The Supreme Court of South Carolina

RE: Admission of Persons to Practice Law During the Coronavirus Emergency

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ORDER

During the coronavirus emergency, no admission ceremonies will be held. Instead, a person eligible for admission shall execute the Lawyer's Oath before a notary and return the completed Lawyer's Oath to the Office of Bar Admissions. Upon receipt of a properly completed Lawyer's Oath, the Office of Bar Admissions shall notify the person, and the person may engage in the practice of law in South Carolina upon receipt of this notification.

This Court is aware that persons eligible for admission may have difficulty appearing before a notary during the current emergency. Accordingly, the following certification may used in place of appearing before a notary:

> I swear or affirm that I will comply with the Lawyer's Oath set forth above. I understand that by signing this certification I will be bound by this Lawyer's Oath as if it had been taken and executed before a notary.

In correspondence or other notice to persons eligible for admission, the Clerk of this Court may provide additional guidance regarding the completion and return of the Lawyer's Oath, and payment of any fees.

This order is effective immediately. It shall remain in effect until modified or rescinded by this Court.

s/ Donald W. Beatty C.J.

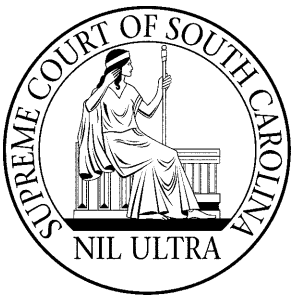
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 15, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 22, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert G. Shirey, Respondent,

v.

Gwen G. Bishop, Cassandra Robinson, and TD Bank, N.A., Defendants,

Of whom Gwen G. Bishop and Cassandra Robinson are the Appellants.

Appellate Case No. 2017-001678

Appeal From Newberry County
Samuel M. Price, Jr., Special Referee

Opinion No. 5718
Heard February 3, 2020 – Filed April 22, 2020

AFFIRMED

Jason Scott Luck, of Garrett Law Offices, of North Charleston, for Appellants.

Kyle B. Parker, of Pope Parker Jenkins, P.A., of Newberry, for Respondent.

GEATHERS, J.: In this land-transaction dispute, Appellants Gwen G. Bishop and Cassandra Robinson (collectively "Appellants") challenge the order of the special referee, arguing that the referee erred in 1) finding Respondent Robert G. Shirey was

entitled to specific performance; 2) setting aside the deed from Bishop to Robinson; 3) finding Shirey to be a bona fide purchaser; and 4) awarding Shirey attorney's fees. We affirm.

FACTS

The property at issue in this case is located at 242 Power Station Road in Newberry County, tax map number 294-23 ("the Property"). For over thirty years, Bishop and her husband operated a grave digging and burial vault business from the Property. In 2010, Bishop's husband passed away, leaving Bishop to run the business by herself. Consequently, Bishop suffered from depression and anxiety and she ultimately determined that she did not want to continue operating the business.

On April 25, 2012, Bishop entered into a land sale contract with Robinson, her niece, to sell the Property ("the 2012 Robinson Contract"). Robinson agreed to purchase the Property by assuming Bishop's mortgage and making monthly payments in the amount of $2,080.77 until the mortgage was satisfied.[1] The contract provided that, "If Buyer does not pay payments on the note monthly, Seller has the right to declare Buyer in default of this Contract." The contract was never recorded.

In many ways this case arises out of what happened next. Although Bishop had agreed in 2012 to sell the Property to Robinson, sometime in late 2014 or early 2015, Bishop approached Shirey about purchasing the Property[2] and the two ultimately entered into a land sale contract on May 20, 2015 ("the Shirey Contract"). Shirey agreed to purchase the Property for $125,000 and tender earnest money in the amount of $1,000 to be paid upon the signing of the contract. The contract also included: 1) a provision requiring that the closing occur "no earlier than August 3, 2015[,] and no later than August 12, 2015," further indicating that time was of the essence; 2) a warranty provision representing that Bishop "ha[d] good and marketable fee simple title to the Property . . . and no person or entity claim[ed] any right of possession to all or any portion thereof . . ."; and 3) a provision requiring (a) a specific writing for the waiver of any provision and (b) a writing signed by both parties for any modification.

Shirey tendered a check for $122,976.92 and deposited it with his attorney's office on August 12, 2015. However, Bishop did not show up to the closing or

[1] TD Bank, the mortgagee, was not notified and did not consent to the assumption.
[2] Shirey owns two commercial parcels that bound the Property on two sides.

otherwise tender a deed to Shirey. After it became apparent that Bishop was not going to appear, Shirey's attorney called Bishop to ask if the closing period could be extended to August 13, 2015, and Bishop agreed to appear the next day for closing.

