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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Spartanburg County Case Nos. 2021-CP-42-00086 and 2021-CP-42-00504

Consolidated Appellate Case No. 2022-001420

Gibbs International, Inc., ... Respondent,

v.

Vidalia Industrial Facilities, LLC, ... Appellant.

AND

Vidalia Industrial Facilities, LLC and Indigo Industrial Investments, LLC, ... Appellants,

v.

Gibbs, International, Inc.; Gregory R. Boozer; and Jimmy Gibbs, ... Respondents.

AND

GBPT, LLC, ... Respondent,

v.

Rumsfeld Indigo, LLC, ... Appellant.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID COUNSEL FOR RESPONDENTS ACT IMPROPERLY WHEN THEY DRAFTED THE SETTLEMENT AGREEMENT AND CONFESSION OF JUDGMENT UNILATERALLY AND SUPPLIED IT TO APPELLANTS FOR EXECUTION WITHOUT PROVIDING A COPY OF SAME TO APPELLANTS' COUNSEL?

2. WERE THE ACTIONS OF RESPONDENTS' COUNSEL SUFFICIENTLY IMPROPER SO AS TO REQUIRE GRANTING APPELLANTS' MOTION TO STRIKE THE CONFESSION OF JUDGMENT?

STATEMENT OF THE CASE

This appeal is brought with regard to two related matters: *Gibbs International, Inc. v. Vidalia Industrial Facilities, LLC, et al.,* Spartanburg Civil Action No. 2021-CP-42-00504 ("*Gibbs Suit*"), and *GBPT, LLC, v. Rumsfeld Indigo, LLC, et al.,* Spartanburg County Civil Action No. 2021-CP-42-00086 ("*GBPT Suit*") (collectively, "Suits"). The *GBPT Suit* was initiated on January 11, 2021, while the *Gibbs Suit* was filed on February 15, 2021. *See GBPT* Compl.*; Gibbs* Compl. For purposes of this Appellant Brief, these two matters share a sufficiently similar factual and procedural history so as to permit discussion of both jointly.[1][2]

In or about October 2021, Mr. Daniel Feibus, on behalf of the Indigo Parties, and Mr. Gregory Boozer, for the Gibbs Parties, began discussing a resolution of the Suits directly and without the assistance of counsel. Transcript from Hearing on Motions to Strike on August 16, 2022, 5:12–15 (hereinafter, "Transcript"). Both parties' counsel were aware that these negotiations

[1] A third related matter, *Indigo Industrial Investments, LLC, et al., v. Gibbs International, Inc., et al.,* Spartanburg County Civil Action No. 2021-CP-42-03254, has also been filed in relation to these matters, but has, by agreement of counsel, not been served.

[2] Gibbs International, Inc. and GBPT, LLC will be collectively referred to as the "Gibbs Parties" herein. Vidalia Industrial Facilities, LLC and Indigo Industrial Investments, LLC are referenced as the "Indigo Parties."

were taking place through the fall of 2021. *Id.* 5:23–24. In or around January 2021, counsel for both the Indigo Parties and Gibbs Parties conferred again and counsel for the Indigo Parties was once more informed that settlement negotiations were ongoing. *Id.* 21:12–20. That conversation, however, was the last instance in which both parties' counsel spoke until the filing of the Confession of Judgment which is the subject of this appeal. *Id.* 6:2–12.

