THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee
Case No: 2009-CP-26-12046



Randy A Beverly, LLC & Donald Godwin, LLC ---------- Plaintiffs

v.

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

v.

Randy A. Beverly & Donald Godwin..... Third Party Defendants & Fourth Party Plaintiffs

v.

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

OF WHOM

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

and

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

Appellate Case No: 2012-212984.

---

# FINAL BRIEF OF RESPONDENTS

---

Submitted By:

J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
T: (843) 692-9889
*Attorney(s) For Respondents*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES:

## Cases

## QUESTION PRESENTED:

Should this Court uphold and affirm the Trial Court's Order, which ruled on all issues on the merits and held that the unambiguous remedies' provision of the parties' contract limited the seller/Appellants' remedies to return of the earnest money or specific performance but that since the seller elected to sell the subject property during the pendency of the action, and the parties had consented to transfer the earnest money to the seller as part of one of the closings, neither remedy remained available to the seller/Appellants?

## STATEMENT OF THE CASE:

This case was filed by Randy A. Beverly, L.L.C. and Donald Godwin, L.L.C. (Hereinafter, "B&G") against Bucksville Farms, Inc (Hereinafter, "Bucksville" or "Creel") on February 26, 2009 as a Declaratory Judgment action contending that the third takedown of real estate under the parties' contract which should have occurred in June of 2008 but had not occurred because Bucksville failed to provide a wetland delineation survey, materially breaching the parties' contract, entitling B&G to terminate the contract. B&G sought only that declaration and sought not monetary damages, other than attorney's fees and costs. (R.p.12-15)

Bucksville answered, entering a Third Party Complaint against Beverly and Godwin personally. It alleged the following defenses: modification of the contract, waiver, and estoppel and course of dealing. By way of counterclaim, cross complaint and/or third party complaint, it also alleged the following: breach of the alleged orally modified contract and breach of that contract accompanied by fraudulent act. This pleading not only brought in Beverly and Godwin

individually, but it was the **first pleading to seek monetary damages other than attorney's fees and costs, with Bucksville seeking consequential and incidental damages, pre-judgment interest, attorney's fees, costs and Punitive Damages.** (R.p.16-28)

Only after receiving this pleading, did B&G file an Answer/Amended Answer, Reply and Fourth Party Complaint, brining in Creel individually and as the sole surviving director of Bucksville Farms, Inc. and seeking monetary relief beyond their fees and costs. In this pleading, Beverly and Godwin alleged the following defenses; Rule 8 and 12 defenses, unclean hands, offset, waiver, release, equitable estoppel, failure of consideration, mutual mistake, laches, accord and satisfaction, the Statute of Frauds, reservation of right to amend, failure to mitigate, unconstitutionality of punitive damages, incorporation of all other pleadings and incorporation of all defenses/motions by all parties. This pleading also made the following fourth party claims against Creel: incorporation of complaint/request for DJ, Attorneys fees and costs, breach of contract, breach of contract accompanied by fraudulent acts and breach of the covenants of good faith and fair dealing. Beverly and Godwin sought actual, proximate and consequential damages, lost value, lost profits, lost future profits and value and punitive damages. (R.p.29-49)

Creel then filed an Answer and Counterclaim to the Fourth Party Complaint which essentially alleged the same defenses as in his prior pleading, and requested the same affirmative relief. B&G filed a Reply essentially alleging the same defenses as in their prior pleading. (R.p.50-65; p. 66-81)

Thereafter, the parties' consented to an Order of Reference which was signed by The Honorable Thomas W. Cooper and recorded on June 22, 2010. (R.p.1) After the conclusion of discovery, the Court took testimony and evidence at a properly noticed and scheduled hearing. After the hearing, the Trial Court requested, received and reviewed Proposed Orders from the

parties. (R.p.535-591) Thereafter, the Court entered judgment on the merits, effectively granting B&G only the relief requested in the original Declaratory Judgment action, finding that none of the parties followed the strict terms of the Agreement because of the relationships involved and the economic factors and climate, but that no intentional or willful breach occurred and awarding no damages to any party. (R.p.3-9) The Appellants moved for reconsideration and the Respondents replied. (R.p.592-614) The Trial Court issued an Order denying the Motion For Reconsideration. (R.p.10-11)

Appellants then filed this appeal.

## STATEMENT OF THE FACTS:

This action arises from an "Agreement To Buy And Sell Real Estate In Multiple Closings" dated October 2, 2005 whereby B&G agreed to buy and Bucksville agreed to sell a 317.5 acre tract, less 40 acres which Creel would retain, in Horry County, parts of which contained wetlands. (R.p.663-677; Tr Exh. 28, pocket part Volume II (Hereafter "p.pt" ) The agreement planned four (4) closings or takedowns to take place approximately a year apart. (R.p.663-677) Two (2) of the anticipated takedowns occurred. (R.p.663-677; p.96, l.16- p.99, l.1) The problems culminating in the filing of this action occurred after the second takedown and meant that takedowns three and four never occurred and the disputed part of the property was ultimately sold by the Defendant to a third party during this litigation. (R.p.663-677; TrExh.28, p.pt; R.p.99, l.23-p.100, l.2; R.p.306, l.4-25; p. 479, p.489-490)

