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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180355

Donald Porter et al.

v.

Byron Porter Williamson

1180634

Byron Porter Williamson

v.

Donald Porter et al.

Appeals from Jefferson Circuit Court
(CV-13-902152)

BRYAN, Justice.

In appeal no. 1180355, Donald Porter, Marc Porter, Porter Capital Corporation, Porter Bridge Loan Company, Inc., Lowerline Corporation, CapitalPartners Leasing, Inc., and CapitalPartners Leasing, LLC (hereinafter referred to collectively as "the Porter defendants"), appeal from a judgment entered by the Jefferson Circuit Court ("the trial court") in favor of Byron Porter Williamson in his action seeking specific performance of a shareholders agreement that Williamson had entered into with Donald and Marc ("the agreement"). In appeal no. 1180634, Williamson cross-appeals from the same judgment seeking prejudgment interest on the full amount of the judgment.

I. Facts and Procedural History

A. Porter v. Williamson

This is the second time the parties in this case have appeared before this Court. See Porter v. Williamson, 168 So. 3d 1215 (Ala. 2015). The relevant background and procedural history was set forth in Porter:

> "Marc Porter and Donald Porter are brothers; they founded Porter Capital Corporation in 1991 and thereafter established the related companies Porter Bridge Loan Company, Inc., Lowerline Corporation,

CapitalPartners Leasing, Inc., and CapitalPartners Leasing, LLC (the business entities are hereinafter referred to collectively as 'the Porter companies'). In 1992, the Porters hired their nephew Williamson as an employee of the Porter companies. In 2004, Williamson, Marc Porter, and Donald Porter entered into a shareholders agreement that made Williamson a 10% shareholder in Porter Capital Corporation, Porter Bridge Loan Company, Inc., Lowerline Corporation, and CapitalPartners Leasing, Inc. ('the agreement').[[1]]

"On August 3, 2012, Williamson's employment as an employee of the Porter companies was terminated. Williamson thereafter provided written notice to the Porter companies of his intention to retire as a shareholder of the corporations and as a member of the limited-liability company. The agreement provided that under certain circumstances, including termination of the employment of a shareholder for cause or retirement of a shareholder, the Porter companies were required to purchase the shares of the terminated or retiring shareholder. Following his termination and resignation as a shareholder of the corporations and a member of the limited-liability company, Williamson demanded that his shares in the corporations and his interest in the limited-liability company be purchased by the Porter companies pursuant to the agreement. The parties, however, were unable to agree on the value of Williamson's shares and interest. On May 30, 2013, Williamson sued Marc Porter, Donald Porter, and the Porter companies.

"Count I of Williamson's complaint asserted that, pursuant to the agreement, the Porter

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[1]We noted in Porter that the agreement did not include CapitalPartners Leasing, LLC, which was formed after 2004, but that the parties treated the limited-liability company as being included in the agreement. See Porter, 168 So. 3d at 1216 n. 1 and n. 2. The same is true in these appeals.

> defendants were required to purchase his shares and interest in the Porter companies. Williamson requested that the court enter an order requiring specific performance of the provisions of the agreement requiring the Porter defendants to purchase his shares and interest. Count II of Williamson's complaint asserted, alternatively, that the agreement was due to be rescinded. Count III sought compensatory and punitive damages for alleged misrepresentations and suppression of material facts by the Porter defendants. Count IV alleged that the Porter defendants had converted money belonging to Williamson from an investment account controlled by the Porter companies."

168 So. 3d at 1216-17 (footnotes omitted).

The Porter defendants moved the trial court to dismiss the action without prejudice or to stay discovery and compel arbitration based on the terms of an arbitration provision set forth in the agreement. The trial court denied that motion after concluding that the arbitration provision in the agreement contained an exception for claims seeking specific performance of the agreement. The Porter defendants appealed, and the sole issue on appeal "concern[ed] the scope of the specific-performance exception of the arbitration provision -- i.e., whether the arbitration provision applies to the dispute in question." 168 So. 3d at 1218. We held:

> "In the present case, the agreement requires that all claims arising out of the agreement shall be arbitrated '[e]xcept for items of specific

performance referred to' in Section 28 of the agreement. Section 28 provides, in pertinent part:

> "'Should any dispute arise concerning the sale or disposition of the Securities, an injunction may be issued restraining any sale or disposition thereof pending the determination of such controversy, in the event of any controversy concerning the purchase or sale of any such Securities, the same shall be enforceable in a court of equity by a decree of specific performance or by temporary or permanent injunction or any other legal or equitable remedy, without the necessity of showing actual damages or furnishing a bond or other security.'

