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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Ninth Judicial Circuit

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-001227

Gerald R. Smith ....Respondent

v.

United Cable Construction Co., Inc.,
South Atlantic Communications, Inc.,
Brandon W. Linder, and
Karla Linder ....Appellants.

FINAL BRIEF OF APPELLANTS

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ISSUES ON APPEAL

I. Did the Court err in finding that there was no genuine issue of material fact entitling Respondent to judgment as a matter of law?

II. Did the Court err in finding it had subject matter jurisdiction, when the issue was subject to binding arbitration?

III. If the Parties' Modification Agreement is valid, did the Court err in finding that the conditions precedent to Respondent's performance had been completed?

IV. Did the Court err in not finding the Modification Agreement void as a matter of public policy?

V. Did the Court err in its award of specific performance?

VI. Did the Court err in finding that the Parties' Modification Agreement was an unambiguous expression of their intentions?

VII. Did the Court err in finding all Appellants jointly and severally liable for monetary damages and specific performance?

VIII. Did the Court err by denying Appellants' Rule 59(e), SCRCP motion?

IX. Did the Court err by denying Appellants' Rule 60(b), SCRCP motion?

X. Did the Court err by denying Appellants' motion to amend to conform to the evidence?

STATEMENT OF THE FACTS

Prior to the series of agreements forming the genesis of this case, Respondent, Gerald R. Smith ("Smith"), owned and operated Appellant, United Cable Construction, Inc. ("United Cable"); and Appellant, Brandon Linder ("Linder") owned and operated South Atlantic Communications, Inc. ("South Atlantic"). (R. pp. 1-115, 119-127). On January 4, 2006, the Parties entered into a contract whereby South Atlantic would purchase all of United Cable's assets, shares of stock, and retain Smith as a paid consultant for South Atlantic, for a total purchase price of approximately $3,000,000.00 ("Primary Agreements"). (R. pp. 12-31). Thereafter, Linder made periodic payments of varying amounts. (R. p. 4). By April of 2017, Smith was owed

$1,084,244.51. (R. p. 4).

On May 21, 2017, Linder, both individually and on behalf of South Atlantic, and United Cable met with Smith and his attorney at Smith's attorney's office to memorialize a deal that would significantly reduce United Cable, South Atlantic, and Linder's balance on the Parties' Primary Agreements. (R. p. 4). Smith cited his desire to simplify his estate planning efforts and to obtain part of the balance owed to him during his lifetime. (R. p. 4). Linder, penniless, facing a series of family deaths and illnesses, his property subject to an Internal Revenue Service (IRS) tax lien and having just been notified by his bank that his property was being foreclosed upon, had sufficient motivation to assent to Smith's terms. (R. pp. 347-85). Thereafter, "[Smith's Attorney] then immediately drafted the agreement which was presented to [Smith], [Linder] and [Linder's] wife Karla Linder[1] the following day by [Smith's Attorney's] employee George Talbert, and the same was executed and witnessed in Mr. Talbert's presence." (R. pp. 5, 32-33). The Pertinent portions of the Parties' Modification Agreement read as follows.

> WHEREAS, the Seller, Gerald Smith, is agreeable to reduce the payoff to $300,000.00 *provided the following terms are met*:
>
> 1. That the Purchaser, Brandon W. Linder, will immediately reinstate a life insurance policy *on his life* in the amount of $1,000,000 and will be *specifically designate Gerald R. Smith as beneficiary*. This must be immediately accomplished.
>
> 2. The Purchaser, Brandon W. Linder, also known as United Cable Construction, Inc. will make monthly payments of $10,000 directly to Grover C Seaton third Esquire attorney for Gerald R Smith through the month of December 2018 at an interest rate of 1% added thereon, the balance in December 2018 will be a balloon note which must be paid during the month of December 2018.

[1] "Karla Linder is a signatory to [the Modification Agreement] because she was the owner of an undivided interest in the 144 Frankie Lane properties." (R. p. 5). Aside from being named as a party to the declaratory judgment action, this is the Master's sole mention of her in the Master-in-Equity's Order. (*Id.)*

3. That the house on the real estate at Frankie Lane…*will be immediately deeded to Gerald R. Smith* subject to all mortgages and liens. Brandon W. Linder shall be responsible for the monthly mortgage, taxes, insurance and upkeep of the property.