B&G have done ten (10) to twelve (12) residential developments together and they and their companies have worked in partnership for a long time. (R.p.271,l.2-7) Godwin had not previously dealt with Bucksville/Creel, except for having bought Creel's interest in the Kingston

Marina development through Beverly. (R.p.271, l.8-15) However, Beverly and Creel have a lifelong association, since Creel is Beverly's nephew, the son of Beverly's late sister, and thus Beverly has known Creel since his birth. (R.p.87, l.14-p.88, l.1)

Creel is the son of the late Paul Creel who worked in real estate development during his lifetime and died owning fairly substantial real estate interests, including ten (10) convenience stores, interests in developments (Kingston Pointe and other projects near the back gate of the air base (now the Market Commons area) in Horry County, interests in developments in Edisto and Moncks Corner, and acreage in four (4) farms - including the acreage involved in this action which was part of Bucksville Farm. (R.p.501-503, p.515) Creel is a lawyer and is licensed but on inactive status. Before and after his father's death, Creel dealt with many real estate matters - on behalf of his father, on behalf of his father's estate and on his own behalf since his father's death. (R.p.499-500, p.503, p.322, l 2- p.323, l.19)

Creel had substantial financial difficulties dating back to 2002, in part because of North American Aviation, a company of which he personally owned 98%. (R.p.326, l.13 - p.329, l.17; p.508, l.1-p.512, l.10; ) Creel had also been encumbered with an IRS lien of approximately 1.2 million dollars arising from taxes due on his late father's estate (R.p.508, l.1-p.512, l.10) North American filed bankruptcy in February of 2009 but Creel had numerous judgments against him because of personal guarantees he signed on loans and other financial matters made to North American but not arising from personal default. (R.p.508, l.1-p.512, l.10)

Additionally, Creel started borrowing money from Beverly in the late 1990s with these transactions structured as sales of property wherein Beverly would get a deed and Creel would have an option to repurchase the property, usually within 1-2 years. These option deadlines were generally extended by Beverly at Creel's request and Creel borrowed money 2 or 3 times on 1

piece of Creel's property in that manner. Beverly ended up owning 3-5 pieces of Creel's property because of these sale/option loans, after Creel failed to buy the property back. (R.p.90, l.4-p.91, l.9) At one point, Creel owed Beverly as much as 2 million dollars for these loans. (R.p.110, l.13-p.111,l.8)

As to the subject transaction, Creel called Beverly about six months before the present agreement, around May of 2005 because Creel knew that B&G were developing another piece of property in the Highway 701 area; Creel advised that he was selling this land and wanted $18,000 to $20,000 an acre. (R.p.94,l.7-21; p.475) Creel wanted to know if Beverly and Godwin were interested but Beverly declined because Creel's price was out of his "ballpark." (R.p.94,l. 7-21) Four (4) to six (6) months later, Creel called Beverly again to advise that he had listed the property with a realtor who proposed breaking the sale down to about 50 acres a year over a 4 to 5 year period to make the land more affordable for smaller developers. Creel also advised that another company was interested. Beverly was interested at that price; they negotiated, agreeing to a sale of 50 acres per year for 4 years at a cost starting at $17,000 per acres, escalating $1,000 per acres per year. (R.p.94, l 23-p.95, l.19) Creel agreed to take those terms to his lawyer and **Creel's attorney drafted the present contract**. (R.p.95, l.17-22; p.140, l.20-p.141, l.5)

Prior to the agreement, Creel asked Beverly not to start the takedowns at the Southeastern corner of the property because that tract had known wetlands issues and Creel wanted time to do silvaculture and ditching so more land would be classified as uplands and sell at a higher rate and would allow B&G to use the land for building. (R.p.96, l.8-p.97, l.16) Beverly didn't know about the wetlands issues on that tract at the time. (R.p.173, l.14-p.177, l.15)

Under the silviculture exemptions, landowners can perform certain acts to facilitate heavily wooded property with dense vegetation in drying out but these acts cannot be performed

by developers. (R.p.20-21) Specifically, landowners can harvest some of the timber, which thins the trees, and then after the logging is done, come in with a mulching machine and mulch the underbrush. (R.p.208, l.6-25) On agricultural tracts, once that process is started, the clearing may reveal older, pre-existing ditches and the landowner can clean out those ditches to try and restore some water flow. Over a bit of time, this process will dry out some of the wetlands on property. (R.p.208, l.8-25)

This sale was structured in four (4) takedowns, with one a year starting in 2006, at a price of $17,000.00 per upland acre, with that price increasing by $1,000.00 each year, so that the per acre price for upland acreage ranged between $17,000 and $20,000. The price for wetlands for all four (4) takedowns and throughout the contract period was $1,000 per acre, so there was a substantial price difference between upland acres and wetland acres. (R.p.663, ¶ 2)

