

AS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Master in Equity

Case No. 2013-CP-18-0183 consolidated with
Case No. 2013-CP-18-0074

Stephen Dudek and Doreen Cross

Respondents

v.

Thomas M. Ferro and Lorraine B. Ferro

[Redacted] Appellants.

AND

Molly M. Morpew

Appellant [Redacted]

v.

Stephen Dudek, Doreen Cross, Thomas Ferro and
Lorraine Ferro, Defendants,

Of Whom

Stephen Dudek and Doreen Cross are

Respondents.

**FINAL BRIEF OF RESPONDENTS
STEPHEN DUDEK and DOREEN CROSS**

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The instant appeal arises from an Order of the Master in Equity of Dorchester County granting Respondents' complaint and ordering specific performance of a sales contract between Respondents and Appellants Thomas and Lorraine Ferro. Molly Morpew, the individual who purchased the property at issue following the breach of Respondents' contract, brought suit against both Respondents and the Ferros, seeking specific performance of her subsequent contract, or, in the alternative, damages in the event the Respondents' contract was found enforceable. The two actions were consolidated for trial, the Trial Court having concluded that the principal position of all of the Appellants was that the Ferro-Morpew contract was valid.

The Ferros appeared *pro se* during the trial phase, and have filed a *pro se* Notice of Appeal. Morpew was represented by counsel initially, but is now also *pro se* in this appeal. The Initial Brief filed by Appellant Morpew indicates, in its introduction, that it is apparently being filed on behalf of all of the Appellants, jointly, and certainly the bulk of the argument seems to be that the initial contract between Respondents and the Ferros is unenforceable. It has a signature line for the Ferros, but is signed exclusively by Appellant Morpew. Ms. Morpew, is, of course, not an attorney and cannot represent any party other than herself. Time has now expired on the right of the Ferros to file a separate Initial Brief.

I. FACTS

The facts of this action are set out in detail in the Order of the Trial Court of November 6, 2014. On October 23, 2012, Respondents entered into a contract for the purchase of a parcel of real property, located in Summerville, with the Ferros. Morpew entered into a contract with the Ferros, for the purchase of the same parcel, on December 16, 2012. The Dudek/Cross contract, as is standard in the real estate industry, contained a "Time is of the Essence" provision, and by its own terms was to close not later than November 30, 2012.

It did not close at that time, and the Ferros believed that Respondents herein had failed to fulfill a significant contingency: i.e., they had not obtained conventional financing by that time. The Ferros subsequently sold the property to Appellant Morpew. The Trial Court found, and the parties have never disagreed, that the property is unique and that its value cannot be compensated for by mere money.

The parties have also consistently agreed that Respondents had not obtained conventional financing, as required by the contract, prior to the scheduled date. The focus of the disagreement is whether or not this failure was excused, and whether or not the failure was actually caused by the Ferros' failure to meet their duties under the contract. The Trial Court concluded, as a Finding of Fact and as a Conclusion of Law, that the failure was excused. Specifically, the Trial Court found that the Ferros had made it impossible to comply with this requirement because of their failures to timely provide documents and complete necessary repairs. The Court found that the actions of the Ferros in failing to adequately communicate with Respondents and to meet certain other duties demonstrate that the Ferros "obfuscated the intent and meaning of the contract in the performance of conditions incumbent upon them to fulfill." Order, p. 11. As a result, the Trial Court ordered that the timing of the contract be reset in order that the parties might complete its terms, and ordered that the Ferros sell the property to Respondents as soon as Respondents were able to obtain conventional financing.

In addition, the Trial Court found that the contract between the Ferros and Morpew was contingent upon the failure of Respondents to meet the financing contingencies, and would only become effective if Respondents terminated their prior contract. Because this contract had not yet come into being, the Court found that the Ferros had not breached it and Morpew was not entitled to damages or other relief. Unfortunately, notwithstanding the Order of the Trial Court,

it appears that the Ferros – who now seem to reside in Colorado – have not transferred ownership but have permitted Morphew to move into the home. The Ferros continue to refuse to complete their obligations under the original Dudek/Cross contract, which remains incomplete at this time.

