

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

---

**APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas**

**Samuel M. Price, Jr., Special Referee**

---

**Case No. 2017-001678**

---

**RECEIVED**

NOV 06 2017

SC Court of Appeals

**Robert G. Shirey ..... Respondent,**

**v.**

**Gwen G. Bishop,  
Cassandra Robinson,  
and T.D. Bank, N.A. .... Defendants,**

**of whom  
Gwen G. Bishop  
and Cassandra Robinson are ..... Appellants.**

---

**INITIAL BRIEF OF APPELLANTS**

---

**Jason Scott Luck  
jluck@garrettlawsc.com  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
Attorneys for Appellants**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF ISSUES ON APPEAL .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS .....	3
STANDARD OF REVIEW .....	7
ARGUMENT.....	8
I.    The Special Referee’s application of Specific Performance was inappropriate. ...	8
A. There was no valid agreement to close on August 13, 2016.....	9
B. Application of Specific Performance is not equitable, as the equities favor Bishop and Robinson.....	11
C. Shirey cannot prove the remaining elements of Specific Performance .....	12
II.   Bishop and Robinson did not have a “confidential relationship” at the time of the execution of the 2015 Deed. ....	13
III.  Even if Shirey is entitled to Specific Performance, Robinson possesses an equitable interest the property.....	15
IV.   Shirey is not entitled to the attorneys’ fees and costs awarded.....	16
CONCLUSION.....	17

## TABLE OF AUTHORITIES

### Cases

<u>Brooks v. Kay</u> , 339 S.C. 479, 530 S.E.2d 120 (2000).....	14
<u>Bullard v. Crawley</u> , 294 S.C. 276, 363 S.E.2d 897 (1987).....	13
<u>C &amp; S Nat'l Bank v. Mod. Homes Constr. Co.</u> , 248 S.C. 130, 149 S.E.2d 326 (1966) ..	12
<u>Campbell v. Carr</u> , 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004).....	7
<u>Cash v. Maddox</u> , 265 S.C. 480, 220 S.E.2d 121 (1975).....	9
<u>Chapman v. Cit. &amp; S. Nat'l Bank of S.C.</u> , 302 S.C. 469, 395 S.E.2d 446 (Ct.App.1990)	14
<u>Crowder v. Crowder</u> , 246 S.C. 299, 143 S.E.2d 580 (1965).....	7
<u>Dixon v. Dixon</u> , 362 S.C. 388, 397, 608 S.E.2d 849 (2005).....	14
<u>Florence Printing Co. v. Parnell</u> , 178 S.C. 119, 182 S.E. 313 (1935).....	10
<u>Gibson v. Hryzikos</u> , 293 S.C. 8, 358 S.E.2d 173 (Ct.App.1987).....	8
<u>Grant v. Hudson</u> , 192 S.C. 394, 7 S.E.2d 2 (1940).....	13
<u>Hembree v. Estate of Hembree</u> , 311 S.C. 192, 428 S.E.2d 3 (Ct.App. 1993).....	14
<u>Hudson v. Leopold</u> , 288 S.C. 194, 341 S.E.2d 137 (1986).....	13, 14
<u>In re Estate of Cumbee</u> , 333 S.C. 664, 511 S.E.2d 390 (1999).....	14
<u>Ingram v. Kasey's Assocs.</u> , 340 S.C. 98, 531 S.E.2d 287 (2000).....	12
<u>King v. Oxford</u> , 282 S.C. 307, 318 S.E.2d 125 (Ct.App. 1984).....	8, 11
<u>Masters v. Rodgers Dev. Group</u> , 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).....	7
<u>Middleton v. Middleton</u> , 288 S.C. 194, 341 S.E.2d 639.....	14
<u>Monteith v. Harby</u> , 190 S.C. 453, 3 S.E.2d 250 (1939).....	8
<u>Shepard v. First American Mort. Co.</u> , 289 S.C. 516, 347 S.E.2d 118 (Ct.App. 1986).....	11
<u>Skipper v. Perrone</u> , 382 S.C. 53, 674 S.E.2d 510 (Ct.App. 2009).....	7
<u>Southern Pole Bldgs., Inc. v. Williams</u> , 289 S.C. 521, 347 S.E.2d 121 (Ct.App. 1986)..	16
<u>Spence v. Spence</u> , 368 S.C. 106, 628 S.E.2d 869 (2006).....	15
<u>Springob v. Univ. of S. Carolina</u> , 407 S.C. 490, 757 S.E.2d 384 (2014).....	10
<u>Thomson v. Scott</u> , 6 S.C. Eq. (1 McCord Eq.) 32 (1825).....	8
<u>Townes Assoc., Ltd. v. City of Greenville</u> , 266 S.C. 81, 221 S.E.2d 773 (1976).....	7
<u>Windham v. Honeycutt</u> , 279 S.C. 109, 302 S.E.2d 856 (1983).....	9