4. *Should the Purchaser, Brandon W. Linder, not perform as to the conditions as setout hereinabove, he will immediately abandon the use of the property at 144 Frankie Lane.*

5. Should the Purchaser, Brandon W. Linder, perform as set out hereinabove, the house as mentioned hereinabove shall be transferred back to Brandon W. Linder and Karla Linder.

6. Lastly the parties forgo and abandon any and all provisions of the sales contracts and addendums thereto as to any arbitration provision in event of default.

(R. pp. 1-11, 32-33) (emphasis added).

Thereafter, on November 7, 2018, Smith brought a declaratory judgment action requesting the Court to declare whether the Modification Agreement was a valid contract. (R. pp. 1-11). On May 15, 2019, a hearing was held before the Berkeley County Master in Equity to determine whether the Modification Agreement was a valid and binding contract. By subsequent written order dated July 15, 2019, the Master held that, "Based upon the findings of fact and conclusions of law, I find and conclude and declare that [the Modification Agreement] is a valid and binding contract between and among the parties to this case." (R. p. 8).

STATEMENT OF THE CASE

The underlying action in this appeal concerns a declaratory judgment on the validity of an agreement by and between the Parties, and Smith's subsequent enforcement action on the same. Following the Master-in-Equity's Order declaring the Parties' contract to be valid and binding, on October 7, 2019, Smith sought enforcement of the Modification Agreement, alleging breach of

contract, and demanding specific performance of the same. (R. pp. 137-157).[2] Appellants filed their Answer and Affirmative Defenses, asserting lack of subject matter jurisdiction, failure to state a claim, lack of standing, unclean hands, and the breach of the covenant of good faith and fair dealing.[3] (R. pp. 159-165). Respondent moved for summary judgment and a hearing for the same was held on August 4, 2021. On August 5, 2021, the Court entered its Form-4 Order in favor of Smith and dismissed Appellants' counterclaims. (R. pp. 116-118). On August 24, 2021, the Court issued its formal order, holding that: "[Smith] is entitled to judgment as a matter of law, that [Appellants] have breached the Contract for monies owed [to Smith]. Specifically, due to the breach of Contract by [Appellants], [Smith] is entitled to judgment against all [Appellants] in the fixed sum certain of $267,000.00 in actual damages. (R. p. 122) The Court of Common Pleas further awarded Smith pre-judgment interest in the amount of $65,475.30. (R. p. 5). In addition, the Court granted the Respondent specific performance, deeming it equitable and necessary for them to:

> [P]rocure a life insurance policy on the life of [Linder] with a death benefit of $1,000,000.00 naming [Smith] as beneficiary; said action to be accomplished within thirty (30) days of the entry of this order, with a certificate of insurance being concurrently provided in writing to [Smith's] counsel. The policy shall remain in full force and effect for the lifetime of [Smith].

(R. pp. 124-125). Thereafter, on August 21, 2021, the Court entered its Form-4 Statement of Judgment for the Index in favor of Smith and against Appellants United Cable Co. in the amount of $332,475.30, South Atlantic Communications, Inc., in the amount of $332,475.30, and Brandon

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[2] Interestingly, Smith sought enforcement of some, but not all, of the Modification Agreement's terms. Smith's Complaint is silent as to the fate of the property known as *144 Frankie Lane, despite its conveyance to Smith as a requirement under the Modification Agreement.*

[3] Styled as a Counterclaim in Appellants' Answer.

W. Linder and Karla Linder in the amount of $332,475.30. (R. p. 128). On September 3, 2021, Appellants moved the Court to alter or amend its August 24, 2021 Order pursuant to Rule 59(e), SCRCP, for relief from the Court's Order pursuant to Rule 60(b), and to amend their pleadings to conform to the evidence pursuant to Rule 15(b), SCRCP. (R. pp. 240-249). On October 1, 2021 the Court denied all three of Appellants' motions, without hearing, via Form-4 Order. (R. pp. 134-136).

