY PETER WYCKOFF

When asked about the closing by Appellant's attorney, Attorney Wycoff testified "[w]ell, I remember that – well, that everything seemed quite normal. The interest rate seemed pretty much in there with the prevailing rate at the time." T3 pg. 8 lines 2-10 (R. pg. 110). He goes on to testify about the late fee. The promissory note had a blank space for the late fee. Attorney Wyckoff testifies that he thinks "Marion Creel said, "Well, why don't you just put $5. So I put $5 in the blank." T3 pg. 9 lines 2-3 (R. pg. 111). He and his office manager, who had been working for him since 1988, believe that is his "5." T3 pg. 9 16-20 (R. pg. 111).

He had no indication before or during the closing that anything was amiss. T3 pg. 15 lines 17-19 (R. pg. 113). Although, the seller does not typically read the note, Attorney Wyckoff explained the terms of the note to the Respondent. T3 pg. 15 lines 22-25 (R. pg. 113). Yet, during this time, Appellant's concentration was directed at the missing late fee and an argument ensued. T2 pg. 28 lines 8-25 (R. pg. 119) and pg. 29

line 1 (R. pg. 120). It would be reasonable to believe, Appellant was privy to this detailed explanation of the note because he was facing in that direction. Further, during the closing, Appellant "seemed perfectly normal to" Attorney Wyckoff and he "had no reason whatsoever to suspect that he had any type of health issues or mental issues or, for that matter, matters of illiteracy... I have no way of – no reason to question anything." T3 pg. 18 lines 3-11 (R. pg. 115).

Relying on a copy to prepare a promissory note is standard practice. T3 pg. 23 lines 14-22 (R. pg. 116). The "OFFER TO PURCHASE REAL ESTATE" "meets all the – all the requirements of a valid binding agreement" so it was not necessary to execute a sales agreement. T3 pg. 24 lines 10-25 (R. pg. 117).

TESTIMONY OF DOUGLAS CREEL

Respondent testified that his father approached him to purchase the Property. At first, Appellant was reluctant at first because he lived very far away and it would be hard to manage the Property. T3 pg. 29 lines 7-17 (R. pg. 120). Respondent agreed to purchase the property but the price was not determined until they met. The parties agreed to a sales price of $550,000.00 with $150,000.00 down. The remaining $400,000.00 would be owner financed at 4% for twenty years. "That was it." T3 pg. 30 lines 9-12 (R. pg. 121). When asked about Appellant and Respondent discussing a call feature, Respondent states, "No, because if he had, I wouldn't have bought the building because he only had two tenants in the building when I bought the building, which was only paying – I think it was twenty – I don't remember what is was, $2,400.00 or $2,800.00." T3 pg. 30 lines 17-21 (R. pg. 121). No one had a written agreement when they arrived at the property. So, once the terms were negotiated and agreed upon, Respondent typed up

the agreement, and both parties signed with Respondent reading the agreement to Appellant. T3 pg. 31 lines 1-12 (R. pg. 122).

Respondent agreed to change the late fee but would not agree to change the interest rate terms because "that was not discussed then when we signed the agreement he and I made." T3 pg. 32 lines 12-15 (R. pg. 123). Respondent did not respond to Appellant regarding the interest rate because "we didn't discuss this when we were doing the contract. I mean I couldn't offer to pay him a living raise every five years, two percent. That wasn't what we agreed on." T3 pg. 32 lines 18-23 (R. pg. 123). He did attempt to call Appellant but Appellant hung up on him. See T3 pg. 33 lines 11-15 (R. pg. 124).

Respondent stated he bought the building to help out his father. The economy was way down and houses were being foreclosed everywhere. T3 pg. 37 lines 6-10 (R. pg. 128). Respondent understands that Appellant trusted him, but he also trusted the Appellant. T3 pg. 37 lines 13-16 (R. pg. 128). And that trust resulted in:

> "...I mean I bought the building. We both sat down and talked about the building, $550,000.00. I paid $150,000.00 and a four percent interest rate. I mean he had two tenants in there; there's no way I could pay he more than that. And he agreed on that. That's what he agreed on and that's what I agreed on. We both had an agreement." T3 pg. 31 lines 22-25 (R. pg. 122) and pg. 38 lines 1-3

(R. pg. 129).