### Statutes

S.C. Code § 30-7-10.....	16
--------------------------	----

### Treatises

Restatement (First) of Contracts § 173.....	12
---	----

## **STATEMENT OF ISSUES ON APPEAL**

- I. Is a buyer entitled to specific performance of an alleged oral amendment to a written real estate contract when there is no clear evidence of a valid contract, the alleged amendment violates the Statute of Frauds and the terms of the written contract, and the equities do not favor such relief?
- II. Is a deed executed in an arms-length transaction between an aunt and her niece subject to cancellation when there is no evidence of undue influence?
- III. Can a buyer who had actual and constructive notice of a third party's claims by the proposed closing date be considered a bona fide purchaser of the property in question?
- IV. Is a contractual award of attorneys's fees and costs to a buyer proper when there was no valid contract and/or the buyer was first to breach?

## STATEMENT OF THE CASE

Respondent Robert G. Shirey filed this action on August 20, 2015 against Gwen G. Bishop for specific performance and breach of contract arising out of Shirey's alleged contract to purchase Bishop's property located at 242 Power Station Road, Newberry, South Carolina. (Complaint). Bishop duly answered the Complaint on or about September 16, 2015. (Bishop Answer). On February 16, 2016, Shirey amended his action to include Cassandra Robinson and TD Bank, N.A. as defendants and to add a cause of action for civil conspiracy. (Am. Complaint). T.D. Bank answered on or about April 7, 2016; Bishop and Robinson answered the Amended Complaint on or about April 25, 2016 (Bishop Answer to Am. Cmpl.; T.D. Bank Answer; Robinson Answer). This action was referred to Special Referee Samuel M. Price, Jr. and tried before him on March 22, 2017. (May 18, 2017 Order, p.1). The Special Referee issued his judgment on May 18, 2017, where he ordered specific performance of the alleged contract, cancellation of a deed conveying the subject property from Bishop to Robinson, and payment of Shirey's attorneys' fees. (May 18, 2017 Order, pp. 12-14).

Bishop, Robinson, and Shirey all filed motions to reconsider (*i.e.* to alter or amend under Rule 59(e)), and the Special Referee denied all these motions by order dated July 23, 2017. (July 23, 2017 Order). Bishop and Robinson served their Notice of Appeal on August 8, 2017.

## STATEMENT OF THE FACTS

This appeal concerns a parcel of land located at 242 Power Station Road, Newberry, South Carolina (tax parcel number 294-23). (Trial Ex. P1). For over thirty years Appellant Gwen G. Bishop and her husband James Bishop operated a grave digging and burial vault business on the property in question. (Bishop Dep. pp. 6-7; Tr. Trans. p. 10). On November 10, 2010, James Bishop died, leaving Gwen Bishop to operate the business alone. (Bishop Dep. p. 8). This responsibility was stressful and overwhelming for Bishop, and Bishop's pre-existing anxiety and depression began to worsen. (Bishop Dep. p. 8; Tr. Trans. p. 10).

On April 25, 2012, Bishop and Appellant Cassandra Robinson (Bishop's niece and owner of a trucking company in Goose Creek, South Carolina) executed a Land Sale Contract ("2012 Contract") to purchase the Power Station Road property. (Tr. Ex. D1; Tr. Trans. pp. 52, 110). The 2012 Contract required Robinson to make monthly payments of \$2,080.77 until the mortgage on the property was satisfied. (Tr. Ex. D1, p.1). The 2012 Contract further provides: "If Buyer does not pay payments on the note monthly, Seller has the right to declare Buyer in default of this Contract." (Tr. Ex. D1, p. 1). Robinson made payments pursuant to the 2012 Contract, but eventually Bishop and Robinson modified their course of dealing: Bishop began paying the \$2,080.77 monthly mortgage payments, instead of Robinson.<sup>1</sup> (Tr. Trans. pp. 53, 54, 71; 07/28/17 Order p. 2). Robinson and Bishop treated Bishop's mortgage payments as Bishop's "rent" for use of the property, and Bishop did not hold Robinson in default, even though Robinson had

---

<sup>1</sup> Bishop testified that she began making the payments because business had begun to pick up. (Tr. Trans. p. 69, 74-75).

missed several payments in the past. (Tr. Trans. pp. 53, 54, 64-69, 74, 154).