On August 13, 2015, Shirey arrived at his attorney's office but Bishop again failed to appear. Later that morning, Bishop's doctor sent a note to Shirey's attorney asking that Bishop be excused from the closing. However, that afternoon, Bishop entered into a second land sale contract with Robinson ("the 2015 Robinson Contract"). Pursuant to the contract, Robinson agreed to purchase the Property for $33,000[3] and assume the mortgage. Notably, the 2015 Robinson Contract included a provision absent from the 2012 Robinson Contract providing that "The seller also[] agrees to indemnify the Buyer of any and all issues and of illegality or fraud concerning this transaction." Additionally, Bishop executed a deed conveying the Property to Robinson, and Robinson recorded the deed the same day.

Shirey filed a complaint against Bishop on August 20, 2015, requesting specific performance of the Shirey Contract and attorney's fees. Bishop filed her answer on September 16, 2015. On October 8, 2015, after learning of the deed from Bishop to Robinson, Shirey filed a motion to amend his complaint to add TD Bank and Robinson as parties to the action. The motion was granted, and Shirey filed his amended complaint on February 16, 2016. TD Bank filed its answer on April 7, 2016, and Bishop and Robinson both filed their answers on April 25, 2016. Neither Bishop nor Robinson raised any affirmative defenses in their answers.

On February 23, 2017, the action was referred to the special referee, and the case was heard on March 22, 2017. The parties offered records, depositions, and testimony demonstrating that Robinson did not make all of the mortgage payments required by the 2012 Robinson Contract,[4] she made sixteen late payments, and she knew about the Shirey Contract prior to August 13, 2015, the date of the Shirey closing. Additionally, Bishop testified that she forwarded all of her mortgage statements to Robinson and did not understand what she was signing when she signed the 2015 Robinson Contract.

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[3] Robinson testified that the $33,000 purchase price was equal to the amount of mortgage payments she had made under the 2012 Robinson Contract.

[4] Bishop resumed making the mortgage payments after Robinson made her last payment in August 2013. Appellants testified that these payments served as Bishop's rent for occupying the premises, but such an agreement was never reduced to writing.

On May 18, 2017, the special referee entered an order in favor of Shirey, setting aside the deed to Robinson, ordering specific performance of the Shirey Contract, and awarding Shirey attorney's fees. The special referee further determined that 1) Shirey was a bona fide purchaser who took free of any interest Robinson might have in the Property; 2) Robinson and Bishop were in a confidential relationship; 3) the phone call from Shirey's attorney to Bishop was tantamount to an extension of the contract; and 4) Bishop's entering into the Shirey Contract demonstrated an intention to hold Robinson in default of the 2012 Robinson Contract. Appellants filed a motion for reconsideration, which was denied by the special referee on July 28, 2017. This appeal followed.

ISSUES ON APPEAL

1. Did the special referee err in finding that Shirey was entitled to specific performance?

2. Did the special referee err in setting aside the deed from Bishop to Robinson?

3. Did the special referee err in finding Shirey to be a bona fide purchaser?

4. Did the special referee err in awarding Shirey attorney's fees?

STANDARD OF REVIEW

An action for specific performance and an action to set aside a deed are both matters in equity. *Bullard v. Crawley*, 294 S.C. 276, 278, 363 S.E.2d 897, 898 (1987); *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004). "In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence." *Greer v. Spartanburg Tech. Coll.*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). However, "[t]his broad scope of review does not require this court to ignore the findings below when the [referee] was in a better position to evaluate the credibility of the witnesses." *Id*.

"The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard." *Raynor v. Byers*, 422 S.C. 128, 131, 810 S.E.2d 430, 432 (Ct. App. 2017) (quoting *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009)).

LAW/ANALYSIS

I. Specific Performance

Generally, "[s]pecific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Campbell*, 361 S.C. at 263, 603 S.E.2d at 627 (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)). However, "[w]hen land is the subject matter of an agreement[,] the jurisdiction of equity to enforce specific performance is undisputed[] and does not depend on the inadequacy of the legal remedy in the particular case." *Adams v. Willis*, 225 S.C. 518, 526, 83 S.E.2d 171, 175 (1954); *see also Belin v. Stikeleather*, 232 S.C. 116, 123, 101 S.E.2d 185, 188 (1957) ("It is elementary that the jurisdiction of equity to grant specific performance of an agreement of this kind does not depend upon the inadequacy of the legal remedy in the particular case."). "Equity will not decree specific performance unless the contract is fair, just, and equitable." *Campbell*, 361 S.C. at 263, 603 S.E.2d at 627. Accordingly, "specific performance of a contract to sell real property will be ordered whe[n] the contract 'is fair and was entered into openly and aboveboard.'" *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) (quoting *Adams*, 225 S.C. at 528, 83 S.E.2d at 176).