ARGUMENT

The Court of Common Pleas' orders fail to view the Parties' Primary Agreements in conjunction with the Modification Agreement. The Court of Common Pleas' orders also fail to consider Respondent's misconduct in relation to the execution of the Modification Agreement. When viewed as a whole, the record contains at least a scintilla of evidence necessary to defeat Respondent's Motion for Summary Judgment. Further, the Court's award of specific performance and apportionment of damages was a reversible error of law. In addition, the Parties' Modification Agreement is void in both substance and execution. It was a reversible error of law to find the Parties' Modification Agreement binding and enforceable. Although Appellants' continued objection to a contract upheld by two separate courts may seem quixotic, Appellants are not tilting at windmills. The Master-in-Equity declared the Modification Agreement to be valid and enforceable but offered no findings of fact or conclusions of law as to the Parties' rights and obligations in the event of a breach. When brought by Smith for enforcement at the Court of Common Pleas, the question still remains, what happens if Linder breaches under the Modification Agreement?

I. The record contains at least a scintilla of evidence sufficient to defeat Smith's motion for summary judgment.

Although Appellant strenuously disagrees with the findings of fact and conclusions of law within the Master-in-Equity's Declaratory Order (R. pp. 1-115), their preclusive effect on the present case are extremely limited, if at all. The doctrine of *res judicata* comprises two types of preclusion: issue preclusion and claim preclusion. In South Carolina, a mere scintilla of evidence of a material issue of fact can defeat a motion for summary judgment. The record, when viewed in a light most favorable to Appellants, contains at least a scintilla of evidence against the Modification Agreement's validity and enforceability, against a finding that Smith's recovery is not otherwise barred by the doctrine of laches or unclean hands, against Karla Linder's culpability or liability under any theory of recovery, and most importantly, whether the Modification Agreement void as matter of law or public policy.

A. Standard of Review – Summary Judgment

"In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure." *M & M Grp., Inc. v. Holmes*, 379 S.C. 468,473, 666 S.E.2d 262, 264 (Ct. App. 2008). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Rule 56(c), SCRCP). A material issue constitutes a legal defense, or affects the result of an action. *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." *Id.* (quoting *Willis v. Wu*, 362 S.C. 146,

151, 607 S.E.2d 63, 65 (2004)). Summary judgment should not be granted if further development of the facts would assist in the application of the law. *Mosteller v. Cty. of Lexington*, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. *Id.* "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).[4]

B. There are genuine issues of material facts as to whether the Parties' Modified Agreement is valid and enforceable.

The Parties' Contract is patently and facially ambiguous; its terms uncertain, presenting a question of fact for a jury to decide. The construction of a written contract presents a question of law for the Court only when the contract is clear, unambiguous, and free from doubt. Where there is ambiguity, uncertainty or doubt as to proper construction of the contract, the intention of the parties becomes a question of fact for the jury to determine with extrinsic evidence to show the conditions surrounding the parties, the circumstances under which the contract was executed, as well as the negotiations between the parties leading up to the execution thereof. *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 305, 128 S.E.2d 171, 174 (1962); *Cooper & Griffin, Inc. v. Bridwell*, 177 S.C. 219, 181 S.E. 56 (1935); *Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 118 S.E. 609 (1923). "Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." *Wallace v. Day*, 390 S.C. 69, 700 S.E.2d 446 (Ct. App.

[4] The South Carolina Supreme Court has defined a "scintilla" as '"a gleam,' 'a glimmer,' 'a spark.' 'the least particle,' the smallest trace.'" *Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935).

2010) (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." *Wallace,* 390 S.C. at 67, 700 S.E.2d at 446.

Appellants contend that because the Court of Common Pleas had to look beyond the four corners of the Parties' Modification Agreement to ascertain its meaning, it was a reversible error not to submit the question to a jury. What's more, any ambiguity must be interpreted in favor of the non-drafting parties, in this case, Appellants. The most straightforward manner to resolve this ambiguity is to look no further than the third "WHEREAS" of the Parties' Modified Agreement. (R. p. 32). It reads in pertinent part, "[S]eller, Gerald Smith is agreeable to reduce the payoff to $300,000.00 provided the following terms are met." Following this condition precedent is a list of six items Linder must perform to be eligible for the purported debt reduction. (*Id.*) Item 6 of 6 of the Modified Agreement purports to waive the Parties' arbitration clause within their Primary Agreement. Because Linder failed to satisfy all the conditions precedent to Smith's performance, the Modification Agreement is void[5], and the Parties' Primary Agreements control.