The Agreement provided for an initial "feasibility period" slated to end at midnight on the 120th day following Creel's delivery of a "Boundary Survey and Wetlands Survey" by a professional surveyor licensed in SC and for purposes of the feasibility period, the seller was not required to have the wetlands permitted by the US Corps of Engineers. (R.p.664-665, ¶ 7) The first closing was to occur within 15 days after the feasibility period and was to "contain a minimum of 50 upland acres" and subsequent closings were governed by a later paragraph (22). (R.p.664, ¶ 6) When read together, Paragraphs 6 and 22 provide that each of the first three (3) takedowns must contain a minimum of 50 upland acres and the fourth (4th) takedown would then include the remainder of the property. (R.p.664 ¶ 6 & p.671 ¶ 22)

**Paragraph 9 required Bucksville/Creel to furnish a boundary survey "indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller." B&G**

**were to obtain the takedown surveys for each takedown, the costs for which would be split equally. (R.p.665, ¶ 9)**

The Contract drafted by the Seller's, Bucksville's/Creel's, attorney, contains the following provision as to default and remedy:

> 20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: ***(i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser.*** Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.
>
> (R.p.671, ¶ 20)

**Creel was aware that the contract called for him/the seller/Bucksville Farms to be responsible for delineating the wetlands in the transaction. (R.p.520, l.21-25) And Creel testified that as a licensed attorney, he was aware that it was common practice for Horry County Banks to require a certification letter from the Corps of Engineers before loaning money on wetlands. (R.p.525, l.21-p.526, l.4)**

The first takedown was 50 acres of the 86 acre "parcel A" tract and was in the Northeastern corner of the property, right on Highway 701 in the section closest to Conway. (R.p.95, l.8- p.96, l.2; R.p.477) That parcel was chosen for the first takedown because Creel had

asked B&G not to start the Southeastern corner because Creel knew he had serious wetlands issues there and he wanted to have time to dry it up by doing some silvaculture so that more of the land would be classified as uplands, fetching a much higher price under the contract. (R.p.96, l. 8 - p.97, l.16)

The first takedown occurred fairly quickly because B&G were accommodating Beverly's nephew, Creel, who was having financial problems and B&G had cash for the closing. At the time of that first takedown, the parties didn't realize that there were some wetlands on the parcel and BP&G were given credit for that with the second takedown. (R.p.13-14) The second takedown was of the remaining 36 acres of the "parcel A" tract plus 14 acres on this side of Shelley Farm Road. (R.p.98, l.5- p.99, l.1) It was after the second takedown that serious problems occurred, ultimately resulting in the instant action.

At the time of the first takedown, a wetlands delineation was not particularly important because B&G knew there were no significant wetlands on that tract. (R.p.480, l.3-5) Even though the Contract made the wetlands delineation Creel's responsibility - (R.p. 663-677 and R.p.665, ¶ 9) – B&G retained Charles Oates of S&ME (Soils & Material Engineering) to do a wetlands delineation of the first and second tracts before the second takedown. (R.p.395, l. 22-p.396, l.4; p. 404, l.24-p.405, l. 14; R.p.478-479) That wetlands delineation did not include the third takedown property because it was in an area with known wetlands and Creel had asked for time to get those dried up, which would have to have been done before a wetlands delineation. (R.p.102, l 1-18) In this delineation of the first and second takedowns, a small area of wetlands (about .32 acres) was discovered on the first tract and B&G were given credit for that in the second takedown. (R.p.477-478; R.p.103, l.8-14)

At the time of the first two takedowns the real estate market and general economy were better. B&G had cash for both closings, the first of which was expedited, as noted above, because of Beverly's awareness of his nephew Creel's financial difficulties. (R.p.102, l.2-18) B&G needed a bank loan for the third takedown. (R.p.102, l.1-18) The contract required Bucksville/Creel to provide a wetlands survey, so after the second takedown Beverly spoke to Creel and asked that Creel provide the contractually required wetlands survey so that the third takedown could be structured and scheduled. (R.p.100,l.13-5)

Beverly testified that there were two reasons for requiring a full wetlands delineation for the proposed third phase: (1) known and serious wetlands issues on the piece which Creel had earlier stated his intention to do some silvaculture and (2) banks require a full wetlands survey and delineation, including a certification letter from the US Army Corps of Engineers. (R.p.100, l. 11-18) Creel testified that he was aware of this requirement by lenders. (R.p.525, l. 21-p.526, l.4)

The wetlands survey process was explained by Charles Oates, of S&ME, who did the wetlands survey for Beverly and Godwin for the first two takedowns, as stated above. Mr. Oates testified that the process starts with gathering a number of maps which are mostly available through public records and include various vicinity maps, overlay maps, topographic surveys and soils maps, many of which are done as overlays. (R.p.190, l.15-p.192, l.3) All of this information is sometimes gathered and used by surveyors when they are asked to do an estimation of the wetlands on a tract, which was done in this case because initially, S&ME did such an estimation as to the whole tract at the request of one of Godwin's employees, James McLean in January of 2006. Later, around March of 2006, McLean came back to Oates and explained they wanted the full wetlands survey only done on the pieces taken down first and

second because there were wetlands issues with the other pieces and Creel wanted time to try to do silvaculture and dry those out. (R.p.399-p.409; p.252, l.5-12)