> In order to compel specific performance, a court of equity must find: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract.

Gibson v. Hrysikos, 293 S.C. 8, 13–14, 358 S.E.2d 173, 176 (Ct. App. 1987).

Appellants argue the special referee erred in granting Shirey specific performance because 1) there was no valid contract as Shirey breached the contract and the oral extension of the closing date was ineffective under the statute of frauds; 2) the equities of the transaction did not favor specific performance; and 3) Shirey

has not demonstrated that he was capable of performing the contract at the time of filing.[5] We will address each argument in turn.

a. Contract validity and the statute of frauds

Appellants argue Shirey is not entitled to specific performance because the Shirey Contract was no longer valid after Shirey breached by asking Bishop to close on the day after the initial closing date. Shirey argues he did not breach the Shirey Contract because the contract was orally extended. We agree with Shirey.

Appellants argue the oral modification of the Shirey Contract's closing date was ineffective under the statute of frauds.[6] Shirey argues Appellants waived this argument by failing to plead it in their answers. We agree with Shirey.

The statute of frauds is an affirmative defense that must be set forth in the responsive pleading of the party seeking its protection. *See* Rule 8(c), SCRCP ("In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . statute of frauds . . . ."); *Am. Wholesale Corp. v. Mauldin*, 128 S.C. 241, 243, 122 S.E. 576, 576 (1924) ("[T]he party seeking the protection of the statute of frauds must plead it."); *Parker v. Shecut*, 340 S.C. 460, 489, 531 S.E.2d 546, 561 (Ct. App. 2000) ("Affirmative defenses, such as the statute of frauds, must be set

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[5] Appellants also argue that Robinson is entitled to the Property under the 2012 Robinson Contract because Bishop never held her in default for late or missed payments. We find the referee properly determined that Bishop's act of entering into the Shirey Contract evinced her intent to hold Robinson in default of the 2012 Robinson Contract. *Cf. Masonic Temple v. Ebert*, 199 S.C. 5, 16, 18 S.E.2d 584, 589 (1942) ("[T]he law does not require a notice of withdrawal of an offer to be in any particular form."); *id*. ("[I]t [is] sufficient that the [offeror] does some act inconsistent with it[] and the [offeree] has knowledge of such act." (citation omitted)). Accordingly, the referee properly determined that Robinson was not entitled to the Property under the 2012 Robinson Contract. *See Davis v. Monteith*, 289 S.C. 176, 345 S.E.2d 724 (1986) (finding a purchaser who failed to perform under the land sale contract had "no legal right to the property").

[6] Appellants also argue the oral modification is ineffective because the Shirey Contract required that all modifications be in writing. This argument is without merit. *See ESA Servs., LLC. v. S.C. Dep't of Rev.*, 392 S.C. 11, 23, 707 S.E.2d 431, 438 (Ct. App. 2011) ("Written contracts may be orally modified by the parties, even if the writing itself prohibits oral modification.").

forth in a responsive pleading."), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

Here, neither appellant pleaded the statute of frauds in their answers to Shirey's amended complaint, nor did Bishop plead the statute of frauds in her answer to Shirey's original complaint. Moreover, neither appellant argued this issue while they were before the special referee. Therefore, Appellants have waived this defense by failing to include it in their responsive pleadings. *See Am. Wholesale Corp.*, 128 S.C. at 243, 122 S.E. at 576 ("[T]he party seeking the protection of the statute of frauds *must* plead it." (emphasis added)). Accordingly, because Appellants have waived the statute of frauds, the oral extension of the closing date was effective. Thus, the Shirey Contract was still valid and enforceable on August 13, 2015. *See Gibson*, 293 S.C. at 13–14, 358 S.E.2d at 176 ("In order to compel specific performance, a court of equity must find . . . clear evidence of an agreement[.]").

b. Equities of the transaction

Appellants argue the special referee erred in granting specific performance because the equities of the transaction do not favor such relief. At the outset, Shirey argues this issue has not been preserved for appellate review because it was not raised to and ruled upon by the special referee. We agree. Appellants never argued that the equities of the transaction did not favor specific performance while they were before the referee. Rather, Appellants raise the issue for the first time on appeal. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Accordingly, this issue has not been preserved for appellate review.

c. Capability of performing

Appellants argue the referee erred in granting specific performance because Shirey did not demonstrate that he was capable of performing his obligations under the contract both at the closing and at the time of the action. Shirey argues specific performance was justified because he fulfilled his obligations under the contract by tendering the purchase price on August 12, 2015. We agree with Shirey.