II. ARGUMENT

A. Appellant Morphew Lacks Standing to Argue the Merits of the Contract Between Respondents and Appellants Thomas and Lorraine Ferro, Sellers of the Property.

As noted *supra*, the Initial Brief ostensibly submitted on behalf of all of the Appellants, jointly, is a *pro se* document signed exclusively by Appellant Molly Morphew. Although it contains a signature line for the Ferros, neither of them – let alone both – have signed it. Ms. Morphew is not an attorney and is not authorized under the laws of the State of South Carolina to represent anyone other than herself. *See* S.C. Code § 40-5-310 (“No person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar...”). Morphew’s Initial Brief cannot, by statute, be read to include arguments made by other parties, including the Ferros.

There are a total of five separate, although essentially overlapping, arguments made in the Initial Brief. With the possible exception of Number V,¹ all of the arguments raise alleged errors in the manner in which the Trial Court dealt with the contract between the Ferros and Respondents. Despite the statement contained in the Order that Morphew and the Ferros “have consistent positions on the Dudek/Cross Contract,” this is insufficient to confer standing on Morphew to challenge the validity of a contract to which she is not a party. That Morphew wishes to have the opinion of the Trial Court with respect to the enforcement of the first sales

¹ This argument, addressed *infra*, addresses primarily whether or not Ms. Morphew sought damages or merely the enforcement of her contract. As is further explained below, it is completely immaterial whether or not Ms. Morphew sought exclusively specific performance or alternative remedies.

contract overturned does not give her the ability to challenge any of the terms of or conclusions drawn from the examination of that contract.

Although the remedy fashioned by the Trial Court upon finding that the contract between Respondents and the Ferros was enforceable was in specific performance rather than in damages, there is no question but that the entirety of this action is founded upon a simple claim of breach of contract. In order to bring an action for breach of contract, one must, first and foremost, have a contract. Morphew had a contract with the Ferros, a contract which is clearly contingent upon a finding that the prior contract, the contract with Respondents, is invalid and unenforceable. Morphew has every right and the ability to bring suit against the Ferros under her contract with them, should the contingency remaining in her contract come to pass. She has, however, no relationship, contractual or otherwise, with Respondents. She has no stake in the contract between the parties to that contract, is not in privity with Respondents, and lacks standing to argue the position advocated by the Ferros with respect to their contract.

It is axiomatic that a part must have standing in order to institute an action. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). In order to have standing, one must have a personal stake in the subject matter of the action. *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 297 (2001). One must, in other words, be the real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999).

That having been said, it would almost seem, on first glance, that Morphew has an actual and substantial interest in the contract between Respondents and the Ferros, because she too wishes to purchase the particular and singular parcel of real property at issue. Full examination

of the facts of these two consolidated actions shows that is incorrect. It is highly significant, in this respect, that this appeal arises from a consolidation of two entirely different actions, brought together for trial purposes merely because the witnesses were identical, and because the contract between Morphew and the Ferros was entirely contingent upon a preliminary finding that the contract with Respondents was invalid. Consolidation for trial does not, however, transform Morphew into a party in interest with regard to Respondents' contract.

As a general rule, "one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third party is not, as such recoverable by the plaintiff." *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). Over the years, the courts and legislature of this State have created a number of exceptions to this time-honored rule. Direct privity with the owner of a project is not required in order to impose a mechanic's lien. S.C. Code § 29-5-20; *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 762 S.E.2d 561 (2014). The South Carolina Supreme Court has recently held that privity is not a requirement for a third party who is an intended beneficiary of a will to bring an action in malpractice against an attorney whose negligent drafting of the document defeated or diminished the client's intent. *Fabian v. Lindsay*, ___ S.C. ___, 765 S.E.2d 132 (2014). It is no longer required in order to bring an action under the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10; see *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 666 S.E.2d 247 (2008).