In 2013, Bishop's son committed suicide, and Bishop's mental condition further deteriorated. (Bishop Dep. Tr. pp. 7-9; Trial Tr. pp. 55, 68). Bishop was hospitalized in 2014 for psychiatric issues, and her condition caused her to forget about the 2012 Contract with Robinson. (Tr. Trans. pp. 55-57, 62, 103). In late 2014, a mutual friend put Bishop in contact with Respondent Robert G. "Bob" Shirey to discuss a possible sale of the property. (Tr. Trans. pp. 4-5, 10). Shirey is the owner of a business that leases heavy equipment to contractors across the United States and Canada for use at "power plants, wind farms, coliseums, bridges, lock and dam work, and hydroelectric work." (Tr. Trans. p. 6). The Special Referee described him as a "very successful business man". (May 18, 2017 Order, p. 6, ¶ 16). Shirey owns the parcels that border the property in question on two sides (tax parcel numbers 294-20 & 294-24), while the other two sides of the property in question are bordered by Duke Power Company and Power Station Road. (May 18, 2017 Order p. 6 ¶ 16; Trial Ex. P1; Tr. Trans. pp. 7-8).

When put in contact with Shirey, Bishop explained that she was overwhelmed with operating her late husband's business, was experiencing considerable stress, and wanted to close the business. (Tr. Trans. pp. 10-11). In early 2015, Bishop closed her husband's business as her mental condition worsened. (Bishop Dep. pp. 8, 20, 55, 56; Tr. Ex. D8<sup>2</sup>).

Though suffering from depression and under the care of a doctor, Bishop engaged in negotiations with Shirey from March to May of 2015. (Bishop Aff. p. 1). Bishop and

---

<sup>2</sup> While this exhibit was not admitted into evidence at trial, it was exhibit 1 to Bishop's August 11, 2016 deposition, which the Special Referee reviewed in full. (Tr. Trans. p. 49; Bishop Dep. Trans. p. 2).

Shirey exchanged several phone calls and visited the property during this period; Shirey testified that Bishop appeared “undecided”. (Tr. Trans. p. 12; Bishop Aff. p. 1). Eventually Shirey told Bishop: “you know, if you want to sell it let’s sell it. If you don’t...there’s no need to continue to contact me.” (Tr. Trans. p. 12). On May 20, 2015, Bishop traveled to Shirey’s attorney’s office to execute a contract to sell the Power Station Road property to Shirey (the “Shirey Contract”). (Tr. Ex. D2; Bishop Aff. p. 1). Bishop was not represented by counsel at this time, and Shirey was not present at the execution of the contract; Bishop claims “[Shirey’s] lawyer told me to go ahead and sign the contract.” (Bishop Aff. p. 1). The Shirey Contract provided closing must take place “no earlier than August 3, 2015 and no later than August 12, 2015” and that “time is of the essence”. (Tr. Ex. D2 p. 2 ¶ 6, p. 4 ¶ 16.b).

On August 12, 2016, Bishop received a call from Shirey’s attorney’s office requesting to reschedule closing:

- Q: When was the first time you were contacted to go sign the closing papers?
- A: Someone from Mr. Pope’s Law Firm [attorney for Shirey] called and told me not to come on the 12th, to wait till the 13th.
- Q: Okay. So, that was -- so you didn’t -- so you were told not to come on the 12th?
- A: Not to come on the 12th, to wait till the 13th.
- Q: Okay. And, did they tell you, or do you recall why you were not supposed to come on the 12th?
- A: I don’t think he had my contract or something ready. I’m not sure what it was, and I don’t even know who the lady was that called.
- Q: Okay. All right. So you did not show up on the 12th and refuse to sign these things?
- A: No. They told me not to come on the 12th.
- Q: Okay. Now, were you asked to sign an extension of the contract on the 12th?
- A: No.