The next step required Oates to go to the property and do field work, which he did for the first two tracts taken down on April 10, 2006. During the field work, the areas which his on site analysis and prior map and soil reviews shows to most likely contain wetlands are marked with pink flagging tape to show a wetland boundary or delineation. (R.p.409, l.17 - p. 410, l.16) After that, a submission package of the initial maps and the field work was composed and forwarded to the Corps of Engineers requesting that the Corps come out and concur with the results and issue a letter certifying the wetland delineation. (R.p.410, l.16-p.414, l.11) ***That letter from the Corps is often called a JD letter and is regarded as the "Rosetta Stone" by developers as that is the point when plats can get approved, engineering can start and banks will loan money. (R.p.391, l21-p.392, l.7; R.p.100, l.16-p.101, l.7)***

The Submission package to the Corps on the tracts taken down first and second went out on April 19, 2006. (R.p.412) The Corps came to the property sometime later and their field work disagreed with Oates as to 1 section which was reclassified as wetlands and Oates added it to the full boundary survey. (R.p.415-417) That plat was provided to the surveyors who came out and prepared a full and legal plat based on the flags and markings and that plat was provided to the Corps which issued a letter certifying the wetlands on November 27, 2007, which letter was good for 5 years. (R.p.418, l.18-p.419,l.11) That wetlands letter should have only included the first two takedowns but later a B&G employee came back in June of 2008 asking Oates to pull the maps and do an estimation of the wetlands on the tract previously excluded and at that time it was discovered that as a result of a mapping error in the submission process by Oates, the excluded tract had erroneously been certified as containing no wetlands, when in actuality Oates'

June of 2008 estimate showed that tract as having 28.3 acres of wetlands out of a total acreage of 49.6 acres. The employee asked that the estimate be expanded to include 40 additional acres and at that point Oats estimated that roughly 50 acres would be designated as wetlands. (R.p.422-p.426)

In June of 2008 it was also discovered that the Corps had erroneously certified wetlands on what likely would have been at least part of the proposed third takedown. Oates advised that this was a clear error; no field work had been done and the Corps never looked at that area. According to Oates, the Corps would say the erroneously certified area had not been legally delineated, so that certification could not be used as a basis for any further activity. The work on this area would have to be done and a proper submission to the Corps would have to be made. (R.p.427-433)

As noted above, Beverly asked Creel to have the Wetlands delineated as required by the Agreement so that the third takedown could occur. (R.p.100, l.13-5) Instead of having a full survey and delineation done, Creel met with surveyor Oates in August of 2008. During that meeting Oates gave Creel the "thumbnail sketch" he'd done earlier for Godwin via his employee and Oates recommended that Creel do Silvaculture on the tract before having the survey work done. (R.p.205, l. 21- p. p.209, l.17) Oates testified that to his knowledge Creel had not done the Silvaculture and never contacted S&ME to do the wetland delineation, boundary survey or the submission to the Corps. (R.p.213, l.1-19)

Despite Creel's request from the beginning that the takedown of proposed tract 3 be delayed so that silvaculture could be done, nothing had been done, although Creel told Beverly that he had called Truitt Hardwick about getting it done and Creel testified that he called Hardwick in November of 2006 but that Hardwick never called him back. (R.p.107, l.4-9;

R.p.522, p.523) Because nothing was being done, Beverly hired and paid Matt Johnson to go out with a backhoe and dump truck to clean out the existing ditches to at least try to start drying up the land and Beverly had Creel reimburse this expense as part of the second takedown. (R.p.107, l. 4- p. 108, l.2) There was never an agreement to change or modify the contract and B&G were just trying to get the process going so that the tract would be dried before the third takedown. (R.p.108, l.3-17)

*The contract gave Beverly and Godwin the right to take down the tracts in the order they chose and they started on the opposite end to give Creel time to dry out the proposed tract 3, but they felt that they could not take tract 4 and then come back to take tract 3 for the following reasons: (1) they wanted the land to be contiguous so that one phase after another could be developed for a subdivision; (2) tract 4 did not adjoin tract 2; (3) the lift station had already been designed and engineered to go in right at tract 3; and (4) with Creel's financial difficulties, if Beverly and Godwin took tract 4 before tract 3, by the time they went back to take 3 Creel might not own it anymore and then Beverly and Godwin would be left with a subdivision designed around a vacant tract* which is now the case with Creel's sale to Larry Paul in 2009 to pay off the July, 2008 mortgage of the subject property to Larry Paul. *(R.p.110, l.1-12)*

Although Creel suggested that B&G wanted to take the third tract before the fourth because the third tract or takedown would have included land fronting on Highway 701, Beverly denies this allegation. Beverly testified that land fronting on a major highway is a disadvantage or a negative instead of a positive for a residential subdivision because most people do not wish to live on land adjoining a busy highway. (R.p.109, l.3-12)

Creel never had the wetlands delineation and survey done and at one point brought Beverly the estimate Oates had done as referenced above as a "thumbnail" and left a note asking

Beverly to close on that but Creel is a trained lawyer and knew enough about real estate to know that the bank would never loan money on such a tract without a proper and official Corps letter certifying it. (R.p.112, l.1-p.113,l.19) Letters were written by Beverly and Godwin's prior counselors advising Creel via attorney Stevens that Beverly and Godwin would close on tract 3 if Creel would present a proper wetlands delineation and survey. (R.p.115, l.16 - p.117, l.7)