C. There is a genuine issue of material fact as to Appellants' affirmative defenses of laches, unclean hands, and breach of the covenant of good faith and fair dealing.

Respondent's misconduct implicates Appellants' defense of unclean hands. (R. p. 163). An action for specific performance is an action in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (2000). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance

[5] "[A]n agreement to do that which one is already legally bound to do is not sufficient consideration to support a new contract. *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 54, 135 S.E.2d 311, 315 (1964).

of the evidence. *Townes Assocs., LTD v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965). *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004) (holding that upon appeals in equity cases, an appellate court may reverse a factual finding of a lower court when the appellant makes a showing that the lower court's findings were against the preponderance of the evidence).

Viewing the facts in a light most favorable to Appellants, the record contains more than a monochrome of evidence that Smith's hands in this matter are far from spotless. It is more than pure coincidence or plain altruism that brought Linder to Smith's attorney's law office. (R. pp. 347-85). Linder, penniless, facing a series of family deaths and illnesses, his property subject to an Internal Revenue Service (IRS) tax lien and having recently been notified by his bank that his property was being foreclosed upon, had sufficient motivation to assent to Smith's terms. (*Id*). The economic constraints placed upon Linder give rise to a scintilla of evidence that Smith's predatory conduct towards Linder could bar his recovery under the doctrine of laches or unclean hands.

D. There is a genuine issue of material fact regarding Karla Linder's liability to Smith.

The Court of Common Pleas entered a judgment in the amount of $332,475.30 against both Karla Linder and Brandon Linder. (R. p. 126). Aside from her name appearing in the case caption below, Karla Linder was not named nor mentioned in the Court of Common Pleas Order. The only findings of fact and conclusion of law cited by the Court of Common Pleas as to Karla Linder are limited to a finding that she was a party to a contract, and collectively, the Appellants, as a whole, breached it. (R. p. 120). Despite her tangential and dubious involvement in with Smith and Co-Appellants' businesses, the Court found that there was no genuine issue of material fact that she is liable for a breach of contract with Smith, and must procure life insurance on her husband, Mr.

Linder, naming Smith as beneficiary in the amount of $1,000,000.00.[6] (R. p. 126). Despite her scant mention in the entire record before it, the Court of Common Pleas found that Smith was entitled to an award of specific performance and monetary damages against her.

Viewing the facts in the light most favorable to Mrs. Linder, as the non-moving party, summary judgment cannot be sustained against her. Ms. Linder's Answer included an affirmative defense for failure to state a claim for which relief can be granted. (R. pp. 159-165). Mrs. Linder's affirmative defense, taken in conjunction with her virtual absence in the record before the Court, cannot sustain the summary judgment granted against her. Accordingly, this Court must reverse the Court of Common Pleas and remand this case for a trial on the merits.

II. The Court lacked subject matter jurisdiction due to the parties' arbitration provision.

If the Modification Agreement is held to be a binding and enforceable contract, if anything, the Modification Agreement is just that, a modification to Respondent and Appellants United Cable, Atlantic Communication, and Mr. Linder's Primary Agreements.[7] Despite this, it appears that the Court of Common Pleas disregarded the Parties' Primary Agreements and the effect of the Parties' Modification Agreement to the same. This was in error as the Parties' Primary Agreements each had a valid and binding arbitration provision. The arbitration provision(s) contained within the Parties' Primary Agreement(s) deprived the Court of subject matter jurisdiction.[8]

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[6] It is unclear from the Court of Common Pleas's Order whether Ms. Linder is subject to the Court's award of specific performance.

[7] As raised in Defendants' Motion to Alter or Amend addressing the issue. (R. pp. 242-249).

[8] "[A] Judgment may be [impeached] in a collateral proceeding on the ground of fraud where fraud goes to the jurisdiction of the court, or to the method of acquiring jurisdiction or appears on the face of the record. *McLeod v. Sandy Island Corp.*, 260 S.C. 209, 215, 195 S.E.2d 178, 180 (1973).