(Tr. Trans. pp. 59-60; see also Tr. Trans. pp. 80, 81, 91, 95).<sup>3</sup> Shirey was likewise told (presumably by his attorney's office) to "come back on the 13th." (Tr. Trans. pp. 19, 20). Bishop and Shirey never executed a written extension of the contract, despite the Shirey Contract's explicit requirement that such a modification be in writing.<sup>4</sup> (Tr. Trans. pp. 39-40, 60).

The morning of August 13, 2015,<sup>5</sup> Bishop had an appointment with a doctor at the Lovelace Family Clinic in Newberry, South Carolina. (Tr. Trans. pp. 82, 83, 88, 91).<sup>6</sup> She did not feel well, and she requested a written note from the doctor excusing her from attending the day's closing. (Tr. Trans. pp. 80, 81, 88; Tr. Ex. P4; Tr. Ex. P8).<sup>7</sup> Bishop was "terribly upset" after her doctor visit. (Tr. Trans. p. 89). After this visit on August 13, 2015, Bishop and Robinson discussed<sup>8</sup> the 2012 Contract and the Shirey Contract. (Tr. Trans. pp. 57-59, 103). Bishop and Robinson also executed at this time a new contract (the "2015 Contract") which incorporated the 2012 Contract and a deed for the property

---

<sup>3</sup> In cross-examination, Shirey's attorney does not attempt to challenge Bishop's assertion that his office requested an August 13 closing. (Tr. Trans. p. 80).

<sup>4</sup> Section 16(h) of the Shirey Contract provides: "This Contract may not be modified or amended except by a writing signed by both Buyer and Seller." (Tr. Ex. P2 p. 5).

<sup>5</sup> Bishop's January 6, 2016 affidavit indicates this date was August 12, 2015. (Bishop Aff. p.2). This is likely a scrivener's error.

<sup>6</sup> Shirey contends that there was some manner of family disagreement between Bishop, Robinson, and other family members on the evening of August 12, 2016. (Bishop Dep. Trans. p. 30; Tr. Trans. pp. 31, 102). Bishop does not recall such a disagreement, and Robinson testified she had no knowledge such a disagreement (or "ruckus") took place (Bishop Dep. p. 30; Robinson Dep. pp. 139-40).

<sup>7</sup> During trial, Shirey testified that Bishop "may or may not have forged a doctor's statement..." (Tr. Trans. p. 33). The record contains no evidence supporting this allegation.

<sup>8</sup> In July of 2015 Bishop informed Robinson of the Shirey Contract, at which time Robinson reminded her of the pre-existing 2012 Contract and provided Bishop a copy of it. (Bishop Aff. p. 2).

in question from Bishop to Robinson (the “2015 Deed”). (Tr. Ex. P6; Tr. Ex. P9).<sup>9</sup> These documents were filed of record on August 13, 2015.<sup>10</sup>

Shirey’s attorney attempted communications with Bishop on and after August 13, 2015 regarding the property in question. (Tr. Ex. P5). On August 20, 2015 Shirey filed suit against Bishop. (Complaint).

### STANDARD OF REVIEW

“An action for specific performance is one in equity.” Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004). Actions for cancellation of a deed are likewise equitable. Skipper v. Perrone, 382 S.C. 53, 674 S.E.2d 510 (Ct.App. 2009). “It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence.” Id. (quoting Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)).

In a non-jury award of attorneys’ fees and costs under a contract, appellate courts will correct errors of law and shall reverse findings of fact if no evidence reasonably supports the findings. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d

---

<sup>9</sup> Shirey goes to great lengths to argue that, according to metadata, these documents were created the day before. (Tr. Trans. pp. 159-164). Assuming the metadata in question was accurate, it can only establish that a file was created on a particular date: it *cannot* establish the contents, or even the name of the file, when it was created.

<sup>10</sup> The 2015 Contract in the trial record (Tr. Ex. P9) is not the recorded version; this contract was recorded in Book 1841, page 287, of the ROD office of Newberry County. Appellants would ask this Court to take appellate judicial notice of this fact in the public record. See Masters v. Rodgers Dev. Group, 283 S.C. 251, 256-7, 321 S.E.2d 194, 197 (Ct. App. 1984) (An appellate court may take judicial notice of indisputable facts.).

773 (1976).