At no time did Creel ask his Uncle, Mr. Beverly, to get the wetlands survey done for tract 3. (R.p.113, l.23- p.114, l.12) Creel never indicated to Beverly that he thought Beverly and Godwin were responsible for the survey or delineation; Creel admitted that he was responsible for it according to the contract drafted by Creel's lawyer, and at no time did Creel ask that the Contract be amended or modified to make B&G responsible for the wetlands survey or delineation. (R.p.117, l.22- p.118, l.13; p.119, l.7 - p.120, l.17; p.5205, l.21-25) Instead of making any effort to have the survey and delineation done, as he was obligated to do under his contract with B&G, Creel sold the land in question to Larry Paul, for a reduced price that Creel never offered to B&G. (R.p.117, l.7-21)

B&G sold a partial interest in the tracts taken down to a group known as 701, South, LLC. 701 includes entities headed by Stephen Sciaretta which are associated with the Claremont Companies, New Jersey citizens and limited liability companies. (R.p.528) A Claremont entity, Byram Land Development, Claremont SC Enterprises, LLC, RB LLC and DG LLC each own 25% interest in the property. (R.p.529-530) The Claremont Companies paid B&G about $11,000 per acre more than Beverly and Godwin paid Creel for the land. (R.p.531) B&G netted about $1,082,680 above the purchase price. (R.p.534) Claremont had an option to participate in the third tract but wrote B&G declining to exercise that option at the prior purchase price based on the economy but then subsequently Sciaretta wrote B&G suggesting that they be allowed to

participate in the purchase of tract 3 at the Contract price with Creel. That never came to fruition because the anticipated third closing never occurred because Creel never had the wetlands delineated as required by his underlying contract with B&G. (R.p.531-p.533) Sciaretta testified that he often purchased and developed land via a bank loan and that in his experience banks invariably require full, formal wetlands delineations including Corps certification before they will loan money. (R.p.534)

During the course of this matter, B&G hauled in and stored "quality" dirt hauled in from a development they were doing in Georgetown County on the land that would have been taken in the third takedown. B&G intended to use this "quality" dirt in developing the subject property. (R.p.486. l.14-487, l.5) The dirt, evidencing B&G's good faith intentions to close on the property once they received the full boundary survey and wetlands delineation (that paragraph 9 of the parties agreement required Creel to provide) was still on the property when it was deeded to third party Larry Paul during the course of this litigation. (R.p.117, l.7-21)

## ARGUMENT:

I. Standard of Review:

An action to construe or interpret a contract is an action at law. Alexander's Land Company, LLC v. M&M&K Corp., 90 S.C. 582; 703 S.E.2d 207 (2010); Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n, 343 SC 335, 339, 540 SE2d 843, 845 (2001) An action for breach of contract seeking monetary damages is also an action at law. R&G Constr. Inc. v. Lowcountry Reg'l Transp. Auth, 343 SC 424, 430, 540 SE2d 113 (Ct. App. 2000) In actions at law tried without a jury, the Trial Court's factual findings won't be disturbed on appeal unless the appellate court determines those findings to be made without evidence reasonably

supporting them. Karl Sitte Plumbing Co. Inc. v. Darby Dev. Co., 295 SC 70, 77, 367 SE2d 162, 166 (Ct. App. 1988) Unlike factual findings, a reviewing court may decide questions of law without giving particular deference to the Trial Court. Hunt v. Forestry Comm'n,358 SC 564, 569, 595 SE2d 846 (Ct. App. 2004)

In the present case, Bucksville/Creel sold the subject property after the commencement of this litigation without notice to B&G. (R.p.117, l.7-21) Therefore, Creel waived any right to specific performance, leaving all issues in the case relating to claims arising out of the contract. The sale also made this an action at law to construe or interpret the contract in light of the parties' claims.

II. The Trial Court found no ambiguities in the contract AND found that had ambiguities existed, they would have been construed against the Appellant, a licensed attorney whose attorney drafted the agreement:

In considering all the issues raised by the Appellant, it is important to emphasize the fact that the Trial Court's Order finds no ambiguities to exist in the parties' contract and provides that had any ambiguities existed, they would have been resolved against the drafter – the Appellant via his attorney. (R.p.3-9)

Construction of a clear and unambiguous contract presents a question of law for the Court. US Bank Trust National Association v. Bell, 385 SC 364, 684 SE2d 199 (Ct. App. 2009). Had the Court found any ambiguities in the contract, those ambiguities would have to be resolved against the drafter of the contract. WDI Meredith & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004). "As the drafter of the contract, WDI was in the best position to prevent confusion in the contract's construction and should be the party to suffer from its

shortcomings." WDI Meredith & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004) citing Williams v. Teran, Inc., 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976)

In this case, Creel's attorney drafted the contract. (R.p.95, l.19-22; R.p.323, l. 20- p.324, l. 5) Further, Creel is an attorney, who is licensed but on inactive status. (R.p.499, l.19 --p.500,l.14 and p. 503; R.p.322, l.2- p.323, l.19) If there are any ambiguities about the availability of common law remedies to supplement Paragraph 20's "Default and Remedy" provisions or as being otherwise available to Creel under the contract, which the Trial Court did not find, then those ambiguities must be construed against Creel and the Trial Court's Order should stand.