None of the exceptions applies in the instant matter. Morphew is completely unconnected to the contract between Respondents and the Ferros. She is not a third party beneficiary of their contract and does not fall into any of the statutory or common-law exceptions

to the requirement of privity. She can neither bring suit upon nor defend the contract between the sellers of the property and the original purchasers. She is not a party and has no interest in the litigation. That her own contract with the Ferros is contingent upon whether or not Respondents finally close on the property she also wants does not, in a legal sense, make her a party in interest to the outcome of the Ferro-Dudek/Cross litigation.

In short, Morphew cannot represent the Ferros, and lacks standing to bring arguments on their behalf. Almost without exception, the Initial Brief filed *pro se* by Molly Morphew attacks the validity of the Dudek/Cross – Ferro contract. These are not arguments that can be made by an individual not a party to that contract. Even though Molly Morphew has an interest in the real property at the heart of this action, she lacks the legal interest in the first contract that would permit her to defend it on appeal. As Morphew clearly lacks standing to make any arguments with respect to the validity or the invalidity of the original contract, all those portions of her Initial Brief that focus on this issue should be stricken.

B. Even If Morphew Has Standing to Raise Issues Related to the Contract Between Respondents and the Ferros, Her Arguments Regarding the Master’s Findings of Fact and Conclusions of Law Are Without Merit.

Morphew has made a total of five substantive arguments in her Initial Brief. The first two jointly purport to challenge the legal conclusions of the Trial Court; those arguments are predicated upon the second two, which attack his factual findings. The fifth argument, which is independent of the claims made with respect to the Dudek/Cross – Ferro contract, contends that the Trial Judge mis-comprehended Morphew’s complaint. For the sake of convenience, these groups of arguments will be dealt with together.

1) **The Legal Conclusions of the Trial Court Are Correct, and This Court Should Not Review *De Novo* the Findings of Fact Below.**

“An action for breach of contract is an action at law.” *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). “In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law...The trial judge’s findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Id.* As noted in the Order, both Respondents and Morphew brought their actions to enforce contracts entered into with the Ferros. This action is, consequently, an action at law – although the Trial Court determined that the only appropriate remedy was in equity – and the scope of this Court’s review is limited to errors of law. The facts should not be reviewed *de novo*, and the Findings of the Trial Court should be upheld unless there is no evidence to support them.

Morphew’s second set of two arguments – that the Master in Equity who tried the action erred by finding facts not in the record and that he relied upon unreliable testimony and consequently demonstrated bias in favor of Respondents – are direct challenges to the facts as found by the Trial Court. The Court below made extensive findings of fact in its Order. After a thorough review of the contract between Respondents and the Ferros, and after careful examination of the testimony of the parties and the loan officer with whom Respondents were dealing, the Trial Court concluded that it was apparent from the evidence that the Ferros had breached the contract with Respondents by failing to comport themselves in a manner showing good faith and fair dealing.

As in any case, the legal conclusions drawn are predicated upon the factual scenario before the Court. In this case, the lengthy factual findings made by the Trial Court led it to the

inescapable conclusion that, as a matter of law, the Ferros had breached their contract with Respondents. The further conclusion drawn from that is that any alleged breach committed by Respondents is excused as a result of the prior breach, and that Respondents are entitled to the appropriate remedy for the breach by the Ferros. In this instance, as a house is not a fungible asset, and compensation in money damages would have been insufficient, the Trial Court ordered the equitable remedy of specific performance.

The entirety of Morpew's arguments regarding enforcement and breach of the Dudek/Cross – Ferro contract is based upon her insistence that many of the facts expressly found by the Trial Court are incorrect. The bulk of the argument consists of emphasis on those of the facts presented which support Morpew's position² and claims that this Court should disregard any testimony to the contrary.

This entire string of purported "arguments" presented by Morpew is nothing more than the quintessential contention that this Court should review the facts *de novo* and apply its own version of those facts to the case. There is no legal argument; there is no actual claim that the Trial Court applied the wrong law. There is no dispute regarding what constitutes a breach of contract, or that the Trial Court incorrectly analyzed the components of that cause of action.³ Rather, despite the extensive and lengthy discussion of the testimony heard by the finder of fact in this case, Morpew wishes to have this Court conclude that only those facts, or those inferences drawn from some of the facts, should be considered. She contends only that the actual findings of fact below are incorrect.