A. Standard of Review – Subject Matter Jurisdiction

The issue of subject matter jurisdiction may be raised at any time, including upon appeal. *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). When raised for the first time at the appellate court, the appellate court may take its own view of whether the preponderance of the evidence supports jurisdiction. Arbitrability determinations are subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Singh v. Singh*, 429 S.C. 10, 19, 837 S.E.2d 651, 656 (Ct. App. 2019) (quoting *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). The South Carolina Uniform Arbitration Act (S.C. Code Ann. §§ 15-48-10 - 15-48-240 (2005)) (the "Arbitration Act") provides that a "[w]ritten agreement to submit any existing controversy to arbitration…is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the for the revocation of any contract." *Singh*, 429 S.C. at 19, 837 S.E.2d at 656 (quoting S.C. Code Ann. § 15-48-10(a)).

B. Regardless of the validity or enforceability of the Parties' Modification Agreement, its terms were not satisfied, and the Parties' Primary Agreement dated May 22, 2017 must control, depriving the Court of subject matter jurisdiction.

The Court of Common Pleas, vis-à-vis the Master-in-Equity, found the Modification Agreement at issue to be a "[v]alid and binding contract between and among the parties to this case." (R. pp. 8, 121-126). Although the contract at issue purports to waive the Parties' obligation to arbitrate, such waiver is ineffective, especially when the Modification Agreement is analyzed in conjunction with the Parties' Primary Agreements, as amended. (R. pp. 12-25).

Assuming that the Parties' Modification Agreement is valid and enforceable, the conditions precedent to parties' performances under the Modification Agreement were not satisfied. Thus, the Modification Agreement is no longer binding, or at least still voidable. Instead, the Parties' Primary Agreement, dated March 18, 2013, must control. (R. pp. 27-30). The Parties' Primary Agreement, dated March 18, 2013, has a valid and binding arbitration provision, depriving the Court of Common Pleas of Jurisdiction to entertain Smith's enforcement action. Although not required, Appellants have maintained that the Court of Common Pleas lacked subject matter jurisdiction throughout the proceedings below. (R. pp. 162, 246). The Court of Common Pleas committed a reversible error by not enforcing the Parties' controlling agreement, and not ordering the matter to binding arbitration.

III. The order granting summary judgment violates South Carolina's public policy regarding the duration and enforceability of judgments

The Court of Common Pleas' Formal Order Granting Summary Judgment is void *in ab initio* because it can be enforced in perpetuity, against public policy and statute. An action for specific performance typically concerns the performance of a discrete act by a person or persons. Unlike a typical case for specific performance, the Appellants in the present matter must continue their performance, presumably for eternity, subject to perpetual enforcement by the Court of Common Pleas.

A. Standard of Review – Public Policy Decisions

Appellate courts exercise de novo review of public policy issues. *Williams v. Gov't Emps. Ins. Co.,* 409 S.C. 586, 762 S.E.2d 705 (2014). ("Whether a particular provision in [a contract] violates the public policy of the state is a question of law that is reviewed de novo by an appellate court… public policy considerations include not only what is expressed in state law such as the constitutions and statutes and decisions of the court but also a determination whether the agreement

is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to public welfare.")

i. The order granting summary judgment violates South Carolina's public policy concerning the enforceability of judgments beyond ten years.

Executions on final judgment or decrees must occur within ten years from the date on which the judgment was entered. *Home Port Rentals, Inc. v. Moore*, 359 S.C. 230, 234, 597 S.E.2d 810, 812 (Ct. App. 2004). Our Supreme Court has concluded that a judgment is "utterly extinguished . . . after the expiration of ten years from the date of entry." *Id.* (citing *Hardee v. Lynch*, 212 S.C. 6, 17, 46 S.E.2d 179, 183 (1948); *see also Garrison v. Owens*, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972) ("[a] judgment lien is purely statutory[;] its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried."). This Court has consistently held that under the statute, a judgment becomes stale and a judgment lien is extinguished after ten years. *Home Port Rentals, Inc. v. Moore*, 369 S.C. 493, 496, 632 S.E.2d 862, 863 (2006).