"(Emphasis added.) The allegations of Williamson's complaint include the following:

> "'[T]he [Porter] defendants have failed and refused to follow the Shareholder Agreement and purchase Plaintiff Williamson's shares as set forth in the Shareholders Agreement, even though they agreed [Williamson] has voluntarily retired....
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> "'6. Accordingly, [Williamson] is entitled under Section 28 of the Agreement to specific performance and an injunction requiring [the Porter] Defendants to purchase his shares in accordance with the Agreement.
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> "'7. If a jury determines the Agreement is valid, [the Porter] Defendants are in breach of this Agreement, and [Williamson] prays that this Court shall enter an order requiring specific performance and purchase of his shares.

> "'....
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> "'9. [Williamson] prays that this Court shall empanel a jury on all issues and determine if the Agreement is enforceable and, if valid, [enter] a judgment that [the Porter] Defendants are required to buy his shares at their fair value.'

> "Williamson's action clearly pertains to a 'controversy concerning the purchase or sale of any ... Securities.' As a result of that 'controversy,' Williamson seeks 'a decree of specific performance[,] ... injunction or other legal or equitable remed[ies].' Accordingly, we hold that, under the express and unambiguous terms of the agreement, Williamson's claims for specific performance and injunctive relief are not within the scope of the arbitration provision."

168 So. 3d at 1219-20 (footnote omitted; final emphasis added).

Thus, we affirmed "the trial court's denial of the Porter defendants' motion to compel arbitration insofar as that motion related to Williamson's request for specific performance and injunctive relief." 168 So. 3d at 1220 (emphasis added). As to Williamson's remaining claims, the Court "remand[ed] this case with instructions for the trial court to determine if any of the remaining claims are due to be dismissed," but, "[t]o the extent those claims [were] not dismissed, we instruct[ed] the trial court to grant the Porter

defendants' motion to compel arbitration with respect to those claims." Id.

B. On Remand After Porter v. Williamson

On July 2, 2015, the trial court entered an order dismissing with prejudice counts II and IV of Williamson's complaint and dismissing without prejudice count III. The sole remaining count, count I, which sought specific performance of the agreement, was set for a bench trial. On remand, the trial court conducted a hearing over three days in late July and early August 2015 at which it heard ore tenus evidence.

The primary factual dispute between the parties was whether, under the agreement, there was an event that triggered the obligation of Porter Capital Corporation, Porter Bridge Loan Company, Inc., Lowerline Corporation, CapitalPartners Leasing, Inc., and CapitalPartners Leasing, LLC (hereinafter referred to collectively as "the Porter companies"), to purchase Williamson's 10% interest in the Porter companies. The evidence indicated that, on August 3, 2012, Donald and Marc notified Williamson that they were terminating his employment with the Porter companies effective

December 31, 2012; Williamson was given no reason for his termination from the Porter companies. Williamson communicated his desire to sell his interest in the Porter companies to Marc and Donald. The parties engaged in discussions regarding the value of Williamson's shares, and Donald invited Williamson to make a proposal as to the value of his interest in the Porter companies. Williamson hired an evaluator who determined the value of Williamson's shares in the Porter companies, but Donald and Marc rejected that valuation.

The parties could not agree on which part of the agreement -- if any -- controlled the sale of Williamson's shares of the Porter companies to the remaining shareholders, i.e., Donald and Marc. The agreement provided that the Porter companies "shall ... acquire" or "shall ... purchase" the securities of a shareholder in the event of the shareholder's death (paragraph 8), retirement (paragraph 9), voluntary termination of employment with the Porter companies (paragraph 10), permanent disability (paragraph 11), or termination of employment of the shareholder for cause (paragraph 12). It is undisputed between the parties that the agreement does not

require the Porter companies to purchase the shares of a shareholder who, like Williamson, was terminated without cause.[2] Thus, Donald and Marc insisted that, pursuant to the terms of the agreement, the Porter companies were obligated to purchase Williamson's shares in the Porter companies only if Williamson was willing to "travel" under paragraph 12 of the agreement, i.e., termination for cause. However, unlike other buyout provisions in the agreement, paragraph 12 provided significantly less favorable buyout terms for the departing shareholder.