On April 4, 2022, Mr. Feibus, Mr. Boozer, and Mr. Jimmy Gibbs, on behalf of GBPT, LLC, purported to enter into a settlement agreement which resolved the *Gibbs* and *GBPT Suits* (hereinafter, the "Settlement Agreement"). Br. in Supp. of Mot. for Recons., Ex. A, 6. The Settlement Agreement purported to govern the terms by which the Suits would be dismissed and compensation would be made. *Id.* Exhibit A, 1–5. Further, the Settlement Agreement provided that the Indigo Parties would execute a Confession of Judgment which "shall be recorded if a default occurs with regards to the terms" of the Settlement Agreement. *Id.* Exhibit A, 6. Counsel for the Indigo Parties was never informed that settlement terms were reached prior to the drafting and subsequent execution of the Settlement Agreement and Confession of Judgment. *Transcript*, 6:2–12. Counsel for the Gibbs Parties never afforded the Indigo Parties' counsel an opportunity to review the Settlement Agreement or the Confession of Judgment. *Id.*

On April 13, 2022, Mr. Boozer's counsel sent him a draft of the Confession of Judgement and instructed him to "[t]ell [Mr. Feibus] to sign, notarize, witness, and return" the Confession of Judgment. *Transcript*, 7:24–8:2; *see also* Email from Greg Boozer to Daniel Feibus, dated April 14, 2022. Again, this was done without apprising counsel for the Indigo Parties of the Confession of Judgment. *Transcript,* 7:24–8:2. Mr. Boozer then, as instructed by his counsel, forwarded the Confession of Judgment to Mr. Feibus, representing that it was "one of the follow-up documents" and that the Confession of Judgment would "be held until there is an issue." *Id.* Despite nearly a

year's worth of communications, counsel for the Gibbs Parties did not afford the Indigo Parties' counsel the opportunity to review the Confession of Judgment or Settlement agreement and instead used the Gibbs Parties as an agent for sending the documents directly to Mr. Feibus, a represented party.

Sometime following Mr. Feibus' signing the purported Settlement Agreement, the Gibbs Parties contended that the Indigo Parties failed to make certain payments related to the Settlement Agreement. On the basis of that contention, the Gibbs Parties filed the Confession of Judgment on June 21, 2022. Confession of Judgment, filed on June 21, 2022.

Shortly thereafter, on June 29, 2022, the Indigo Parties filed their Motion to Strike Confession of Judgment. Mot. To Strike Confession of Judgment, filed June 29, 2022. Oral arguments were made on August 16, 2022, and Master-in-Equity Phillips issued her Order denying the Indigo Parties' Motion to Strike on September 9, 2022. Ord. Denying Mots. to Strike ("*Order*"), filed September 9, 2022. On September 19, 2022, the Indigo Parties timely filed their Motion for Reconsideration which was, on September 20, 2022, rejected by the Spartanburg Clerk of Court's office. The Indigo Parties refiled their Motion for Reconsideration shortly thereafter on September 20, 2022, but out of an abundance of caution elected to pursue this appeal in lieu of proceeding with the Motion for Reconsideration. Mot. for Recons., filed September 20, 2022.

STANDARD OF REVIEW

South Carolina appellate courts review motions to strike under an abuse of discretion standard. *See, e.g., Flowers v. Giep*, 871 S.E.2d 604, 607 (S.C. Ct. App. 2021) (citing *Totaro v. Turner*, 254 S.E.2d 800, 801 (S.C. 1979)). Thus, denial of a motion to strike may be reversed upon an error of law in the lower court, a factual finding by the lower court that lacks evidentiary support, or a failure by the lower court to exercise any of its vested discretion. *Id.* (citing *State v. Allen*, 634 S.E.2d 653, 656 (S.C. 2006)). A showing of "prejudicial error" is also sufficient to

justify the reversal of a motion to strike's denial. *Skywaves I Corp. v. Branch Banking & Trust Co.*, 814 S.E.2d 643, 656 (S.C. Ct. App. 2018).

ARGUMENT

I. Rules 4.2 and 8.4 of the South Carolina Rules of Professional Conduct Guide and Limit Counsel's Ability to Assist Their Clients in Securing Binding Agreements Directly from a Represented Opposing Party.