"In order to compel specific performance, a court of equity must find . . . that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." *Gibson*, 293 S.C.

at 13–14, 358 S.E.2d at 176. Here, the record indicates that Shirey was required to tender earnest money and the purchase price under the Shirey Contract.[7] Shirey tendered the earnest money on May 20, 2015. Shirey then deposited the purchase price with his attorney's office on August 12, 2015. Accordingly, the special referee correctly found that Shirey timely complied with his obligations under the Shirey Contract. The record also shows that upon receipt of a payoff quote for the TD Bank mortgage, Shirey's attorney intended to transfer the purchase price to Bishop in exchange for a deed to the Property. Thus, there is evidence in the record demonstrating that Shirey has partially performed his obligations under the Shirey Contract and remains ready, willing, and able to complete performance of his part of the contract.

Based on the foregoing, there is evidence demonstrating: 1) a valid agreement; 2) that Shirey partially performed his part of the contract with Bishop's consent; and 3) that Shirey remains ready, willing, and able to complete performance and purchase the Property. *See Gibson*, 293 S.C. at 13–14, 358 S.E.2d at 176 ("In order to compel specific performance, a court of equity must find: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract."); *see also Clardy v. Bodolosky*, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) ("We find the Clardys satisfied the elements of [specific performance]; there is evidence of a valid agreement, the Clardys performed their part of the contract with Bodolosky's consent, and the Clardys remain able and willing to buy the real estate."). Accordingly, we affirm the special referee's grant of specific performance.

II. Setting aside the deed

Appellants argue the special referee erred in setting aside the deed to Robinson because Robinson and Bishop were not in a confidential relationship and there was

[7] Appellants also argue that Shirey was incapable of performing because there is no evidence that his title insurer was prepared to deliver a title policy on August 12 or August 13. This argument is not preserved for appellate review because it was not raised to and ruled upon by the special referee. *See Pye*, 369 S.C. at 564, 633 S.E.2d at 510 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

no evidence of undue influence. Shirey argues the referee's order should be affirmed under Rule 220(c), SCACR because the cancellation of a deed is the proper remedy when a purchaser is entitled to specific performance of a contract to sell land and the seller has conveyed the land to a third party with notice of the purchaser's claim.[8]

Appellants also argue the special referee erred in setting aside the deed after determining Robinson and Bishop were in a confidential relationship because mere familial relationships are inadequate to establish a confidential relationship.[9] We disagree.

"A deed regular and valid on its face raises a presumption of validity." *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). However, "[o]nce a confidential relationship is shown, the deed is presumed invalid." *Bullard*, 294 S.C. at 280, 363 S.E.2d at 900. "A [confidential] relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption." *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138.

"A confidential relationship arises when the grantor has placed his trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." *Brooks v. Kay*, 339 S.C. 479, 488, 530 S.E.2d 120, 125 (2000). A confidential relationship does not arise based merely on a family relationship, friendship, or confidence and affection. *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138–39; *Brooks*, 339 S.C. at 488, 530 S.E.2d at 125. Rather, "[t]he essence of the relationship is the trust and confidence." *Brooks*, 339 S.C. at 488, 530 S.E.2d at 125. Thus, "[s]ome evidence is required that the grantor actually reposed trust in the grantee in the

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[8] Because we find that the referee's ruling was proper, we decline to address Shirey's alternative sustaining ground. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (indicating that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

[9] Appellants further argue this court must rule in their favor on this issue because Shirey did not respond to their argument in his brief, citing *Turner v. S.C. Dep't of Health and Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008), for the same proposition. However, the opinion plainly states the appellate court *may* treat the failure to respond as a confession that the appellant's position is correct. We decline to do so here as the referee's ruling was proper.

handling of her affairs." *Id*.; *see also Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990).

In *Dixon v. Dixon*, our supreme court determined that a mother and son were in a confidential relationship after considering the following factors: 1) the parties were related; 2) the mother gave her son a limited power of attorney; 3) after a deed from the mother to the son was recorded, they opened up a joint bank account consisting entirely of the mother's money; 4) the son prepared all of the documents in question, including the deed; and 5) the mother signed the documents without first consulting an attorney. 362 S.C. 388, 398, 608 S.E.2d 849, 853–54 (2005). The court further explained that while "a familial relationship, alone, is [not] sufficient evidence of a confidential relationship, a familial relationship certainly *supports* an argument that a confidential relationship exists." *Id*. at 398, 608 S.E.2d at 853 (footnote omitted).