Regardless of the reason for the Porter companies' obligation to purchase or acquire a departing shareholder's shares in the companies, the agreement defined how the value of the shares would be determined. The agreement defines "share value" as "the value (as determined in accordance herewith) of each Corporation divided by the number of shares outstanding in each such Corporation upon the occurrence of a

[2]"Cause" is defined in the agreement as when "a Shareholder commits any of the following acts: (i) disloyalty or dishonesty which results or is intended to result in personal enrichment to the Shareholder at the expense of any of the Corporations or (ii) fraudulent conduct in connection with the business or affairs of any Corporation."

Triggering Event."[3] (Emphasis added.) In the definition of "share value," the agreement further provides:

> "For purposes of determining the value of each Corporation, the current accountant for the Corporation shall select an independent evaluator ('the Evaluator') acceptable to the Shareholders. The Evaluator shall determine the value of each Corporation by using the evaluation methods set forth on Exhibit 'C' attached hereto which are most applicable for the Corporation being evaluated and then averaging the result obtained to determine the value of each Corporation."

(Emphasis added.) Exhibit C to the agreement, which is labeled "Evaluation Methods," has two numbered blanks, and the first blank is followed by a parenthetical that states: "(Get from Shank)." It was undisputed that the reference to "Shank" was a reference to the Porter companies' long-time accountant, John Shank. Exhibit C does not actually contain any evaluation methods -- just the parenthetical indicating that the evaluation methods should be "gotten" from Shank. It was undisputed that Exhibit C to the agreement was in this form

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[3]The agreement defines a "Triggering Event" as "the death, permanent disability, retirement or termination of the employment with the Corporations of a Shareholder." As noted above, however, the parties agreed that a termination without cause was not an event that triggered the Porter companies' obligation to purchase the shares of the departing shareholder.

when the parties signed the agreement in 2004 and that it had not been changed at any point thereafter.

In late November 2012, Donald sent Williamson an e-mail stating that Shank would provide the shareholders with the names of three evaluators who Williamson could choose from to determine share value under the agreement. In early December 2012, Donald, Marc, and Williamson tentatively agreed to have the evaluation performed by William Dameworth, one of the evaluators recommended by Shank, subject to further discussion concerning the valuation method to be used. However, Donald and Marc refused to engage Dameworth to value Williamson's shares unless Williamson agreed that paragraph 12 of the agreement controlled the buyout; Williamson, however, refused to accept paragraph 12 -- and its less favorable buyout terms -- as the operative provision of the agreement because his employment was not terminated for cause.

Shortly thereafter, on December 11, 2012, Williamson notified Donald and Marc that he was retiring "as a shareholder," effective February 3, 2013. Williamson informed Donald and Marc that, because he was retiring as a shareholder, paragraph 9 of the agreement controlled the

Porter companies' obligation to purchase his shares. Paragraph 9 provides:

> "9. Retirement of a Shareholder. In the event of the Retirement of the Shareholder, after such shareholder has given at least six months notice to the Corporations and the remaining Shareholders of his Retirement, the Corporations shall within ninety (90) days after the date of such retirement of the Shareholder, acquire the Securities from the Shareholder at a price equal to the Share Value for the Securities determined as of the end of the fiscal year immediately preceding the date of retirement of the Shareholder times the number of shares held by such Shareholder, plus the undistributed profit or loss of each Corporation since the end of such fiscal year."

Although the buyout terms in paragraph 9 and paragraph 12 of the agreement differ, both paragraph 9 and paragraph 12 require a determination of the "Share Value for the Securities determined as of the end of the fiscal year immediately preceding the date of such termination of employment [or retirement of the Shareholder] times the number of shares held by such Shareholder."

Shank testified that, in fall 2012, he provided the names of three individuals who could serve as evaluators pursuant to the agreement. Shank further testified that, in February 2013, while the parties were still discussing how to value Williamson's interest in the Porter companies, he e-mailed the

attorney for the Porter companies and advised that "share value" pursuant to the agreement should be determined using the fair-market-value standard of valuation. In his e-mail, Shank further stated that "[t]he Evaluator shall use his education, skill, training and expertise to determine the appropriate weight to be given to the following three evaluation methods so as to determine the fair market value." Shank then provided three evaluation methods that the evaluator was to use to determine the fair market value of the Porter companies. Williamson was not included in this e-mail, and it is unclear when he learned that Shank proposed that share value be determined based on the fair-market-value standard of valuation.