Thus far, Respondent has complied with the parties' agreement by paying Appellant $150,000.00down, [mortgaging the Property] and keeping the payments current. T3 pg. 40 lines 9-14 (R. pg. 131).

1. THERE IS NO ERROR IN THE TRIAL COURT'S DECISION WHEN THE TRIAL COURT FOUND DR. HAMMET WAS NOT PROPERLY QUALIFIED AS AN EXPERT BY APPELLANT

Dr. Hammet was deposed on May 3, 2013. Attorney Thuss elicits Dr. Hammet's background beginning on page 6 line 14 and continuing to page 8 line 1. D1 (R. pgs. 134-136). After hearing this testimony, Appellant's counsel failed to move to qualify[10] Dr. Hammet an expert. In fact, there is no evidence in the record that Dr. Hammet has ever qualified as an expert before. What field is he an expert in? The burden fell on Appellant to show the witness, here, Dr. Hammett, possessed the necessary learning, skill or practical experience to enable Dr. Hammett to give expert testimony.[11] Although, eliciting some back ground information, Respondent respectfully submits Appellant failed to show the trial court Dr. Hammet possessed the requisite knowledge, skill, experience, training, or education to testify as an expert. Furthermore, Dr. Hammett's "opinions" throughout his testimony are not rendered to a "reasonable degree of medical certainty."

Although, Dr. Hammett's deposition was admitted into evidence, Appellant's failures above are not absolved. The record reflects that Dr. Hammet did not testify as an expert. Dr. Hammet, without being qualified as an expert, testified as a layman. His testimony should be given little or no weight at all.

If Dr. Hammett's testimony is admitted as Appellant requests, Dr. Hammet's testimony only strengthens Respondent's position that the terms of the promissory note should be upheld. Even if he was properly qualified, Dr. Hammet's testimony does not

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[10] See Rule 702 South Carolina Rules of Evidence.
[11] See Gadson v. Mikasa Corp, 628 S.E.2d 262, 270 (Ct. App. 2006)

bolster Appellant's contention that his stroke affected his ability to comprehend the closing.

Dr. Hammet testified that the stroke did not make Appellant incompetent. He further testified that the stroke "could've" played a factor that day (closing on property). Finally, Dr. Hammet testified that he has no medical opinion regarding Appellant's cognitive abilities "during any time periods [Appellant] is talking about." D1 pg. 26 lines 22-25 (R. pg. 149) and pg. 27 line 1 (R. pg. 150). A finding that Dr. Hammet testified as an expert offers no basis for Appellant's request for relief. The admittance only strengthens Respondent's case.

2. THE TRIAL COURT PROPERLY FOUND THAT APPELLLANT FAILED TO MEET THE BURDEN OF PROOF TO SHOW UNILATERAL MISTAKE ON APPELLANT'S PART

"In order to rescind an instrument on the grounds of mistake, the proof must be by evidence that is clear and convincing." Smothers v. Richland Memorial Hosp., 328 S.C. 566, 493 S.E.2d 107 (Ct.App.1997)(citing Blanton v. Blanton, 284 S.C. 250, 325 S.E.2d 340 (Ct. App. 1985) as cited in Truck South, Inc. v. Patel, 528 S.E.2d 424 at 429. "Unilateral mistake is not by itself grounds for rescinding the contract unless the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to recession, or where mistake is accompanied by a very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement." State Farm Mut. Auto. Ins. Co. v. Turner, 303 S.C. 99, 399 S.E.2d 22 (Ct. App. 1990) referencing Scott v. Mid Carolina Homes, Inc., 359 S.E.2d 291 (1987). "The clear and convincing standard is the highest burden of proof known to civil law." Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct.App.2004).

“Clear and convincing evidence is: "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Anderson v. Augusta Chronicle, 355 S.C. 461, 473, 585 S.E.2d 506, 512 (Ct.App.2003).

Appellant has to show by a clear and convincing standard that there was a unilateral mistake. Further, a unilateral mistake will not by itself grounds for rescinding the contract unless the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to recession, without negligence on the part of the party claiming recession, or where mistake is accompanied by a very string and extraordinary circumstances which would make it wrong to enforce the agreement. See State Farm v. Turner. Appellant has failed to meet these requirements. The evidence offered by the Appellant falls well below the “highest burden of proof known to civil law.” See Austin v. Specialty Transp. Servs., Inc.