The case at bar is strikingly similar to the mother-son relationship in *Dixon*. First, Bishop is Robinson's aunt, and the two admitted that they frequently talk and visit with each other. *See id*. ("[A] familial relationship certainly *supports* an argument that a confidential relationship exists."). Second, Bishop testified that she forwarded all of the TD Bank statements to Robinson when Robinson was making the payments, but did not check to ensure that Robinson was making the payments. Third, Robinson prepared the deed and 2015 Robinson Contract. Fourth, Bishop signed the deed and 2015 Robinson Contract without first consulting an attorney. Fifth, Bishop indicated that she was so distraught on August 13, 2015, that she did not understand what she was signing when she entered into the 2015 Robinson Contract and deed. Finally, Robinson included a provision in the 2015 Robinson Contract that required Bishop to indemnify Robinson in the event of any fraud or illegality concerning the transaction.

Given these facts, we find that Bishop and Robinson were in a confidential relationship. That Bishop reposed trust in Robinson is apparent from the record, as she did not hesitate to sign the land sale documents that Robinson prepared despite the fact that she did not understand what she was signing. Moreover, the fact that Robinson included an indemnity clause in the 2015 Robinson Contract, which she drafted and Bishop did not understand, is demonstrative of the concerns our courts have regarding land transactions between individuals in a confidential relationship. The indemnity provision is seemingly designed so that Bishop assumed all of the potential liability stemming from the breach of the Shirey Contract. However, under

the 2015 Robinson Contract, Bishop did not receive anything that she did not receive in the 2012 Robinson Contract by agreeing to indemnify Robinson. As such, it appears Bishop signed a contract that she did not understand was not in her best interests, without consulting an attorney, because she trusted Robinson. *See Brooks*, 339 S.C. at 488, 530 S.E.2d at 125 ("Some evidence is required that the grantor actually reposed trust in the grantee in the handling of her affairs."). Thus, the special referee did not err in finding that Robinson and Bishop were in a confidential relationship. Further, Robinson did not rebut the presumption of undue influence that arose from the evidence showing a confidential relationship. *See Bullard*, 294 S.C. at 280, 363 S.E.2d at 900 ("Once a confidential relationship is shown, the deed is presumed invalid."); *Hudson*, 288 S.C. at 196, 341 S.E.2d at 138 ("A [confidential] relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption."). Therefore, the referee properly set aside the deed.

III. Equitable interests and bona fide purchasers

Appellants argue that if Shirey is entitled to specific performance, the special referee erred in determining the conveyance was not subject to Robinson's equitable interest in the Property. Shirey argues the referee properly determined that Shirey, as a bona fide purchaser, took the Property free of Robinson's equitable interest. We agree with Shirey.

"The general rule is that a purchaser of land takes subject to outstanding equitable interests in the property [that] are enforceable against him to the same extent they are enforceable against the seller[] whe[n] the purchaser is not entitled to protection as a bona fide purchaser." *Smith v. McClam*, 289 S.C. 452, 458, 346 S.E.2d 720, 724 (1986).

> To claim the status of a bona fide purchaser, a party must show (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, 'i.e., in good faith and with integrity of dealing, without notice of a lien or defect.'

Robinson v. Estate of Harris, 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006)). "The bona fide purchaser must show all three conditions . . . occurred

before he had notice of a title defect or other adverse claim, lien, or interest in the property." *Spence*, 368 S.C. at 117, 628 S.E.2d at 875.

Here, Shirey tendered the purchase price for the Property on August 12, 2015. Moreover, the record reveals that Shirey did not have notice of Robinson's claims to the Property before entering into the Shirey Contract, tendering the purchase price, or filing the action at bar. In fact, the Shirey Contract included a warranty provision indicating that no other person or entity had an interest in or claimed possession of the Property. Thus, whether Shirey is a bona fide purchaser will turn on whether he acquired title to the Property or had "the best right to it."

Robinson argues that Shirey is not a bona fide purchaser because he now has notice of Robinson's claims to the Property and has not yet acquired title. However, it would not be equitable to allow Robinson's interference with the Shirey Contract to defeat Shirey's status as a bona fide purchaser. By allowing Robinson to maintain an equitable interest in the Property after procuring Bishop's breach of the Shirey Contract, this court would be sanctioning, if not rewarding, Robinson's misconduct. Furthermore, a purchaser does not have to actually acquire the title before receiving notice of any outstanding encumbrances or equities in the property in order to be deemed a bona fide purchaser. Rather, our courts have indicated that a party may acquire bona fide purchaser status if the party acquires "the best right to" the title before receiving notice of any outstanding encumbrances or equities in the property. *See S.C. Tax Comm'n v. Belk*, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976) (indicating the party seeking bona fide purchaser status must acquire the title, or best right to it, and pay the purchase price "before notice of outstanding [e]ncumbrances or equities"). As indicated in Section I, Shirey is entitled to specific performance of the Shirey Contract, which entitled him to take the Property upon tendering the purchase price. Consequently, we find that Shirey acquired the "best right to" the Property's title upon tendering the purchase price, which occurred before he learned of Robinson's interest in the Property. Accordingly, the special referee did not err in finding that Shirey was a bona fide purchaser and not subject to any equitable interest that Robinson may have in the Property.