## ARGUMENT

There is no basis in the record that justifies the extraordinary remedy of specific performance. Specific performance requires *clear evidence of a valid agreement*, and the Shirey Agreement was no longer valid by August 13, 2015. Equity does not favor bending or disregarding the well-settled law of specific performance in order to accommodate Shirey to the detriment of Bishop and Robinson. Further, the Special Referee had no basis under which to disregard the validly-executed deed from Bishop to Robinson and to find Robinson's payments on the 2012 Contract afforded her no equitable right in the property. The Special Referee's order must be reversed and Bishop and Robinson be given the benefit of their bargain.

### **I. The Special Referee's application of Specific Performance was inappropriate.**

Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct.App. 1984) (citing Monteith v. Harby, 190 S.C. 453, 3 S.E.2d 250 (1939)). 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. Gibson v. Hryzikos, 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)).

**A. There was no valid agreement to close on August 13, 2016.**

Specific performance requires clear evidence of a valid agreement, and the alleged oral extension to close on August 13, 2016, was not valid under the applicable contract or South Carolina law. The Shirey Contract required that closing take place by August 12, 2016, and provided explicitly that “time was of the essence”. (Tr. Ex. D2 p. 2 ¶ 6, p. 4 ¶ 16.b). On August 12, 2016, Shirey’s attorney’s office contacted Bishop to tell her that closing could not be accomplished on that day. (Tr. Trans. pp. 59, 60, 81, 91, 92, 95).<sup>11</sup> When the caller from this office suggested that closing should take place on August 13, 2016, Bishop’s only response was: “ok”. (Tr. Trans. pp. 59, 80, 95). The terms of the Shirey Contract require that any extension of it must be in writing and signed by both parties: “This Contract may not be modified or amended except by a writing signed by both Buyer and Seller.” (Tr. Ex. P2 p. 5). Bishop and Shirey’s attempted oral extension of the Shirey Contract did not meet these requirements. Further, this attempted extension violated South Carolina’s Statute of Frauds, which provides that any contract for the purchase of land must be in writing and signed by the party against whom enforcement is sought. E.g. Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975); 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).

The record contains no evidence that Shirey’s title insurer was “unconditionally prepared to issue a standard ALTA owner’s form title policy” on August 12 (or August 13), as required by Section five of the Shirey Contract. (Tr. Ex. P2 p. 2). Such a failure constitutes default on the part of Shirey, and gives Bishop the right under Section 14 to

---

<sup>11</sup> As this act breaches the Shirey Contract, Bishop is entitled to retain Shirey’s \$1,000.00 earnest money deposit. (Tr. Ex. P2 p. 4).

terminate the Shirey Contract and retain Shirey's earnest money. (Tr. Ex. P2 p. 4). Shirey's default is additional evidence that there was no valid agreement between the parties. Further, the record contains no evidence that Shirey had a deed prepared to present to Bishop at signing (the Shirey Contract only provided that Bishop pay for the preparation of the deed). (Tr. Trans. pp. 60, 77; Tr. Ex. P2 p. 2).

Without *clear evidence of a valid agreement*, Shirey's argument for Specific Performance fails. The Special Referee attempts to excuse Shirey's failure to provide a valid agreement with an estoppel argument, relying on Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313 (1935). (5/18/17 Order p. 9; ¶ 2). Florence Printing was not a case of an alleged oral extension of a real estate contract, but of an oral modification of a written contract to purchase stock in a corporation. The oral modification of Florence Printing took place years before one party sought its enforcement (and thus there was years' worth of detrimental reliance). Estoppel is not appropriate under Florence Printing.

Even if estoppel were legally appropriate, Shirey did not present facts supporting its application. In order to assert estoppel, a party must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. Springob v. Univ. of S. Carolina, 407 S.C. 490, 497, 757 S.E.2d 384, 388 (2014) (citing, *inter alia*, Florence Printing). "It is not sufficient to show merely that he has lost an expected benefit under the contract." Id. "Before the estoppel doctrine can be invoked, however, there must be competent proof of the existence of the oral contract." Id.

The record does not reflect Shirey's "definite, substantial, detrimental" change of position in the less than 24 hours between the August 12 oral extension and the purported

new closing date of August 13. (Tr. Trans. pp. 59, 60, 80, 81, 91, 92, 95). The only injury he incurred in that short period of time was the loss of his expected benefit under the contract. This injury is insufficient to justify the use of estoppel to subvert the terms of the Shirey Agreement and the Statute of Frauds. Such an equity-based argument is also inapplicable because the equities do not favor Shirey, as is set forth below.