Although Appellant’s wife testified she assisted the Appellant in preparing certain documents with the sale of the Property, she *never* negotiated the terms. This was left to the Appellant. T1 pg. 24 lines 19-22 (R. pg. 47). The daughter of Appellant, Robin Creel Chavis, *did not know* of the sale of the Property until after it happened. T1 pg. 13 lines 14-17 (R. pg. 36). So, it appears we are left with only the Appellant’s testimony.

Appellant’s testimony does not show unilateral mistake or “fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to recession, or where mistake is accompanied by a very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.” Yet, it does show seller’s remorse. Appellant sought out his son, the Respondent, to purchase the Property. He wanted his son to have it. His son could not afford it. Is it reasonable for a father to negotiate a

fixed rate with his son? Is it reasonable to treat a son differently than others? Of course it is.

3. THE TRIAL COURT DID NOT ERR FINDING APPELLANT FAILED TO PROVE UNILATERAL MISTAKE IN ALL OF ITS FORMS

The Court and Dr. Hammett found Appellant competent. T2 pg. 64 lines 12-13 (R. pg. 106) and D1 pg. 18 lines 8-12 (R. pg. 143). Appellant was asked if he was physically able to read the documents at the closing, he responded "I couldn't see the documents that good." T2 pg. 31 lines 23-25 (R. pg. 84). Yet, he noticed the late fee was omitted from promissory note. This omission was discovered while Appellant had a headache and according to him could not concentrate. T2 pg. 28 lines 8-11 (R. pg. 81).

Appellant contended below that he was wronged by Respondent and Attorney Wycoff. T2 pg.48 lines 7 to 19(R. pg. 95), pg. 60 lines 19-22 (R. pg. 102), pg. 61 lines 6-11 (R. pg. 103). Now with an adverse ruling, Appellant contends that the lower court erred in limiting the elements of unilateral mistake. Respondent submits the lower court did not narrowly limit the elements of unilateral mistake but properly ruled on the evidence before the court.

Appellant had a duty to inspect and insure the documents at closing were proper and accurately reflected the parties' agreement. He failed to do so. Respondent submits the terms (interest rate without a call provision) is accurately reflected in the promissory note. Appellant as stated before contacted Attorney Wycoff's office and told them the terms of the contract before the closing. T2 pg. 48 lines 2-7 (R. pg. 95).

There is no clear and convincing evidence that Appellant because of a medical condition should be excused from the terms of the contract between the parties. The only testimony offered as to Appellant's medical condition at the time of the closing came

from Appellant himself. He testified he had a headache and could not concentrate. T2 pg. 28 lines 8-13 (R. pg. 81). Yet, Appellant testified he could read, noticed a late fee missing among numerous documents, and has done proposals and contracts from 1962 to 1997 (T2 pg. 18. lines 14-17)(R. pg. 71).

Appellant and Respondent negotiated the terms to purchase the property. The parties were the only people present when they signed THE OFFER TO PURCHASE REAL ESTATE. Respondent could not afford the property with a call feature and depressed economy. Respondent purchased the property to help his Dad/Appellant. T3 pg. 37 lines 6-12 (R. pg. 128) and line 16 to pg. 38 line 3 (R. pg. 129). During negotiations, trust existed between the parties. T3 pg. 37 lines 13-15 (R. pg. 128). Yet, this trust or fiduciary relationship, as Appellant denies, was consummated in good faith and due regard to the interests of the Appellant.

This is not a case of unilateral mistake in all of its forms. This is a case of a binding agreement to purchase property whose terms are clear and unambiguous. It should be noted once more that Appellant testified that "I called these people before the closing. Eight days before the closing I called every one of them, told them the terms of the contract. Eight days. I told Wyckoff. Called Karen in his office. Mr. Wycoff called me back, I told Mr. Wycoff what them terms was in that thing..." T2 pg. 48 lines 2-7 (R. pg.95). It is respectfully submitted those terms are accurately reflected in the promissory note.[12]

4. THE TRIAL COURT PROPERLY FOUND THAT THE PARTIES AGREEMENT SHOULD BE UPHELD AND APPELLANT'S COMPLAINT BE DISMISSED WITH PREJUDICE

[12] Appellant was provided with the original note and copy of the mortgage at the end of the closing. T3 pg. 16 lines 9-17 (R. pg. 114).