IV. Attorney's fees

Appellants argue the special referee erred in awarding Shirey attorney's fees because Shirey breached the Shirey Contract first. Shirey argues the referee properly awarded him attorney's fees because the contract provided for attorney's fees and he was the prevailing party. We agree with Shirey.

"In South Carolina, the authority to award attorney's fees can come only from a statute or . . . the language of a contract. There is no common law right to recover attorney's fees." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238–39, 616 S.E.2d 431, 434 (Ct. App. 2005) (quoting *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001)).

Appellants do not challenge the reasonableness of the attorney's fees awarded to Shirey. Rather, Appellants argue that it is the Appellants, not Shirey, who are entitled to attorney's fees. In *Raynor*, this court held that the circuit court did not abuse its discretion in awarding attorney's fees where the contract at issue provided for attorney's fees. 422 S.C. at 132, 810 S.E.2d at 433. Like the case at bar, the appellants in *Raynor* argued the respondents were not entitled to attorney's fees but did not challenge the reasonableness of the attorney's fee award. *Id*. at 131, 810 S.E.2d at 432. This court determined that "[t]he contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation in the event of default." *Id*. at 132, 810 S.E.2d at 432–33. Accordingly, this court found that "the circuit court did not abuse its discretion because there was evidence to support its finding that the contract allowed for an award of attorney's fees." *Id*. at 132, 810 S.E.2d at 433.

Here, the contract provided that, "[i]n the event of any litigation between Buyer and Seller regarding this Contract, the losing party shall promptly pay the prevailing party's attorneys' fees and expenses and costs of litigation." Accordingly, the contract clearly allows for the prevailing party to recover attorney's fees. Thus, because Shirey was the prevailing party, the special referee did not abuse his discretion in awarding Shirey attorney's fees. *See id*. ("[T]he circuit court did not abuse its discretion because there was evidence to support its finding that the contract allowed for an award of attorney's fees.").

CONCLUSION

Based on the foregoing, we affirm the special referee's order.

AFFIRMED.

LOCKEMY, C.J., and HEWITT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Patrick O'Neil McGowan, Appellant.

Appellate Case No. 2016-001220

Appeal From Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5719
Heard March 17, 2020 – Filed April 22, 2020

AFFIRMED IN PART AND REVERSED IN PART

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

GEATHERS, J.: Appellant Patrick O'Neil McGowan seeks reversal of his convictions for four counts of first degree assault and battery. Appellant argues the circuit court erred by failing to direct a verdict on the indictment referencing a child victim because there was no evidence showing Appellant's knowledge of the child's presence inside the home into which Appellant fired gunshots. Appellant also argues

the circuit court erred by declining to instruct the jury that the State was required to prove specific intent as to each victim. We affirm in part and reverse in part.[1]

FACTS/PROCEDURAL HISTORY

On March 31, 2012, John Glenn and his wife, Sarah Irby, hosted a birthday party for their four-year-old granddaughter (Child) at their mobile home on Boyd Road in Laurens. In the early evening, after the birthday party concluded, the couple hosted a cookout for friends and neighbors. Appellant, who was related to one of the neighbors, attended the cookout and started arguing with Glenn. At this time, Irby and Child were inside the home. As soon as Irby heard the argument, she went outside and brought Glenn back inside with her. On his way into the home, Glenn asked Appellant to leave the premises.

Irby's daughter, Tiffany Garrett, who had been acquainted with Appellant and saw him at the cookout, testified that she was standing by the porch of the home when she saw Glenn and Appellant arguing. She also stated that when Glenn subsequently went inside the home, Appellant, who was angry and appeared intoxicated, started walking toward the road and shooting a gun. At that time, she thought that Appellant was shooting into the air. However, bullets flew into Glenn's home, which was below street level.

One bullet went into the bathroom where Irby was at the time. Another bullet went into the bedroom used by Child and Garrett, who were both living with Glenn and Irby. Child was asleep in the bedroom at that time. A third bullet went through the living room wall, flew past Glenn, and shattered a television screen. Irby ran outside and saw Appellant, who was carrying a gun, fleeing the premises. Garrett later identified Appellant from a photographic lineup.