**B. Application of Specific Performance is not equitable, as the equities favor Bishop and Robinson.**

Just like any other equitable remedy, Specific Performance requires the court to balance the equities in order to justify its application. King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct.App. 1984). Equity will seek to protect the party who was less able to protect himself, the party less likely to avoid the problem the court confronts. See Shepard v. First American Mortgage Co., 289 S.C. 516, 519-20, 347 S.E.2d 118 (Ct.App. 1986). The record reflects that it is Shirey who was most able to protect himself in this transaction:

- (a) Shirey was represented by counsel, while Bishop had no attorney until she was sued by Shirey. (Bishop Aff. p. 1).
- (b) Shirey was a “very successful business man”, while Bishop was unable to keep her business open after the deaths of her husband and son. (05/18/17 Order p. 6, ¶ 16; Tr. Trans. pp. 10-11; Bishop Dep. pp. 8, 20, 55, 56).
- (c) Shirey has no health issues in the record, while Bishop was suffering from mental conditions that at one point required hospitalization. (Bishop Dep. pp. 8, 20, 55, 56; Tr. Ex. D8; Tr. Trans. pp. 55-57, 62, 68, 103). Additionally, during negotiations Shirey was aware that Bishop was stressed and overwhelmed with her late husband’s business. (Tr. Trans. pp. 10-11; Bishop Dep. pp. 8, 20, 55, 56).

(d) The one-sided provisions of the Shirey Contract largely inured to Shirey's benefit, and were signed at his attorney's office with no witnesses. (Tr. Ex. P2; Bishop Aff. p. 1). For example, Shirey contends (incorrectly) that his only responsibility under the Shirey Contract is to present payment for the property in question.<sup>12</sup> (Tr. Trans. p. 16). Further, the Shirey Contract's required earnest money deposit is 0.8% of the contract value, smaller than a more customary 1%. (Tr. Ex. P2, p.1).

Further, equity follows the law. E.g. C & S Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966). As set forth in Section I.A., the alleged oral extension does not comply with the Statute of Frauds or the Shirey Contract, Shirey was in default for failing to close by August 12, 2016, and Shirey was potentially in default for failing to provide title insurance information and a deed. Further, Robinson had the legal right to purchase the property by virtue of the 2012 Contract, and Bishop had never held her in default of this agreement.<sup>13</sup> (Tr. Trans. pp. 53, 54, 64-69, 74, 154).

**C. Shirey cannot prove the remaining elements of Specific Performance**

The party seeking to compel specific performance must show he was capable of performing his duties both at the time specified (*i.e.* when the contract demands it) and at the time of suit. Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). According to the record, it was Shirey, through his attorney's office, who requested an extension to the closing date, indicating that he was unable to close on August 12, 2015. (Tr. Trans. pp. 59, 60, 81, 91, 92, 95). The record contains no evidence

---

<sup>12</sup> Shirey was also responsible for producing proof of title insurance and likely for preparing the deed (though Bishop was obligated to pay for deed preparation). (Tr. Ex. P2 p. 2).

<sup>13</sup> The Special Referee appears to hold that the signing of the Shirey Contract voided the 2012 Contract, but the authority cited (Restatement (First) of Contracts § 173 ["Priorities Between Successive Assignments of the Same Right"]) does not support this contention.

that Shirey's title insurer was "unconditionally prepared to issue a standard ALTA owner's form title policy" on August 12 or August 13. (Tr. Ex. P2 p. 2). There is no evidence Shirey produced a deed. (Tr. Trans. pp. 60, 77). Shirey's Complaint does not specifically allege that he is capable of performing the contract at the time of filing (it alleges he has "fully performed" the contract, an allegation not supported by the record). (Complaint p. 3). Under Ingram, these deficiencies are sufficient to deny specific performance.<sup>14</sup>

**II. Bishop and Robinson did not have a "confidential relationship" at the time of the execution of the 2015 Deed.**

The Special Referee also erred in finding that Bishop and Robinson had a "confidential relationship" at the time of the execution of the 2015 Deed and then voiding said deed. (May 18, 2017 Order, pp. 7). The record does not support this finding, which must be reversed.