The Court of Common Pleas cannot enforce its Order Granting Summary Judgment beyond ten years. Conceivably, Linder could purchase the requisite life insurance policy, and cancel the same in ten years and one day with impunity. Unless this Court is prepared to make an exception for actions on specific performance beyond ten years, Smith will have no recourse. However, he does have an adequate remedy at law – an award of monetary damages.

ii. The life insurance policy clause within the Modified Agreement amounts to a wager and does not promote the continuation of life.

"It is firmly established that insurance procured by one person on the life of another, in which the party effecting the insurance has no interest, is void as a wager contract against public

policy, which condemns gambling speculation upon human life." *Henderson v. Life Ins. Co.*, 176 S.C. 100, 127-128, 179 S.E. 680, 691 (1935). The law forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a "wager policy," or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. The basis for holding such contracts of insurance to be against public policy is grounded upon the law prohibiting wagering contracts." *Hack v. Metz*, 173 S.C. 413, 415, 176 S.E. 314, 315 (1934).

Here, the Court's award of specific performance in this context warrants scrutiny. It amounts to nothing more than a wager policy as Smith has no vested interest in prolonging Linder's life as required by *Metz.* Although Appellants have no reason to fear for their lives, other litigants in like arrangements may want to hasten the receipt of their funds. The Court's Order Granting Summary Judgment is repugnant to South Carolina's public policy concerning wager life insurance policies and must be reversed as a matter of law.

IV. Specific performance is not an available remedy because Smith has an adequate remedy at law.

"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." *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291. A plaintiff must show more than the mere existence of a valid contract to be entitled to specific performance. The court should grant specific performance only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250 (1939); *Holley v. Anness*, 41 S.C. 349, 19 S.E. 646 (1894).

A. Standard of review – Specific Performance

An action for specific performance is an action in equity. *Ingram*, 340 S.C. at 98, 531 S.E.2d at 287. In an action in equity tried by a judge, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Townes Associates, Ltd.*, 266 S.C. at 81, 221 S.E.2d at 773.

B. Respondent can be made whole with an award of strictly monetary damages, negating the need to award the same.

The purpose of an award of damages for breach of contract is to put the Plaintiff in as good a position as he would have been in if the contract had been performed." *Pingley v. Brunson*, 272 S.C. 421, 252 S.E.2d 560, (1979) The idea of compelling a close personal association over a protracted period of time after disputes have arisen and loyalty and confidence dissipated has been repugnant to courts facing the situation. *Id.*

Here, Respondent has an adequate remedy at law – an award of monetary damages. Respondent can be made whole without compelling Appellants to maintain life insurance for Brandon Lindon for Respondent's benefit in perpetuity. This is especially so in the context of one party securing a life insurance policy for the benefit of another. Typically, a party is ordered to maintain life insurance on themselves for the benefit of another in order to secure alimony payments. *Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005). However, before a party can be ordered to maintain life insurance in perpetuity, a court must conduct a comprehensive review to determine whether a special circumstance exists which would require life insurance to secure monetary damages. *Id.* Although the Court of Common Pleas Found that because of the

> [S]pecialized and unique nature of a policy of life insurance, [Respondent] has established to [the Court's] satisfaction that the requisite elements of specific performance have been met with respect to the life insurance required to be procured, and because

> there is no genuine issue as to any material fact regarding the same, [Respondent] is entitled to judgment as a matter of law.

The record does not support the Court of Common Pleas' findings that Appellants and Respondent's business relationship was sufficiently unique and specialized to warrant Appellants' compelled procurement of a life insurance policy, on the life of Brandon Linder, for the benefit of Respondent. Not only does this violate the sound reasoning in *Wooten*, the Order, and Modification Agreement violate South Carolina's Public Policy concerning agreements to procure life insurance that amount to wagers against prolonging life. There are no special circumstances that warrant the compelled purchase of a life insurance policy in the present case. Likewise, there are insufficient facts to support a finding of special circumstances. Unlike a parent-child relationship or spousal relationship, there are no special circumstances in the present matter.[9]

The Court erred by granting Respondent's Motion for Summary Judgment because Appellant has an adequate remedy at law, the Parties' relationship does qualify as a special and unique relationship under *Wooten,* and the Parties' agreement concerning the procurement of life insurance is void as a matter of public policy.