The lower court properly ruled in favor of the Respondent. Respondent, in addition to the arguments above, relies on the Statute of Frauds and Parol Evidence Rule.

Statue of Frauds

"**SECTION 32-3-10.** Agreements required to be in writing and signed.

No action shall be brought whereby:

...

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them;

...

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

HISTORY: 1962 Code Section 11-101; 1952 Code Section 11-101; 1942 Code Section 7044; 1932 Code Section 7044; Civ. C. '22 Section 5516; Civ. C. '12 Section 3737; Civ. C. '02 Section 2652; G. S. 2019; R. S. 2151; 1712 (2) 545."

"The writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement. Rest.2d. Contracts § 131. The essential terms must be ascertainable from the memorandum without resort to parol testimony. Barr v. Lyle, 263 S.C. 42, 211 S.E. 2d 232 (1975); Walker v.Preacher, 188 S.C. 431, 199 S.E. 675 (1931) cited in Smith v. McClam, 346 S.E.2d. 720, 723 (S.C.1986).

"Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. South Carolina Code Ann. § 32-3-10(4). Failure to put such a contract in writing renders it void. South Carolina Code Ann. § 27-35-20 (1976). Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds)" as cited in Player v. Chandler, 382 S.E.2d 891, 299 S.C. 101 (S.C. 1989)

The "OFFER TO PURCHASE REAL ESTATE" signed by both parties clearly meets the requirements of South Carolina Code §32-3-10 (4). The document clearly identifies the property for sale, sale terms (price and down payment), and mortgage with interest rate terms. The document states with reasonably certainty the essential terms as

agreed to by the parties. The parties' agreement is required to be in writing, and, thus, cannot be orally modified. The court does not have to resort to parol evidence because the "essential terms [are] ... ascertainable from the memorandum." Barr v. Lyle, 263 S.C. 42, 211 S.E. 2d 232 (1975); Walker v.Preacher, 188 S.C. 431, 199 S.E. 675 (1931) cited in Smith v. McClam, 346 S.E.2d. 720, 723 (S.C.1986).

Parol Evidence Rule

"Where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms." Ray v. South Carolina Nat'l. Bank, 281 S.C. 170, 314 S.E.2d 359 (1984).

A review of Respondent's Exhibit number 1 (T2)(R. pg. 169) would leave the reader with a clear impression that the terms are "unambiguous, clear and explicit." id. Further, the promissory note[13] executed at the closing would leave the same impression. T2 Appellant's Exhibit 2 and 3 (R. pg.166-167).

OFFER TO PURCHASE REAL ESTATE:

"1. This offer is subject to buyer obtaining a real estate mortgage for no less than $OWNER TO HOLD MORTGATE 400000.00 AT 4% INTEREST FOR 20 YEAR LOAN payable over 20 YEARS years with interest not to exceed 4% at customary terms within 30 days from date hereof."

Appellant's Exhibit number 1. (T2)(R. pg. 169).

Promissory note:

"Together with interest at the rate (4%) percent per annum payable in equal monthly installments of **$2,423.92** commencing on **May 9, 2009** and continuing on the same day of each month thereafter until the principal sum of **$400,000.00** and the interest accrued thereon has been paid, and if not sooner paid, shall be due and payable on **April 9, 2009**. Said Installment when so paid shall be applied

[13] The promissory note being drafted from the OFFER TO PURCHASE REAL ESTATE.

first to the interest then accrued and the balance thereof to the reduction of the principal hereof.

Appellant's Exhibit 2 and 3 (T2) (R. pg.166-167).