In this case, counsel for the Gibbs Parties and counsel for the Indigo Parties agreed to step back and allow their clients to negotiate directly toward a potential settlement. There is nothing improper about that; indeed, the American Bar Association's Standing Committee on Ethics and Professional Responsibility observed that "[i]t sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel." ABA Formal Op. 11-461 at 1 ("ABA Opinion"). Comment [4] to Rule 4.2 of the South Carolina Rules of Professional Conduct ("Rule 4.2") also recognizes that attorneys may advise their clients regarding such communications. Rule 4.2, RPC, Rule 407, SCACR.

Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." "However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a)." ABA Opinion at 2. Rule 8.4(a) of the South Carolina Rules of Professional Conduct ("Rule 8.4(a)") provides that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, *or do so through the acts of another*." Rule 8.4(a), RPC, Rule 407, SCACR (emphasis added).

"Rule 8.4(a)'s prohibition against a lawyer's violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer's client, or what the lawyer

may do to assist the client in communicating directly with the represented opponent." *ABA Opinion* at 3. The ABA Opinion concluded that, while a lawyer can draft settlement documents for a client to share with their counterparty, "counsel must be careful not [to] violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]." *Id.* Comment [1] to Rule 4.2 observes:

> [Rule 4.2] contributes to the proper functioning of the legal system by *protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter*, interference by those lawyers with the client lawyer relationship and the uncounselled [sic] disclosure of information relating to the representation.

Rule 4.2, cmt. [1], RPC, Rule 407, SCACR (emphasis added).

This language is mirrored in Comment [1] of the ABA's Model Rules of Professional Conduct. Model Rules of Pro. Conduct r. 4.2, cmt. [1]; *see also Niesig v. Team I,* 558 N.E.2d 1030, 1032 (N.Y. 1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the non-contact rule] safeguards against *clients making improvident settlements*, ill-advised disclosures and unwarranted concessions.") (emphasis added). In fact, Rule 4.2 applies even where the represented parties initiates the communication with opposing counsel without notifying her own lawyer. Model Rules of Pro. Conduct r. 4.2 cmt [2]; Rule 4.2 cmt [2], RPC, Rule 407, SCACR.

The ABA Opinion concluded that "[p]rime examples of overreaching include assisting the client in securing from the represented person an *enforceable obligation* . . . without the opportunity to seek the advice of counsel." ABA Opinion at 5 (emphasis added). The Standing Committee counseled that, "[t]o prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations[.]" *Id.* Finally, the Standing Committee advised that "[i]f counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such

agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement." *Id.*

In *Weckesser v. Knight Enterprises S.E., LLC*, United States District Judge Richard M. Gergel had occasion to apply Rule 4.2 and Rule 8.4(a) to an analogous situation, and did so with the guidance of the ABA Opinion. 392 F. Supp. 3d 631 (D.S.C. July 22, 2019). The *Weckesser* defendant, in a class action suit, sent some of the plaintiffs copies of a settlement offer letter drafted by the defendant's lawyer. Several of the plaintiffs signed. *Id.* at 632–34.[3]

Judge Gergel addressed a number of class-action rules which are not relevant here, then concluded: "[m]ore fundamentally, the Court is troubled by the nature of the party to party communications here." *Id.* at 637. "The ABA and this Court," he wrote, "are cognizant of ethical concerns when assisting party to party communications, as under Rule 4.2 a lawyer is not permitted to contact a represented party and, similarly, Rule 8.4 prohibits an attorney from using an agent to breach this rule." *Id.* at 637–38 (quoting ABA Opinion).

In *Weckesser*, "notably absent from the [settlement offer] letter [was] any recommendation that the Opt-In Plaintiffs consult with their counsel." *Id.* at 638. "This failure to advise the Plaintiffs to consult with counsel" necessitated a protective order. *Id.* For relief, among other things, Judge Gergel invalidated and struck "all offer letters, opt-out forms, and settlement checks submitted to Opt-In Plaintiffs and invalidate[d] all offer letters, opt-out forms or settlement checks signed by Opt-In Plaintiffs." *Id.*

It is against this framework that the facts here should have been evaluated.