III The Court should uphold and affirm the Trial Court's Order, which ruled on all issues on the merits and held that the unambiguous remedies' provision of the parties' contract limited the seller/Appellants' remedies to return of the earnest money or specific performance but that since the seller elected to sell the subject property during the pendency of the action, and the parties had consented to transfer the earnest money to the seller as part of one of the closings, neither remedy remained available to the seller/Appellants

The remedies provision of the contract states as follows:

> 20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: ***(i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser.*** Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.
>
> (R.p.671, ¶ 20)

First, Creel's contention that the remedies provision was limited to breaches that occurred by the FIRST closing date is refuted by the contract itself. The subject agreement refers to multiple closings on multiple dates. (R.p.663, ¶ 2, p.669-670 ¶16, p.671-672 ¶ 22) In fact, the contract is titled: "Agreement To Buy and Sell Real Estate In Multiple Closings." (R.p.663)

Further, Creel contends that the "Default and Remedy" provisions in Paragraph 20 of the contract are not the seller's exclusive remedies and that based upon these facts, principals of contract interpretation and South Carolina law, the Trial Court erred in finding the "Default and Remedy" provision in this contract to be exclusive. In actuality, based upon these facts, principals of contract interpretation and South Carolina law, the Trial Court ruled correctly and its Order should be upheld and affirmed.

Creel attempts to support his contentions by citing to a South Carolina case that holds that if there is no clear language in a contract to the contrary, then a nonbreaching party can seek a remedy provided by the contract or can sue for any other remedy available for breach. Bannon v. Knauss, 282 SC 589, 320 S.E.2d 470 (Ct. App. 1984) Additionally, Creel cites to inapplicable portions of the same decision about "forfeiture" clauses as being usually interpreted to give a nonbreaching seller the right to disaffirm the contract and keep the earnest money or to affirm the contract and sue for the purchase price. *Id*

Paragraph 20 of the subject contract, regarding "Default and Remedy, is an exclusive remedy under the contract and it contains "clear language" to the contrary of the general rule, taking it out of the scope of the Bannon decision. Paragraph 20 provides that the **seller** for any breach by the purchaser would be entitled to either – (1) retain the Earnest Money "as and for Seller's liquidated damages for purchaser's default" or (2) to "seek specific performance."

*PARAGRAPH 20 THEN GOES ON TO SAY that "Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11."* The paragraph goes on to give the **purchasers** the same remedies for a breach by the seller – and to add an additional remedy – **giving purchasers the right to pursue any other remedy at law or in equity if the seller committed an intentional or willful breach.** (R.p.671, ¶ 20)

A review of the "Default and Remedy" provision of Paragraph 20 shows that it is clearly intended to provide exclusive remedies to the parties. It gives the seller the right to keep the Earnest Money or seek specific performance but goes on to say that the seller can also seek indemnification per a prior provision of the contract. Paragraph 11 provided that after the contract was signed, the purchasers had an inspection period during which they could have surveys, inspections, environmental testing, delineations, market feasibility studies or any other investigation that the purchasers deemed reasonably necessary or desirable. (R.p.671, ¶ 20, p. 666 ¶ 11)

Paragraph 11 required the purchasers to indemnify and hold the seller harmless from any claims of any sort arising from these inspections or investigations and it stated that this right to indemnity would survive closing and the termination of the agreement. **There would be no reason for Paragraph 20 to refer to Paragraph 11 if Paragraph 20 were not intended to be an exclusive remedies provision. Yet, Mr. Creel's lawyer, who drafted the agreement,** said in Paragraph 20: "Notwithstanding the aforesaid" that the seller retained the right to indemnity given by Paragraph 11. Paragraph 11 already said that the right to indemnity would survive closing and/or termination – the only reason to bring it up in Paragraph 20 is that Paragraph 20 was intended to provide the exclusive remedies, so it had to refer back and incorporate Paragraph 11 because "indemnity" is a remedy. (R.p.671, ¶ 20)

Additionally, Mr. Creel's lawyer specifically gave the purchasers the right to "pursue any other remedy at law or in equity" if the seller committed a willful or intentional breach of the agreement. The inclusion of this language in the remedy section was a deliberate drafting choice. It means that no one had the right to seek any other remedy "at law or in equity" unless a breach was willful and intentional and then it only gave that right to the purchasers. From a common sense perspective, this makes sense. If the purchasers defaulted, the seller would have the land and the ability to sell it later, but if the seller defaulted, the purchasers would not have that cushion, so the agreement gave the purchasers additional security in the event of a willful breach by the seller. If the remedy provision was not meant to be exclusive, then there is no basis for conditioning the purchaser's right to seek those remedies outside the agreement on a willful or intentional breach by the seller. **The fact that Paragraph 20 speaks to all of the otherwise available common law remedies and then only gives them to the purchasers and then conditions the availability of those remedies on a breach being "willful or intentional" means that the remedy provision of Paragraph 20 was intended to be exclusive.**

"The cardinal rule of **contract** interpretation is to ascertain and give legal effect to the parties' intentions as determined by the **contract** language. Where the **contract's** language is clear and unambiguous, the language alone determines the **contract's** force and effect." Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 S.C. 582; 703 S.E.2d 207; 2010 S.C. LEXIS 384 (2010) Based upon the plain language of Paragraph 20, the default and remedy provision was intended to be exclusive and does bar the parties from seeking any remedy not provided by the contract.