A deed regular and valid on its face raises a presumption of validity. Grant v. Hudson, 192 S.C. 394, 7 S.E.2d 2 (1940). If the party challenging a deed proves the existence of a "confidential relationship" between the grantor and grantee, then the burden shifts to the grantee to show the absence of undue influence. Bullard v. Crawley, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987). "A family relationship is insufficient [to prove a 'confidential relationship'], as is mere confidence and affection." Hudson v. Leopold, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986) (citations removed). To show a "confidential relationship" existed between the grantor and grantee, the grantor must

---

<sup>14</sup> Further, Shirey also asserted causes of action for Breach of Contract and Civil Conspiracy (Am. Complaint pp. 4-5) both of which serve as tacit admissions that he has an adequate remedy at law (*i.e.* money damages).

present adequate evidence that he has placed his “trust and confidence in the grantee, and the grantee has exerted dominion over the grantor.” Brooks v. Kay, 339 S.C. 479, 489, 530 S.E.2d 120, 125 (2000); Middleton v. Middleton, 300 S.C. 402, 404, 388 S.E.2d 639, 641 (1990); Hudson v. Leopold, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986).

Our courts have identified analogous scenarios (undue influence regarding a will) where a grantor has placed trust and confidence in a grantee, while the grantee exerted dominion over the grantor. See Dixon v. Dixon, 362 S.C. 388, 397, 608 S.E.2d 849 (2005) (joint bank account); In re Estate of Cumbee, 333 S.C. 664, 672-673, 511 S.E.2d 390, 394 (1999) (power of attorney and management of finances); Hembree v. Estate of Hembree, 311 S.C. 192, 428 S.E.2d 3 (Ct.App. 1993) (in cases where allegations of undue influence have been successful there have been evidence of threats, force, restricted visitation, or an existing fiduciary relationship); Chapman v. Citizens & S. Nat’l Bank of South Carolina, 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct.App.1990) (one party to the confidential relationship must abuse the trust and confidence so reposed).

The Special Referee’s factual basis for finding a confidential relationship was sparse and does not resemble any of the scenarios described above:

2. Confidential Relationship. That Defendant Bishop was in a special confidential relationship with Defendant Robinson. Testimony of both parties indicated that Defendant Bishop had faith, trust and confidence in representations made by Defendant Robinson. Both Defendants testified that there was much contact between each other, much visitation, and much talking. It is apparent that on the weekend prior to this transfer of real estate, there was some type of family dispute. Thereafter, without explaining to Plaintiff or his attorney, on the advice and counsel of Defendant Robinson, Defendant Bishop signed a deed and another contract of sale which was the direct result of counsel and [advice] of Defendant Robinson.

(05/18/17 Order p. 7). “[M]uch contact...much visitation, and much talking” does not support a finding of a fiduciary relationship, and it does not provide any evidence that any relationship was abused. Further, the 2012 Contract and 2015 Contract between Bishop and Robinson are arms-length agreements that evenly divide responsibilities and penalties between the two parties, especially when compared to the one-sided provisions of the Shirey Contract, particularly sections 5 (contingencies), 6 (closing and possession), 11 (seller’s warranties), and 14 (default). (Tr. Ex. P1; Tr. Ex. D2; Tr. Ex. D9). The 2012 Contract and 2015 Contract were also executed in the presence of witnesses, unlike the Shirey Contract, which Bishop executed at Shirey’s attorney’s office at the direction of Shirey’s attorney. (Tr. Ex. P9 p. 2; Tr. Ex. D1 p. 2; Bishop Aff. p. 1). Without a “confidential relationship” between Bishop and Robinson, cancellation of the 2015 Deed was improper and must be reversed.

**III. Even if Shirey is entitled to Specific Performance, Robinson possesses an equitable interest the property.**

The Special Referee held that Robinson “may have had an equitable right of redemption” arising out of her payments of Bishop’s mortgage, but then extinguishes that right by ruling that Shirey was a bona fide purchaser for value. (05/18/17 Order pp. 10-11). South Carolina law requires that bona fide purchaser must be specifically pled. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). Shirey did not plead for this relief in his Complaint and Amended Complaint, and thus this relief is waived. (Complaint; Amended Complaint).

Even if Shirey has not waived his right to assert a bona fide purchaser argument, it is inappropriate under the facts of this appeal:

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect.

Id. None of these elements fit these circumstances. While Shirey tendered a check, the check was never accepted. Shirey has not purchased or acquired legal title to the property in question. Most importantly, Robinson's filing of the 2015 Contract (which references the 2012 Contract) and the 2015 Deed on August 13, 2016 provides Shirey constructive notice of Robinson's claims. See S.C. Code § 30-7-10. Further, Shirey recognizes Robinson's claim in his Amended Complaint. (Am. Compl. p. 1).