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[3] As the Indigo Parties stated at the August 16, 2022 hearing, several facts in *Weckesser* were egregious, and far exceed what happened in the present matter. *Transcript,* 13:9–14. However, the "more fundamental" principals set forth in *Weckesser*, nonetheless apply to this matter.

II. The Indigo Parties' Motion to Strike the Confession of Judgment Should Have Been Granted, as the Gibbs Parties' Counsel's Actions Ran Afoul of Rules 4.2 and 8.4 of the South Carolina Rules of Professional Conduct.

In its Order Denying Motions to Strike, the trial court wrote that the Indigo Parties possessed the opportunity to consult with their counsel prior to executing the Settlement Agreement and Confession of Judgment and elected not to do so. *See Order* at 3 ("There is no evidence the [] Indigo Parties did not have the opportunity to seek advice of counsel prior to executing the Confession of Judgment"); *see also id.* at 4 ("The cases currently before this Court involve an arms-length negotiation between experienced business entities encouraged by both sides' counsel to pursue settlement directly"). However, the *opportunity* to consult with counsel is not the primary criterion by which the Indigo Parties' Motion to Strike should have been evaluated.

The purpose of Rule 4.2 is to "protect a person who has chosen to be represented by a lawyer[.]" Rule 4.2, cmt. [1], RPC, Rule 407, SCACR. That a represented party initiates or consents to communication with opposing counsel does not "mitigate or remove the ethical taint that results from such a communication." *See, e.g., Blanchard v. Edgemark Fin. Corp.,* 175 F.R.D. 293, 301 (N.D. Ill. Aug. 25, 1997) (citing *Faison v. Thornton,* 863 F. Supp. 1204, 1213 (D. Nev. July 3, 1993)); ABA/BNA Lawyer's Manual on Prof. Conduct § 71:302 (June 22, 1988)); *see also Clemons v. Norton Healthcare, Inc.,* 2013 U.S. Dist. LEXIS 137106, *7, 2013 WL 5407184 (W.D. Ky. Sept. 24, 2013) (incorporating *Blanchard* for purposes of establishing that a party may not "consent to or waive a Rule 4.2 type violation").[4]

[4] While the authorities cited above are factually dissimilar and involve instances in which opposing counsel communicated directly with represented members of class actions, a lawyer may similarly violate Rule 4.2 by and through the actions or communications of third parties, including her client. Rule 8.4(a), RPC, Rule 407, SCACR; *see also Weckesser*, 392 F. Supp. 3d at 637.

Rather, "it is only the consent of the adverse party's counsel that allows an attorney to communicate with the adverse party with ethical impunity." *Blanchard,* 175 F.R.D. at 301 (internal citations omitted); *see also State v. Miller,* 600 N.W. 2d 457, 565 (Minn. 1999) ("[Rule] 4.2 protects the right of counsel *to be present* during any communication between the counsel's client and opposing counsel. The focus of [Rule] 4.2 is on the obligation of attorneys to respect the relationship of the adverse party and the party's attorney. . . [T]he party cannot waive the application of [Rule 4.2] – *only the party's attorney can approve direct contact and only the party's attorney can waive the right attorney's right to be present* during a communication between the attorney's client and opposing counsel.") (emphasis added).

It is with these concerns in mind that "[c]ase law from other jurisdictions supports the view that an attorney crosses the line in advising a client about [party-to-party] communications when the attorney prepares binding legal documents that the client plans to ask the opposing party to sign." *S.F. Unified Sch. Dist. ex rel. Contreras, v. First Student, Inc.,* 213 Cal. App. 4th 1212, 1235–46 (Cal. Ct. App. 2013) (internal citations omitted). Again, this is because the focus of Rule 4.2 is to "protect a person who has chosen to be represented by a lawyer[.]" Rule 4.2, cmt. [1], RPC, Rule 407, SCACR.