On August 3, 2012, Appellant was indicted for four counts of attempted murder. On May 31 through June 2, 2016, the circuit court conducted a trial during which Irby identified Appellant. At the conclusion of the State's case, the circuit court denied Appellant's directed verdict motion but indicated that it was inclined to

[1] Because we reverse the conviction pertaining to the child victim on the ground of specific intent, we need not address Appellant's argument that the evidence of only three gunshots limited his possible convictions to three counts. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

give a jury instruction on the lesser-included offense of first degree assault and battery and to possibly grant a renewed directed verdict motion as to Child after the conclusion of the defense's case and any possible rebuttal by the State.

When Appellant renewed his directed verdict motion, the presiding judge indicated he would take the matter under advisement and asked defense counsel to remind him the next morning to place his ruling on the record. However, the record reflects neither a reminder from counsel nor an express ruling from the circuit court on the following morning. The circuit court instructed the jury on both attempted murder and first degree assault and battery as defined in section 16-3-600(C)(1)(b)(i) of the South Carolina Code (2015).

At the trial's conclusion, the jury found Appellant guilty of four counts of first degree assault and battery. The circuit court sentenced Appellant to seven and one-half years of imprisonment as to each of the four victims, with two of the sentences to run consecutively and the other two to run concurrently with each other and with the two consecutive sentences. This appeal followed.

ISSUES ON APPEAL

1. Was there sufficient evidence of Appellant's specific intent to harm Child?

2. Did the circuit court err by declining to instruct the jury that specific intent had to be proven as to each victim?

STANDARD OF REVIEW

Directed Verdict

"When ruling on a motion for a directed verdict, the [circuit court] is concerned with the existence of evidence, not its weight." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)). Likewise, on appeal, "this [c]ourt must affirm the [circuit] court's decision to submit the case to the jury" when "the [S]tate has presented 'any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused.'" *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (quoting *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). In making this determination, "this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Pearson*, 415

S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (quoting *Butler*, 407 S.C. at 381, 755 S.E.2d at 460).

Jury Instruction

An appellate court will not reverse a circuit court's decision regarding a jury instruction unless there is an abuse of discretion. *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007).

LAW/ANALYSIS

I. Directed Verdict

Appellant argues the circuit court erred by failing to direct a verdict on the indictment referencing Child because there was no evidence showing Appellant's knowledge of Child's presence inside Glenn's home, and thus, there was no showing of Appellant's specific intent to injure Child. We agree.

A. Preservation

The State argues that the question of whether the circuit court should have granted Appellant's directed verdict motion is not preserved for review because the circuit court never ruled on the motion. We disagree.

At trial, the circuit court denied Appellant's initial directed verdict motion as to all four indictments. The circuit court added that once Appellant renewed the motion, the court might grant it as to the indictment referencing Child. When Appellant renewed the motion, the presiding judge advised counsel that he was taking the motion under advisement and asked Appellant's counsel to remind him "in the morning to put [his] ruling on the record." The record has no further specific reference to the motion. Nonetheless, during jury instructions, the circuit court directed the jury to determine whether Appellant was guilty or not guilty of attempted murder or first degree assault and battery as to *all four* indictments. Therefore, the circuit court implicitly denied Appellant's renewed directed verdict motion.

B. Specific Intent

Appellant argues that first degree assault and battery is a specific intent crime and there was no evidence of Appellant's specific intent to harm Child because Appellant had no knowledge that Child was inside Glenn's home when Appellant fired the gunshots.[2] Section 16-3-600(C)(1)(b) provides, in pertinent part, "A person commits the offense of assault and battery in the first degree if the person unlawfully . . . offers or attempts to injure another person with the present ability to do so, and the act . . . is accomplished by means likely to produce death or great bodily injury . . . ."[3] As to the "attempt" alternative of section 16-3-600(C)(1)(b), our case law provides,

> A person guilty of attempt is punishable as if he had committed the underlying offense. To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent.
>
> In the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense.

State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (citations omitted); *see also State v. King*, 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017) (stating that attempted murder requires the specific intent to kill); *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose.").

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[2] Appellant also argues the State could not show specific intent by application of the transferred intent doctrine because Child was uninjured. We note that during arguments on Appellant's initial directed verdict motion, the State relied on the doctrine of transferred intent, but when the circuit court ruled on the motion, it stated that it was not relying on the doctrine.

[3] Subsection (C)(3) provides that first degree assault and battery is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in section 16-3-29 of the South Carolina Code (2015).

At trial, the State conceded that it would be difficult to show specific intent as to Child because the testimony indicated Appellant arrived at Glenn's home "around 7:00 [p.m.] and the children's party ended around 5:00 [p.m.]." Further, the record does not reveal any indicators that would have alerted Appellant to the presence of Child inside the home. This lack of evidence that Appellant specifically intended to injure Child required the circuit court to direct a verdict for Appellant as to the indictment involving Child. Therefore, we reverse Appellant's first degree assault and battery conviction as to Child.