Donald and Marc did not believe that Williamson could retire "as a Shareholder" after his employment with the Porter companies had already been terminated, and they maintained that the Porter companies were required to purchase Williamson's interest in the companies only if Williamson was willing to travel under paragraph 12 of the agreement. Sometime after Williamson filed this action in May 2013, Donald and Marc engaged Dameworth, without Williamson's

knowledge, to conduct an evaluation of Williamson's shares in the Porter companies. However, although Dameworth applied the fair-market-value standard endorsed by Shank, Dameworth completed only a draft report that was a "calculation of value" of the Porter companies rather than a full appraisal of the value of the Porter companies. The Porter defendants did not view Dameworth's draft report as a final, accurate representation of the value of the Porter companies.

At the hearing, over the Porter defendants' repeated objections, the trial court allowed Williamson to present expert testimony concerning the value of his shares from an evaluator independently selected by Williamson. The Porter defendants argued that Williamson's expert was not a mutually acceptable evaluator selected by Shank, as required by the agreement, and that he did not apply the valuation methods required by the agreement -- i.e., the methods proposed by Shank in his February 2013 e-mail.

Goodloe White, Williamson's expert witness, testified that he determined the value of Williamson's interest in the Porter companies using the fair-value standard of valuation, rather than the fair-market-value standard that was endorsed

by Shank. White testified that he believed that fair value was the "more appropriate" standard, that it was "more applicable here as defined under the ... agreement," and that, irrespective of the valuation methods provided by Shank, White did not view Shank's determination of the appropriate valuation methods "as part of the agreement."

The Porter defendants moved for a judgment as a matter of law at the close of Williamson's evidence and again at the close of all the evidence. The Porter defendants argued that White's testimony should not be considered because it had no bearing on Williamson's claim for specific performance, which was the only claim this Court recognized as being properly before the trial court on remand from our decision in Porter. They argued that, because Williamson sought only specific performance of the agreement, and did not bring a breach-of-contract claim, if the trial court found that there had been a "triggering event" that required the Porter companies to purchase Williamson's interest in the Porter companies, the trial court could only order the Porter defendants to perform under the terms of the agreement, which, in this case, would require Shank to select an evaluator "acceptable" to the

parties who would then value Williamson's interest in the Porter companies based on the valuation methods provided by Shank. Because White was not selected pursuant to the terms of the agreement -- that is, he was not "an independent evaluator ... acceptable to the Shareholders" -- and because he had not used the valuation methods proposed by Shank -- instead using fair value and not fair market value -- the Porter defendants argued that the trial court could not consider White's testimony regarding the value of Williamson's interest in the Porter companies. The trial court denied the motions.

On December 26, 2018, more than three years after the conclusion of the hearing, the trial court entered a judgment holding that Williamson was entitled to specific performance of the agreement. Specifically, the trial court found that Williamson gave valid notice of his retirement on December 11, 2012, and that his retirement, which became effective six months later, was a "triggering event" under the agreement that "legally obligated [the Porter companies] to specifically perform the purchase of all of [Williamson's] shares, as well as comply with other relevant provisions of the agreement, on

or before September 9, 2013." The trial court further held that the agreement, specifically Exhibit C, did not contain any evaluation methods; that the evaluation method set forth by Shank in February 2013 was "not the 'most applicable for the Corporation being evaluated'";[4] and that the fair-value standard, rather than the fair-market-value standard, should be applied to determine the value of Williamson's interest in the Porter companies. Thus, the trial court accepted White's testimony concerning the "fair value" of Williamson's interest in the Porter companies and held that Williamson was entitled to $2,554,969.30 from the Porter defendants pursuant to the buyout provisions for a retiring shareholder under paragraph 9 of the agreement, which included an award of undistributed profits.