South Carolina law recognizes that purchasers of property under an installment sales contract acquire an equitable interest in the property. Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 347 S.E.2d 121 (Ct.App. 1986). Robinson has paid at least \$41,067.44 toward principal, interest, and late fees under the 2012 Contract. (5/18/17 Order p. 7). If this Court rules that specific performance is appropriate, Appellants request that any transfer be made subject to Robinson's equitable interest in the property in question.

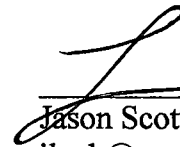
**IV. Shirey is not entitled to the attorneys' fees and costs awarded.**

As set forth in Section I, it is Shirey, not Bishop, who first breached the Shirey Contract during the August 12, 2016 telephone call to Bishop. Accordingly, any award of attorneys' fees and costs is controlled by an error of law and must be reversed, awarding attorneys' fees and costs to Bishop and Robinson.

## CONCLUSION

For the argument set forth above, Respondents Gwen Bishop and Cassandra Robinson ask this Court to reverse the May 18, 2017 and July 23, 2017 Orders of the Special Referee and issue an opinion (1) denying all of Shirey's requested relief; (2) ordering that Bishop may retain the earnest money of \$1,000.00 due to Shirey's default; (3) affirming the validity of the 2015 Deed; (4) ordering that Shirey pay Bishop and Robinson's attorneys' fees and costs; and (5) awarding Bishop and Robinson all such other and further relief as this Court deems just and proper.

Dated: 11/2/17

  
\_\_\_\_\_  
Jason Scott Luck  
jluck@garrettlawsc.com  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
Attorney for Appellants

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

---

**RECEIVED**

NOV 06 2017

**APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas**

SC Court of Appeals

**Samuel M. Price, Jr., Special Referee**

---

**Case No. 2017-001678**

---

**Robert G. Shirey ..... Respondent,**

**v.**

**Gwen G. Bishop,  
Cassandra Robinson,  
and T.D. Bank, N.A. .... Defendants,**

**of whom  
Gwen G. Bishop  
and Cassandra Robinson are ..... Appellants.**

---


**CERTIFICATE OF SERVICE**

---

I certify that I served the Initial Brief and Designation of Matter on the persons set forth below by depositing a copy of it in the United States Mail, postage prepaid, on the date set forth below:

Kyle B. Parker  
Pope & Hudgens, P.A.  
P.O. Box 190  
Newberry, SC 29108  
Attorney for Robert G. Shirey

Date: 11/2/17

  
\_\_\_\_\_  
Jason Scott Luck  
Garrett Law Offices, LLC  
1075 E. Montague Ave.  
North Charleston, SC 29405  
843.554.5515 (phone)  
843.747.3198 (telefax)  
Attorneys for Appellant

# Garrett Law Offices

Ltd. Co.

Gordon H. Garrett (Ret.)  
Gordon H. Garrett  
Jason Scott Luck

1075 East Montague Avenue  
North Charleston, SC 29405  
843.554.5515 (O) 843.747.3198 (F)  
office@garrettlawsc.com

November 2, 2017

RECEIVED

NOV 06 2017

SC Court of Appeals

**VIA US POSTAL SERVICE**

Jenny Abbott Kitchings  
Clerk of Court  
The South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

RE: *Robert Shirey v. Gwen G. Bishop, Cassandra Robinson, and T.D. Bank, N.A.*  
*Court of Appeals Case No.: 2017-001678*  
*Our File No.: 20170165*

Dear Ms. Kitchings:

Enclosed please find the following documents: (1) Initial Brief of Appellants, (2) Designation of Matter and Certificate of Service in reference to the above matter.

Please do not hesitate to contact our office should you need additional information.

Sincerely,



Marilyn Hunt  
Legal Assistant

Enclosures

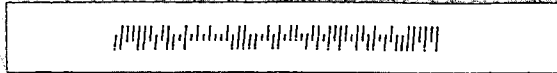
/meh

cc: Kyle B. Parker, Esquire

Garrett Law Offices, LLC  
1075 East Monague Avenue  
Charleston, SC 29201



CHARLESTON SC 294  
NOV 06 2017



**RECEIVED**  
NOV 06 2017  
SC Court of Appeals

Jenny Abbott Kitchings  
Clerk of Court  
The South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211