The Appellant contends that his position that the "Default and Remedies" provision of this contract is not exclusive is supported by Bannon v. Knauss, 282 SC 589, 320 S.E.2d 470 (Ct.

App. 1984) which Appellant claims provides that a liquidated damages clause is not an exclusive remedy unless the agreement clearly limits the party to that remedy. In making this argument, the Appellant misconstrues the Bannon holding and/or the Trial Court's holding in this case.

In Bannon, the purchaser in a real estate deal signed a "written offer on a standard form real estate contract" and the purchaser subsequently breached, refusing to close the deal. The seller sued for specific performance and then amended his complaint to seek damages after he sold the property for $17,300 less to a third party. The purchaser claimed that that the seller's remedy was limited by the clause in the standard contract providing for forfeiture of the Earnest Money to be divided between the seller and his agent. *Id* The trial court disagreed and damages were awarded to the seller.

The SC Court of Appeals upheld the trial court, finding that the remedy provision in that case, involving a standard "form" real estate contract, was not intended to be the exclusive remedy. The Court said that **"In the absence of clear language in the contract to the contrary"** that a nonbreaching parties' potential damage award was not limited to the Earnest Money damages. The Court went on to say that the parties could enter a contract that limited damages to the Earnest Money and if it was reasonable under the circumstances, the Court would enforce it. The Court of Appeals examined the contract and found no language that would have made the remedy clause exclusive. *Id* at p. 59, 472

In Bannon, the standard contract was not drafted by a lawyer for either party. In the present case, the agreement between Creel and B&G contains "clear language to the contrary" and as to the reasonability of enforcing it against Creel (1) The Court's Order never held that B&G breached anything and in fact, Creel was the breaching party and (2) Creel's attorney

drafted the contract and crafted the remedy clause; Creel is a lawyer who would be held to understand the clause.

It is of note that the Fourth Circuit Court of Appeals does not read the Bannon decision in the same fashion as Appellants, and considers that the case holds that under South Carolina law a purchaser can contract and limit its options upon the seller's breach. (R.p 600-602; p.606) In fact, the Fourth Circuit, in finding a remedial provision exclusive, noted that the provision in question provided that the buyer's remedies were not exclusive but the seller's remedies were exclusive. (R.p.600-602; p. 606) The Fourth Circuit held that this drafting difference was significant to its construing a specific remedies' clause as exclusive. *Id* The Fourth Circuit was not bothered by the absence of any "magic words" which it did not feel Bannon required.

In the present case, the contract also contained different language in the provisions dealing with remedies available to the buyer and the seller. The contract, drafted by Creel's attorney, gave B&G the right to pursue remedies outside the contract, and then only if the seller committed a willful and intentional breach – a fairly high standard. (R.p.671, ¶ 20)

In this case Creel's attorney knew how to provide for the nonexclusivity of remedies and did provide that to B&G, but only in the case of a willful and intentional breach by Creel – but Creel's lawyer did not provide the same to Creel. In this case, as in the one construed by the Fourth Circuit, the drafter of the subject contract didn't "flexibly design" the default and remedy provision to permit Creel to seek remedies outside the contract. And in this case, the drafter of the contract was Creel's attorney. (R.p.671, ¶ 20)

Additionally, common law remedies are not available to Creel, even if Bannon were construed as Appellant claims, because the Appellant, Bucksville/Creel, breached the contract, which is B&G's position. This Court's Order never held that B&G breached the contract. In

fact, the Trial Court held that because of the relationships involved, neither party abided by the strict terms of the contract and the acts of all parties were compelled by a dwindling economy and a difficult real estate market and did not constitute willful or intentional breaches (R.p.5, p. 8)

Creel is a licensed lawyer, and he admitted that he was responsible for providing the wetlands delineation under the contract and at no time did Creel ask that the Contract be amended or modified to make B&G responsible for the wetlands survey or delineation. (R.p.117, l. 22- p.118, l.13; p. 119, l 7 – p.120, l.17; R.p.520, l. 21-25) Instead of making any effort to have the survey and delineation done, as he was obligated to do under his contract with B&G, Creel sold the land in question to Larry Paul, for a reduced price that Creel never offered to B&G. (R.p.117, l.7-21)

B&G deny breaching the contract, but the Trial Court heard all of the evidence, appraised all the witnesses' testimony and credibility, and it found that because of the close relationships involved, none of the parties followed the strict terms of the contract. (R.p.5, p. 8) Under the "first breach" doctrine, in not providing the wetlands delineation he knew he was obligated to provide so that each takedown could be structured, Creel committed the first breach of the contract. (R.p.117, l.22- p.118, l.13; p.119, l.7 - p.120, l.17; p.520, l.21-25) Where a contract is not performed, the party committing the first breach is generally liable for all of the nonperformance. Silver v. Aabstract Pools, 376 S.C. 585, 658 SE2d 539 (Ct. App. 2008) As the breaching party, Creel would not be entitled to any remedies or damages, under the terms of the "Default and Remedy" clause of this contract, or otherwise.