The Porter defendants filed a postjudgment motion, arguing, among other things, that the trial court "went outside the long-established parameters of the specific performance equitable remedy ... by ... purporting to

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[4]This language is taken from the definition of "share value" in the agreement. This part of the definition allowed the <u>evaluator</u> to consider the valuation methods provided by Shank and to apply the valuation method "most applicable for the Corporations being evaluated."

determine the value of Williamson's shares in the Porter companies, disregarding the provisions of the Shareholders' agreement concerning share valuation, and entering a money damage[s] award." Williamson also filed a postjudgment motion seeking an award of prejudgment interest. The trial court awarded Williamson prejudgment interest on the part of the judgment that represented his undistributed profits, but the parties' postjudgment motions were otherwise denied. The Porter defendants appealed, and Williamson filed a cross-appeal.

II. Standard of Review

The trial court's findings of fact, insofar as they are based on evidence presented during the hearing, are presumed correct and will not be overturned unless they are shown to be plainly or palpably wrong. See Ex parte Powell, 763 So. 2d 230, 232 (Ala. 1999) ("When evidence is presented to a trial court sitting without a jury, the general rule is that its findings will be presumed correct unless there is plain and palpable error."). However, a presumption of correctness does not attach to the trial court's legal conclusions, which are reviewed de novo. See Van Hoof v. Van Hoof, 997 So. 2d 278,

286 (Ala. 2007) ("The presumption of correctness accorded a trial court's judgment following a bench trial does not extend to its decisions on questions of law. Instead, this Court reviews such rulings on questions of law de novo.").

III. Analysis

A. Appeal No. 1180355

The question presented for this Court's review is whether the trial court exceeded the scope of Williamson's request for specific performance of the agreement by awarding Williamson a monetary sum representing the value of his interest in the Porter companies based on a valuation process that differed from the valuation process set forth in the agreement. In this appeal, the Porter defendants do not challenge the trial court's determination that Williamson's retirement was a "triggering event" under the agreement that required the Porter defendants to "acquire" Williamson's shares under paragraph 9 of the agreement. They argue only that the trial court awarded relief beyond the scope of a request for specific performance of the agreement.

"The remedy of specific performance is equitable in nature ...." Wilson v. Thomason, 406 So. 2d 871, 872 (Ala. 1981). Specific performance is

> "[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif[ically], a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved."

Black's Law Dictionary 1686 (11th ed. 2019). In other words, "[s]pecific performance means 'performance specifically as agreed.'" 71 Am. Jur. 2d Specific Performance § 1 (2012). "The purpose of the remedy is to give the one who seeks it the benefit of the contract in specie by compelling the other party to the contract to do what he or she agreed to do -- perform the contract on the precise terms agreed upon by the parties." Id. (Emphasis added.)

> "It is also a principle of equity jurisprudence that, before a court of chancery will specifically enforce a contract, it must be made to clearly appear to the court that it is thereby enforcing the contract which the parties made .... The court will not attempt to make a contract for the parties, and enforce it, even though it be one which the parties might and ought to have made."

Gachet v. Morton, 181 Ala. 179, 182, 61 So. 817, 818 (1913)(emphasis added). "[T]he courts, under guise of

specific performance, cannot do violence to the contract itself, and make a contract for the parties." City of Andalusia v. Alabama Utils. Co., 222 Ala. 689, 693, 133 So. 899, 902 (1931).

> "This court has frequently held that specific performance may be ordered where the contract is just, fair and reasonable, and reasonably certain in respect to the subject matter, terms and founded on a valuable consideration. Alabama Central Railroad Co. v. Long, 158 Ala. 301, 48 So. 363 (1909); Carlisle v. Carlisle, 77 Ala. 339 (1884); Moon's Adm'r v. Crowder, 72 Ala. 79 (1882)."

Montgomery v. Peddy, 355 So. 2d 698, 700 (Ala. 1978). "In order for a complainant to procure the specific performance of a contract through a court of equity, he must show a contract that is specific, certain and complete." Citronelle Turpentine Co. v. Buhlig, 184 Ala. 404, 406, 63 So. 951, 951 (1913).