II. Jury Instruction

Appellant asserts the circuit court erred by declining to instruct the jury that the State was required to prove specific intent as to each victim. The State argues that the circuit court's instructions to the jury were equivalent to Appellant's requested instruction and, therefore, the circuit court's verbal indication that it was denying Appellant's request was meaningless. We agree with the State.

During the charge conference, Appellant requested the circuit court to reference each victim listed in the respective indictments in its jury charges on the specific intent element of both attempted murder and first degree assault and battery. The circuit court stated that it was denying the request. However, the circuit court included the following statements in its jury instructions:

> The indictments in this case allege four counts of attempted murder against the Defendant, attempted murder of Sarah Irby, attempted murder of John Glenn, attempted murder of Tiffany Garrett, and attempted murder of [Child]. Each indictment charges a separate and distinct offense because *each indictment involves a separate alleged victim. You must decide each indictment separately* based upon the evidence and law applicable to it uninfluenced by your decision as to any other indictment. The Defendant may be convicted or acquitted on any or all of the indictments. You will be asked to write a separate verdict of guilty or not guilty for each indictment. And I will explain that to you at the conclusion of my charge.
>
> . . .

Now, criminal intent can either be specific or general. General intent crimes are crimes [that] only require the doing of some act and do not require that any specific result was intended by the Defendant. Criminal intent only requires that the pr[o]scribed act taken by the Defendant be voluntary in nature. A specific intent crime requires that the Defendant had the intent to cause a particular result or that the Defendant had the specific intent in committing the act. A person acts with specific intent when his conscious objective is to cause the specific result pr[o]scribed by the statute defining the events.

. . .

. . . A specific intent to kill is an element of attempted murder, which must be proven by the State beyond a reasonable doubt.

Now, ladies and gentlemen, if you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed attempted murder on any of the four indictments, then you may consider whether the State has proven beyond a reasonable doubt the lesser included charge of assault and battery in the first degree. A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so and the act is accomplished by means likely to produce death or great bodily injury.

. . . *A specific intent is an element of assault and battery first degree* [that] must be proven by the State beyond a reasonable doubt.

Now, in just a moment, I'm going to come down to the jury box and explain the verdict form that I have prepared to assist you in your deliberations and in reaching your verdict. As to each indictment, your verdict must be unanimous, an agreement by the 12 of you. Once you have

> reached a verdict as to each indictment, then you will notify the bailiff that a verdict has been reached.
>
> . . .
>
> And [the verdict form is] divided up into four sections. One section for each indictment. . . . First indictment involves Sarah Irby. You make a determination whether or not the Defendant is guilt[y] or not guilty as to the attempted murder. If you determine that the Defendant is guilty, then you would go to the second indictment and conduct the same analysis. *However, if you believe that the State has failed to meet its burden of proof by proving to you each and every element of attempted murder as to Sarah Irby, then you can go to the lesser included offense of assault and battery in the first degree and determine whether or not the Defendant is not guilty or guilty. That same analysis will apply to each indictment. The next indictment involves John Glenn. The same analysis. The third indictment, Tiffany Garrett, same analysis. The fourth indictment is involving [Child]*. Okay.
>
> When the jury has reached a unanimous verdict and you mark the appropriate line, put your initials, okay, to indicate the verdict as to each indictment.

(emphases added). These statements as a whole satisfy Appellant's request to link the specific intent element to a particular victim,[4] especially the statements,

> [I]f you believe that the State has failed to meet its burden of proof by proving to you *each and every element* of attempted murder *as to Sarah Irby*, then you can go to the lesser included offense of assault and battery in the first degree and determine whether or not the Defendant is not

[4] Appellant maintains on page 7 of his brief "[h]ad the jury been properly charged that the state was required to prove intent as to each victim beyond a reasonable doubt, there is a reasonable likelihood that the jury would have found [Appellant] not guilty of one or more of the charges."

> guilty or guilty. *That same analysis will apply to each indictment*.

(emphases added). The jury instruction advised the jury that specific intent was a required element of first degree assault and battery and that the jury had to apply the same analysis to each respective indictment referencing the four victims by name when determining whether the state had proved the elements of either attempted murder or first degree assault and battery beyond a reasonable doubt. Therefore, the instruction as a whole covered Appellant's desired instruction. *See State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011))); *id.* ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994))).

CONCLUSION

Accordingly, we reverse Appellant's first degree assault and battery conviction as to Child but affirm Appellant's remaining convictions.

AFFIRMED IN PART AND REVERSED IN PART.

LOCKEMY, C.J., and HEWITT, J., concur.