V. There are not sufficient facts in evidence to reasonably support the Court's findings as to the Modification Agreement's terms, validity, and enforcement mechanisms.

The Modification Agreement that Plaintiff seeks to enforce is an attempted modification of the Primary Agreements between the parties to this case, with the exclusion of Karla Linder. It

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[9] "In making such a determination, the analysis should begin with the supported spouse's need for such security, i.e., consideration of the supported spouse's probable economic condition in the event of the payor spouse's death. The family court should consider the supported spouse's age, health, income earning ability, and accumulated assets. If a need for security is found, the family court should next consider the payor spouse's ability to secure the award with life insurance, i.e., the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plans carried by the parties during the marriage." *Wooten*, 364 S.C. at 532, 615 SE 2d at 98.

is clear that the purpose of the Modification Agreement was to alter the debt, but it is not clear as to what the rights of the parties are in the case that the terms of the Modification Agreement are not met. Given the patent ambiguities of the Parties' Modification Agreement, summary judgment should have been denied.

A. Standard of Review – Breach of Contract

An Action for breach of contract is one at law. *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012). On appeal from a case tried by a judge in an action at law, "the finds of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd.*, 266 S.C. at 81, 221 S.E.2d 7at 73.

B. The Modification Agreement contains sufficient ambiguities to raise a question for a jury.

A contract is read as a whole document to avoid ambiguity by pointing out a single sentence or clause. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). It is a question of law for the court whether the language of a contract is ambiguous. S.*C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). Contract ambiguities are construed in favor of the non-drafting party. *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009). If a contract contains a condition precedent, that condition must either occur or be excused before a party's duty to perform arises. *Id.*

The Modification Agreement is silent as to what, if anything, must occur in the event of Appellants' breach of the same. Here, Respondent agreed to accept less than he claims that he is owed under the parties' Primary Agreements, provided that Mr. Linder complied with the terms of the Modification Agreement at issue. (R. p. 32). Unquestionably, Mr. Linder did not comply with the terms of the Parties' modification agreement. Therefore, the conditions precedent to Respondent's performance were not satisfied, and the Parties' Primary Agreement dated May 22,

2012 controls. *McGill*, 381 S.C. at 179, 672 S.E.2d at 571 (holding that if a contract contains a condition precedent, that condition must either occur or be excused before a party's duty to perform arises). Assuming arguendo, that the Parties' Modification Agreement is still binding and enforceable, any ambiguities contained therein must be construed in favor of the non-drafting parties, Appellants. *Id.*

C. Appellants cannot be jointly and severally liable to Respondent for monetary damages and specific performance.

"Whether contract rights or duties are joint, several, or joint and several depends upon the meaning of the contract as ascertained by a proper interpretation thereof." *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956). One of the rules for determining whether a contract is joint is whether the interest of the parties in the subject matter are joint. *Id.* "As a general rule, a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable when, in its nature and purpose, it is susceptible of division and apportionment." *Id.* As discussed above, the contract at issue is ambiguous as to the rights and obligations of the parties. The parties' contract places no specific obligations or conditions upon Appellants United Cable Construction Co., South Atlantic Communications, Inc., and Karla Linder. Yet, judgment was entered against each, in the same amount, with no indication of joint and/or several liability. If not overturned by this Court, conceivably, Respondent can recover $332,475.30 (the judgment amount) from each Appellant. If so, Respondent would receive a windfall, and the Appellants which have no specific obligations placed upon them under the Modification Agreement, will be at the mercy of Respondents United Cable Construction Co. Mr. Linder's performance, or lack thereof. This is in error and must be reversed.

VI. The Court abused its discretion by denying Appellants' Motion Amend to Conform to the Evidence.

The Court abused its discretion by denying Appellants' Motion to their Amend Pleadings to Conform to the evidence. Appellants' pleadings, when construed liberally, raise genuine issues of material fact. The Court abused its discretion by failing to consider the whole of the evidence before it, especially in light of Appellant's Motion Amend to Conform to the Evidence.