If Williamson's request for specific performance of the agreement is about compelling the Porter defendants "to do what [they] agreed to do," 71 Am. Jur. 2d Specific Performance § 1, we must first determine what the parties actually "agreed to do" after a shareholder provided notice of his retirement and triggered the Porter companies' obligation to acquire the retiring shareholder's interest in the Porter companies. Pursuant to paragraph 9 of the agreement, upon notice of a

shareholder's retirement, the Porter companies were required to "acquire the Securities from the Shareholder at a price equal to Share Value for the Securities determined as of the end of the fiscal year immediately preceding the date of retirement of the Shareholder." Understandably, the parties did not agree on a specific "share value" of each share in the Porter companies, but they did agree that "share value" would be determined in a particular way: (1) "the current accountant for the Corporation <u>shall</u> select an independent evaluator ... acceptable to the Shareholders"; and (2), after an "acceptable" evaluator was identified, "[t]he Evaluator <u>shall</u> determine the value of each Corporation by using the evaluation methods set forth on Exhibit 'C' ... which are most applicable for the Corporation being evaluated and then averaging the results obtained." However, as noted above, Exhibit C does not contain any evaluation methods; Exhibit C includes two blanks with the following parenthetical: "(Get from Shank.)" The parties dispute whether Exhibit C expresses any agreement of the parties.

The Porter defendants argue that the fact that no evaluation methods were specifically included in Exhibit C is

immaterial because, they say, Exhibit C clearly demonstrates that the parties agreed that the evaluation methods for determining share value would be provided by Shank. Thus, according to the Porter defendants, for purposes of determining share value, the parties agreed (1) that Shank "shall" select an evaluator "acceptable" by the shareholders and (2) that the agreed-upon evaluator "shall" determine share value using the evaluation methods provided by Shank. They further argue that, instead of requiring performance of these clear terms, the trial court (1) accepted valuation evidence from an evaluator independently selected by Williamson and (2) rejected the valuation methods provided by Shank in favor of a valuation method that the court found was the most appropriate method of valuing the Porter companies. The Porter defendants argue that, by taking these actions, the trial court, under the guise of ordering specific performance of the agreement, actually enforced "a new, judicially-crafted contract that is at odds with the contract actually agreed to by the parties." Porter defendants' brief at 15.

Williamson maintains that the trial court's actions were acceptable for several reasons. First, he contends that the

trial court found that the parties did not agree to any particular evaluation method because they never filled in the blanks in Exhibit C and that, therefore, the trial court was within its discretion to supply an evaluation method based on the evidence presented at trial. In its judgment, the trial court, citing Murphree v. Henson, 289 Ala. 340, 267 So. 2d 414 (1972), stated that, "[i]f a term in the contract is considered too indefinite to permit specific performance, it may later acquire a more definite meaning and become enforceable based on the parties' subsequent acts, words, or conduct." Citing the facts that Shank did not provide the names of any evaluators or evaluation methods until after a dispute arose between the parties concerning the value of Williamson's shares, that Shank was not an evaluation expert, and that Shank selected the fair-market-value standard of valuation because Marc told Shank to do so, the trial court concluded that the valuation method proposed by Shank was "not the 'most applicable for the Corporations being evaluated.'" The trial court then looked to the agreement itself and concluded that "share value" was the equivalent of fair value, not fair market value, and held that the fair-value standard

of valuation proposed by Williamson should be applied to determine the value of Williamson's shares in the Porter companies.

The Porter defendants argue that the trial court's reliance on Murphree was misplaced and that the agreement, including the method therein for determining share value, was sufficiently definite to support specific enforcement of the actual terms of the agreement, including the provision in Exhibit C that the evaluation methods would be provided by Shank. In Murphree, the plaintiff, Henson, sought specific performance of an oral contract between himself and Murphree for the conveyance of approximately 120 acres of land. Murphree, the owner of the land, argued that the specific terms of the agreement -- the land to be conveyed, the price to be paid, and the time for delivery of the deed -- were too vague for the agreement to be enforced through specific performance. The Court noted that the Statute of Frauds required such agreements to be in writing, "'[u]nless the purchase money, or a portion thereof be paid, and the purchaser be put in possession of the land by the seller.'" Murphree, 289 Ala. at 348, 267 So. 2d at 421 (emphasis

omitted) (quoting the Statute of Frauds found in former § 20-3-5, Ala. Code 1940). The Court stated:

> "It is well established by our decisions that to authorize the specific performance of an agreement to sell land, all the terms of the agreement must have been agreed upon, leaving nothing for negotiation. Alba v. Strong, 94 Ala. 163, 10 So. 242 [(1891)]; Tensaw Land and Timber Co. v. Covington, 278 Ala. 181, 176 So. 2d 875 [(1965)].
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> "However, as stated in 17 Am. Jur. 2d, Contracts, Sec. 78, p. 418:
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> > "'A contract which is originally and inherently too indefinite may later acquire precision and become enforceable by virtue of the subsequent acts, words and conduct of the parties. ... Thus, the objection of indefiniteness may be obviated by performance and acceptance of performance.'"