The writing on the face of the documents expresses the whole agreement. Parol evidence cannot be admitted to add another term, such as a call feature. Blackwell v. Faucett, 117 S.C. 60, 108 S.E. 295 (1921). Appellant trusted the Respondent. Respondent trusted the Appellant. Evidence of fraud is not present. "The general rule is that all conversations and parol agreements between the parties prior to or contemporaneous with the written agreement are considered to have been merged therein so that they cannot be given in evidence for the purpose of changing the contract of showing an intention or understanding different from that expressed in the written agreement. Charleston & W. C. Ry. Co. v. Joyce, 231 S.C. 493, 99 S.E.2d 187. However, it is just as well established that if the writing was procured by words and with a fraudulent intent of the party claiming under it, then parol evidence is competent to prove the facts which constitute the fraud." Parham-Thomas-McSwain, Inc. v. A. L. Ins. Co., 111 S.C. 37, 96 S.E. 697. The writing was not procured by words and the fraudulent intent. Parol evidence is not allowed. The writing was procured between a father and son who trusted each other. It is clear when the agreement was consummated that only the Appellant and Respondent were present. The Parol Evidence Rule excludes any extrinsic evidence that Appellant wishes to offer. The Appellant is bound by the "OFFER TO PURCHASE," promissory note and Property closing.

The trial court properly found that Respondent has "complied with the terms of the parties' agreement and that the Appellant has failed to meet his burden of proof and has failed to show that this was in fact not the parties agreement." Respondent

respectfully request that this Court find, as the lower court, that the parties' agreement should be upheld.

CONCLUSION

Although Appellant suffered a stroke, the impact the stroke had on negotiating the sale of the Property and the closing of the Property is speculative at best.

As shown, Appellant negotiated directly with Respondent. No one else was involved. On March 10, 2009, the parties entered the meeting with the terms of the sale of the Property not finalized. Negotiations ensued resulting in the OFFER TO PURCHASE REAL ESTATE. The terms are clear and unambiguous. All essential terms are present. Regarding the Promissory Note, attorney Wyckoff states the "interest rate seemed pretty much in there with the prevailing rate at the time." The interest rate in the Promissory note is the same as the parties' agreement.

Respondent has complied with the terms of the parties' agreement[14]. He paid $150,000.00 down. He owner financed $400,000.00. Mortgage payments on the Property are current. Respondent plans to continue upholding the parties' agreement.

Respondent respectfully submits that Appellant has failed to meet his burden of proof, failed to show any wrongdoing, and failed to show that this was, in fact, not the parties' agreement. The Respondent respectfully requests that this Honorable Court uphold the parties' agreement and the decision of the lower court. Thus, allowing Respondent to continue upholding the parties' agreement as he has done since March 10, 2009.

[14] If Respondent had fraudulent intent on his mind why not reduce the down payment or mortgage amount?

Respectfully Submitted,

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Michael H. Murphy, III
Attorney for the Respondent
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Dated this 30th day of September 2014
In Moncks Corner, SC 29461

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAEL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master in Equity

RECEIVED
OCT 06 2014
SC Court of Appeals

Case No. 2010-CP08-4140

Marion Creel, Appellant

v.

Douglas Creel, Respondent.

RULE 211 (B) CERTIFICATE

We certify that the undersigned has complied with Rule 211 (B).

After the initial brief the parties agreed to supplement their respective designation of matters. Two minor additions, in bold below, were made to Respondent's initial brief.

The final brief on page 5 references the additional matters requested by Respondent (Record of Appeal Appendix 9-10):

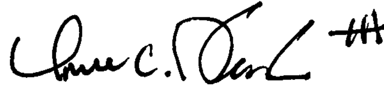
"Testimony was stopped in an attempt to resolve the case. The case did not resolve and testimony continued. (Record of Appeal Appendix 9-10 ("ROA A"))."

Further, on page 7 respondent added the Record of Appeal Appendix reference:

"There was no testimony regarding her husband suffering short-term memory loss as a result of the stroke. Tl pg 23 line 12 to pg. 41 line 20 (R. pgs. 46-59 **and ROA A 1-7**)."

No other additions were made.

Respectfully Submitted,



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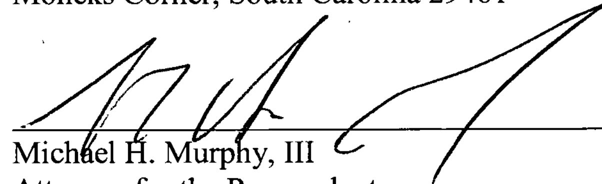

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Robert R. Thuss, Esquire, Attorney for Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on September 30th, 2014 addressed to Mr. Robert R. Thuss, Esquire at Post Office Box 589, Swansea, SC 29160.

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