A. Standard of Review – Motions to Amend

Motions to amend pleadings to conform to the evidence will not be disturbed on appeal absent an abuse of discretion. *Soil & Material Engineers, Inc. v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987).

B. Appellants' Pleadings and the record before the Court, when taken as a whole, are appropriately remedied by Appellants' Motion to Conform.

"When a party wishes to amend a pleading after final judgment from a full trial on the merits, South Carolina Rule of Civil Procedure 15(b) applies. Amendments under South Carolina Rule of Civil Procedure 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the evidence presented at trial." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Although the Court correctly found that South Carolina does not recognize a cause of action for breach of the covenant of good faith and fair dealing, the true nature and effect of Appellants' counterclaim operate as affirmative defenses to the breach of contract and contract formation.

The purpose of a pleading is to put the adversary on notice as to the issues involved. *Langston v. Niles*, 265 S.C. 445, 219 S.E.2d 829 (1975). Pleadings must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case. *Pilkington v. McBain*, 274 S.C. 312, 262 S.E.2d 916 (1980). *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct. App. 1985).

Pleadings in both law and equity should be liberally construed to do substantial justice. *Loftis v. Eck*, 288 S.C. 154, 341 S.E.2d 641 (Ct. App. 1986). S.C. Code Ann. § 15-13-20 (1976) provides that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties.

Here, the counterclaim and affirmative defenses raised Appellants' Answer and counterclaim, if construed liberally pursuant to *Loftis*, creates at least a scintilla of evidence that Respondent is not entitled to judgment as a matter of law. Had the Court granted Appellants' Motion to Amend Pleadings to conform to the evidence, it would have negated summary judgment as to Respondent's claims. "If a demurrer to a pleading raises merely a doubtful question or the case is such that justice may be promoted by trial on the merits, the court should exercise a fair, judicial discretion to that end." *Gossett v. Burnett*, 251 S.C. 548, 549, 164 S.E.2d 578 (1968). The Court abused its discretion by denying Appellant's motion to conform to the evidence, denying Appellants a trial on the merits.

VII. Appellant's 60(b), SCRCP, was curative and would have permitted a trial on the merits.

The Court abused its discretion by denying Appellants' Motion for Relief from Judgment or Order because the Court's findings of fact and conclusions of law are without sufficient evidentiary support to sustain them.

A. Standard of Review – Rule 60(b), SCRCP

The power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Whether to grant or deny a motion under Rule 60(b) is reviewed on an abuse of discretion standard. *Id. "*An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

B. Granting relief to Appellants under Rule 60(b), SCRCP was warranted because the Parties' Modification Agreement is void as a matter of law.

S.C. R. Civ. P. 60(b)(1) provides in part that on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for mistake, inadvertence, surprise, or excusable neglect. *Coleman v. Dunlap*, 306 S.C. 491, 492, 413 S.E.2d 15 (1992). "[I]n order to obtain equitable relief from a judgment based on fraud, the fraud must be extrinsic." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 19, 594 S.E.2d 478, 482 (2004). In considering collateral attacks on final judgments, a court must *balance the interest of finality against the need to provide a fair and just resolution of the dispute. Chewning v. Ford Motor Co.*, 354 S.C. 72, 79-80, 579 S.E.2d 605, 609 (2003) (emphasis added). As discussed herein, the Parties' Modification Agreement is void and unenforceable, and the Court abused its discretion in failing to offer relief to Appellants pursuant to Rule 60(b), SCRCP.

CONCLUSION

For the argument set forth above, Appellants United Cable Construction Co., Inc., South Atlantic Communications, Inc., Brandon W. Linder, and Karla Linder respectfully request this Court to reverse Court of Common Pleas Orders dated August 5, 2021, August 24, 2021, August 26, 2021, and October 1, 2021.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Ninth Judicial Circuit

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-001227

Gerald R. Smith ....Respondent

v.

United Cable Construction Co., Inc.,
South Atlantic Communications, Inc.,
Brandon W. Linder, and
Karla Linder ....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that Appellants' Final Brief and Appellants' Final Brief in Reply comply with Rule 211(b), SCACR.

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