289 Ala. at 348, 267 So. 2d at 421 (emphasis added). The Court in Murphree held that the evidence of the parties' subsequent acts, words, and conduct -- including that Murphree had put Henson in possession of the land at issue after Murphree promised to convey that land to Henson in exchange for Henson's work on other land Murphree owned, which Henson had performed -- was sufficient to remove any uncertainties in the oral agreement to convey the land at issue.

We agree with the Porter defendants that the trial court's reliance on Murphree was misplaced. We cannot agree that the method of determining share value in the agreement was so unclear or indefinite that it could not be specifically enforced. As set forth above, the agreement provided a two-step process to determine share value. Regarding the first step, there is no indication that any of the parties believed that the part of the agreement requiring an evaluator to be selected by Shank that was acceptable to the shareholders was indefinite or otherwise unenforceable. Yet, the trial court ignored that clear and specific part of the agreement when it accepted the valuation provided by an evaluator independently selected by Williamson. As to the second step, we must conclude, as a matter of law, that the agreement clearly expressed the parties' agreement that Shank would provide the evaluation methods that would be used by the independent evaluator acceptable to the shareholders to determine share value. The evidence reflected that Shank had been the accountant for the Porter companies since 1992 or 1993, and, given his knowledge and familiarity with the Porter companies, we see no reason why the parties could not have agreed to

allow Shank to provide the evaluation methods to be used by an independent evaluator for purposes of determining share value.[5] Thus, the rule from Murphree, which the trial court applied in an attempt to make a purportedly indefinite term of the agreement definite, was unnecessary.[6]

Williamson also contends that, "[i]f the blanks in Exhibit C are viewed as missing terms, ... the trial court can supply a reasonable term." Williamson's brief at 43. In

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[5]Williamson contends that taking this holding "to its logical conclusion, if Shank proposed that the methodology for valuing the [Porter companies by] valuing them at $0, Williamson would be bound to follow said methodology." Williamson's speculation about what Shank "could do" is not a convincing basis for ignoring, in an action for specific performance, the clear intent of the parties to obtain evaluation methods from Shank.

[6]Even if we concluded that the agreement did not include an evaluation method and, therefore, that that part of the agreement was indefinite, and even if we determined that the rule from Murphree could be applied in that circumstance to make that purportedly indefinite part of the agreement definite and enforceable, the trial court still incorrectly applied the rule in Murphree to the facts in this case. The facts the trial court relied on do not support a conclusion that there was "performance and acceptance of performance" so that the parties' conduct demonstrated that they agreed to the terms that were enforced by the trial court, i.e., there was no evidence indicating that by their conduct the parties indicated that they had agreed that share value would be determined by an evaluator independently selected by Williamson who applied the fair-value standard to determine share value.

support of this argument, Williamson relies upon § 204 of the Restatement (Second) Contracts, which provides: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." This Court has never expressly endorsed § 204 of the Restatement. Regardless, for the reasons set forth above, § 204 of the Restatement would not have any application in this case because we conclude that the parties agreed on all terms essential to the determination of their rights and duties under the agreement. Although Exhibit C included blanks instead of any specific evaluation methods, the parties signed the agreement, which included Exhibit C, with the intent that evaluation methods would be obtained from Shank. The shareholders were apparently content to allow Shank to choose the evaluation methods, and we see no reason why, in an action for specific performance, that part of the agreement should be ignored.