For all of the foregoing reasons, this Trial Court's Order was correct and should be affirmed.

## CONCLUSION:

The Appellants, Bucksville/Creel, contend that B&G breached the parties' agreement and that any claim to the contrary is "pretextual". Appellants claim that the reversal of the real estate market caused B&G to breach and "hope for the best." (Initial Brief of Appellant, p.16) While it makes for a snappy conclusion, the evidence shows that it was Appellant who breached the parties' agreement. Creel, a licensed attorney, read the contract and knew that it made him the responsibility for the wetlands delineation. He testified to that in his deposition. (R.p.499-500, p. 503; R.p.322, l. 2- p. 323, l 19; p.520, l.21-25) Yet, Creel failed to provide a wetlands delineation for either Takedown tract 3 or 4 after due demand to do so by B&G.

Beverly and Creel are Uncle and nephew and what the Trial Court's Order found was that it was the parties' relationship, rather than the strict terms of the agreement, that largely controlled how this transaction was handled. (Final Judgment) Mr. Beverly knew his nephew was in a dire financial condition because Beverly knew all about Creel's financial predicament and had loaned Creel money on numerous occasions. The first closing under this agreement was rushed to give Creel some quick cash because Beverly knew how badly Creel needed the money and B&G then had the cash on hand to be able to close quickly.

By the time the last two (2) closings under the agreement came around, the economy had changed. B&G intended to close on the land and so advised Creel, but sent him a letter putting in writing that they needed Creel to honor the contract and provide the wetlands delineation. Creel never provided the delineation for either tract 3 or 4 and he ended up selling the land to a third party after B&G filed this action asking the Court to declare the Contract ended.

Creel is a licensed attorney and he had his lawyer prepare this agreement. The "Default and Remedy" provision at issue was part of that agreement. If Creel wanted different wording to

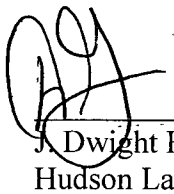
provide that all parties had all remedies available at common law – he could have instructed his lawyer to make that change. If Creel wanted to provide that only he had all remedies available at common law – he could have instructed his attorney to make that change. Instead of directing his lawyer to change the wording of the subject paragraph, Creel simply read the agreement and signed it.

Creel is not recognizing his responsibilities and bearing the burden for his own choices. He asked that the Trial Court shift that burden to B&G and when it failed to do so, he appeals, asking that this Court shift the burden where it doesn't belong.

The "Default and Remedy" provision of the parties' contract says what it says and provides what it clearly provides. When the language of a contract is plain and it can be legally construed, that language determines the effect of the instrument. Silver v. Aabstract, *supra* "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id* at p. 543

The Trial Court reviewed the evidence, heard the testimony, reviewed Proposed Orders and construed the contract, determining that the subject provision provided the exclusive remedies of the parties. For all the reasons stated above, this Court should affirm the Trial Court's Order and enforce the contract made by the parties. Although Appellants seek remand for judgment on the merits, it should be noted that the Order of the Trial Court has already ruled on the merits of the claim. Therefore, regardless of the ruling on the "Default and Remedy" clause, the remainder of the Trial Court's Order should stand as it is supported by the facts and the law.

Respectfully submitted,



J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889
T: (843) 692-9889
F: (843) 692-9190
E: Hudsonlaw@hudsonlawoffice.com

***Attorney For Respondents***

Dated: April 24, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee
Case No: 2009-CP-26-12046

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

OF WHOM

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

and

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

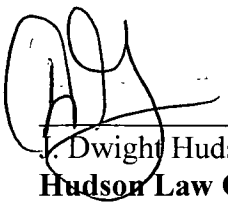
Appellate Case No: 2012-212984.

---

## CERTIFICATE OF COUNSEL

---

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



J. Dwight Hudson, Esquire
**Hudson Law Offices**
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
T: (843) 692-9889; F: 692-9190
E:hudsonlaw@hudsonlawoffice.com
*Attorney for Respondents*

Dated: April 24, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee
Case No: 2009-CP-26-12046



Randy A Beverly, LLC & Donald Godwin, LLC ---------- Plaintiffs

v.

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

v.

Randy A. Beverly & Donald Godwin..... Third Party Defendants & Fourth Party Plaintiffs

v.

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

OF WHOM

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

and

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

Appellate Case No: 2012-212984.

---

**PROOF OF SERVICE RE**
**FINAL BRIEF OF RESPONDENTS**

---

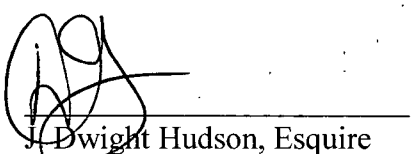
I certify that I have served the FINAL BRIEF OF RESPONDENTS on the Appellant(s) by depositing a copy of the same in the United States Mail, postage prepaid, on April 24, 2013,

addressed to their counsel at the addresses noted below:

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

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

Dated: April 24, 2013



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

**Attorney For Respondents**