² Actually, the emphasis is on that testimony that would support the position the Ferros most likely would have taken had they ever filed a brief. See, *Section A, supra*.

³ The second "Statement of Issues on Appeal", which reads "[d]id the master in equity err in concluding that the failure of Respondents to meet their conditions of their contract in a timely manner incapable of being defended" certainly appears to be a legal argument. Unfortunately, it is incomprehensible.

The Trial Judge, acting as the exclusive finder of fact in this action, heard all of the testimony, considered the credibility of the witnesses presented to him, and reviewed all of the evidence presented at trial. The first 10 pages of his 14-page Order detail the Findings of Fact made as a result of the careful consideration of that testimony. Morphew clearly believes that the Trial Court should have believed different testimony, and should have placed greater reliance on some of the facts, as presented by some of the witnesses, than on others. It is not the role of this Court to reconsider the factual determinations made below. *Electro Lab, supra*. Despite recognition of this principle, Morphew would nonetheless have this Court reverse the Trial Judge on the facts of the case.

Not only is Morphew's Initial Brief completely devoid of any argument on her own behalf, it is completely devoid of any actual legal argument at all. She is asking that this Court re-try the action, by reviewing all of the Findings of Fact and concluding that her version is correct. This is not the role of the Court of Appeals, and the Trial Court should be affirmed.

2) The Only Arguments Regarding Morphew Herself Are Moot.

Section V of the Initial Brief contains the only errors assigned to anything having to do with Molly Morphew, the only signatory to the Brief. Morphew claims, first, that the Master in Equity committed reversible error when he said in his Order that Morphew was asking for damages; and second, that he similarly erred in stating that the Ferros championed her contract with them. Neither of these arguments has any relevance whatever.

It is entirely immaterial whether Morphew sought specific performance of her contract, or specific performance with a claim for damages in the alternative. The Trial Court found that her contract was enforceable, but that its enforceability was contingent upon a decision by Respondents to cancel their prior, and also enforceable, contract. If Respondents close on the

property, Morphew is free to pursue damages against the Ferros at that time, if damages are appropriate. If Respondents fail to close, Morphew is similarly free to remain in the house. Her prayer for relief in the Court below is not material to any issue on appeal.

Her second assertion is both difficult to understand and is similarly immaterial. The Trial Court found that Morphew and the Ferros were, in essence, on the same side with respect to the enforceability of Respondents' contract. Here again, Morphew appears to object to the inference that the Ferros "championed" her contract with them only because she sought damages as an alternative remedy. It is completely irrelevant why, in subjective terms, the parties felt one contract was enforceable and another was not. The Trial Court found that the two sets of Appellants were lined up on the same side of the argument, opposed to Respondents. Their internal feelings about why they were so aligned make no difference.

CONCLUSION

For the reasons above, the instant appeal should be dismissed, and the decision of the Master in Equity of Dorchester County affirmed in its entirety.

Respectfully submitted,



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CERTIFICATE OF COUNSE

The undersigned hereby certifies that Appellants' Final Brief is in compliance with Rule 211 (b) of the South Carolina Rules of Appellate Procedure.



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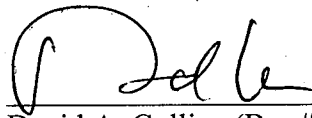
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Final Brief of Respondents Stephen Dudek and Doreen Cross, including the Certificate of Counsel, has been served this 15 day of May, 2015, via ordinary U.S. Mail, upon the following:

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The undersigned hereby certifies that Respondent's Final Brief is in compliance with Rule 211 (b) of the South Carolina Rules of Appellate Procedure.



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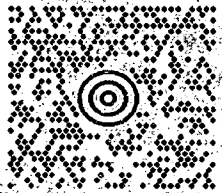
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