Confronted with the clear conclusion that on remand the trial court did not order specific performance of the actual

terms of the agreement, Williamson argues that "the trial court was not rigidly bound by the abstract doctrine of 'specific performance.'" Williamson's brief at 27. He contends that paragraph 28 of the agreement, which was the subject of our decision in Porter, supra, "expressly provides for broader remedies." Williamson's brief at 27. Williamson relies on language in paragraph 28 of the agreement, which excepts certain claims from arbitration: "[I]n the event of any controversy concerning the purchase or sale of any such Securities, the same shall be enforceable in a court of equity by a decree of specific performance or by temporary or permanent injunction or any other legal or equitable remedy ...." (Emphasis added.) Thus, Williamson argues, because paragraph 28 allows for "other legal and equitable remed[ies]" in addition to specific performance in addressing a controversy over the sale of securities under the agreement, the trial court was not bound to provide a remedy within only the confines of a specific-performance claim.[7]

[7]The trial court, in its final judgment in this case, noted the existence of the "any other legal or equitable remedy" language from paragraph 28 and stated that this Court "emphasized" that phrase from paragraph 28 in Porter, supra. At one point in Porter, we emphasized the entire portion of paragraph 28 that was subject to application and

Although Williamson attempts to construe our decision in Porter as "expressly acknowledging" that the trial court was not bound to provide a remedy within only the confines of a specific-performance claim, nothing in Porter supports that contention. Indeed, the actual holding in Porter was simply that Williamson's claims for specific performance and injunctive relief were properly before the trial court. See Porter, 168 So. 3d at 1220 ("[W]e hold that, under the express and unambiguous terms of the agreement, Williamson's claims for specific performance and injunctive relief are not within the scope of the arbitration provision."(footnote omitted)).

Regardless of whether paragraph 28 of the agreement may allow for legal and equitable remedies beyond specific performance of the agreement and an injunction, Williamson is bound by the claims he actually brought against the Porter defendants. As we held in Porter, those claims sought specific performance of the agreement and an injunction. Williamson did not attempt to amend his complaint on remand

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interpretation in that decision, including the phrase "any other legal or equitable remedy." However, no part of our decision in Porter "emphasized" the language in question any more than any other part of paragraph 28. Regardless, the trial court granted Williamson's request for specific performance, not "any other legal or equitable remedy."

after the decision in Porter, nor is there any indication in the record that Williamson's complaint was amended by the express or implied consent of the parties. See Rule 15(b), Ala. R. Civ. P. Accordingly, because Williamson had pending before the trial court only a claim for specific performance of the agreement and an injunction, the trial court was not at liberty to provide relief pursuant to "any other legal or equitable remedy" that may have been available to Williamson under paragraph 28 of the agreement.

Finally, Williamson argues that, even if "strict compliance" with the agreement is required, the Porter defendants "waived their right to enforce strict compliance" because, as the trial court found, the Porter defendants initially indicated a willingness to operate outside the terms of the agreement when Donald asked Williamson to make a proposal for the value of his shares, Shank selected proposed evaluators and a method of valuation only after a dispute arose between the parties, and Shank's method of valuation was not "the most applicable for the Corporation being evaluated," as determined by the trial court. See Silverman v. Charmac, Inc., 414 So. 2d 892, 895 (Ala. 1982) ("[A] party's waiver of

contractual provisions may be implied from the acts and circumstances surrounding the performance of the contract."). However, neither the trial court nor Williamson cites any evidence indicating that the Porter defendants, knowing that paragraph 9 of the agreement applied, demonstrated a willingness to deviate from the process for determining share value as set forth in the agreement. There was no "waiver" on the part of the Porter defendants.

Accordingly, we conclude that the trial court's judgment, insofar as it determined share value using an evaluation process that was inconsistent with the evaluation process set forth in the agreement, must be reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

B. Appeal No. 1180634

In appeal no. 1180634, Williamson filed a cross-appeal challenging part of the trial court's judgment. In his brief on appeal, Williamson makes no challenge to the trial court's judgment and asserts that he "voluntarily waives [his] cross-appeal." Williamson's brief at iii. We construe this

statement as a voluntary dismissal of Williamson's appeal, and, therefore, we dismiss the cross-appeal.

Conclusion

For the reasons set forth above, in appeal no. 1180355, the trial court's judgment is reversed, insofar as it determined share value using an evaluation process that was inconsistent with the evaluation process set forth in the agreement, and the case is remanded for further proceedings consistent with this opinion. In case no. 1180634, the cross-appeal is dismissed.

1180355 -- REVERSED AND REMANDED.

1180634 -- APPEAL DISMISSED.

Parker, C.J., and Bolin, Wise, Stewart, and Mitchell, JJ., concur.

Sellers, J., recuses himself.