Whether or not the Indigo Parties were "experienced business entities," *see Order* at 4, is also irrelevant to the determination of whether Rule 4.2 was violated. Rather, the only inquiries relevant to this consideration are:

(1) Were the Settlement Agreement and Confession of Judgment drafted by counsel for the Gibbs Parties and communicated through the Gibbs Parties to the Indigo Parties?

(2) Were the Indigo Parties represented by counsel when the Settlement Agreement and Confession of Judgment were presented to them?

(3) Were counsel for the Indigo Parties apprised of the Settlement Agreement and Confession of Judgment prior to their being presented to the Indigo Parties?

(4) Did counsel for the Indigo Parties consent to counsel for the Gibbs Parties communicating the Settlement Agreement and Confession of Judgment through his client to the Indigo Parties directly?

It is uncontroverted that the Indigo Parties were represented by counsel at all times relevant to this matter. *See e.g. Transcript*, 16:9–14 (counsel for the Gibbs Parties acknowledging that he emailed the Indigo Parties' counsel that negotiations were taking place in approximately October 2021). Counsel for the Indigo Parties, under obligation from Rule 3.3(a) of both the South Carolina and Indiana Rules of Professional Conduct,[5] advised the trial court during the August 16, 2022 hearing that, before the filing of the Confession on June 21, 2022, they were not informed that settlement terms had been reached or that a Settlement Agreement and Confession of Judgment were executed. It is also uncontroverted that the Confession of Judgment was drafted by opposing counsel and sent to the Gibbs Parties with the explicit instruction for them to pass it along to the Indigo Parties and ensure have they signed it.[6] Neither of these documents includes any language,

[5] Mr. Daniel Kelly, counsel for the Indigo Parties who primarily argued their Motion to Strike on August 16, 2022, is a member of the Indiana Bar and has been given *pro hac vice* status to litigate the Suits in South Carolina. Rule 3.3 of both the Indiana and South Carolina Rules of Professional Conduct states "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" Rule 3.3(a)(1), RPC Rule 407, SCACR); Ind. R. Prof'l Cond. 3.3(a)(1).

[6] In its Order Denying Motions to Strike, the trial court observed that "[t]he complete settlement agreement … was not presented to the Court for consideration." *Order* at 3. The Indigo Parties note that while the Gibbs Parties failed to attach the Settlement Agreement to their pleadings, they nonetheless referenced and incorporated it as an exhibit to Mr. Boozer's affidavit, which was filed on June 21, 2022. Aff. of Gregory Boozer, ¶ 2 (June 21, 2022) ("The parties entered into a settlement agreement on April 4, 2022, which is attached hereto as Exhibit A."). The Confession of Judgment, however, was filed with the trial court, and is intended to be "an enforceable obligation," ABA Opinion at 5, just as the Gibbs Parties contend the Settlement Agreement is an enforceable obligation. The Settlement Agreement was not presented to the trial court because the

"conspicuous" or otherwise, regarding consultation with counsel. Finally, it is uncontroverted that counsel for the Indigo Parties never consented to opposing counsel communicating with their clients, through Mr. Boozer.

Under these circumstances, it was expected and would have been consistent with the Gibbs and Indigo Parties' respective counsels' prior course of dealing for the Gibbs Parties' counsel to have provided the purported settlement documents through the Indigo Parties' counsel. At the very least, the documents drafted by the Gibbs Parties' counsel for Mr. Boozer to present to Mr. Feibus, should have included conspicuous language on the signature page advising Mr. Feibus to consult with his lawyer before signing the Settlement Agreement. *ABA Opinion* at 5. No such language was included, and the record is void of any evidence that the Gibbs Parties and/or their counsel ever advised the Indigo Parties to consult with their respective counsel prior to executing the Settlement Agreement or Confession of Judgment.

The fact that the Indigo Parties made the conscious decision to retain counsel at the onset of this matter affords them the protections of Rule 4.2 of the South Carolina Rules of Professional Conduct. In this context, the proper remedy to right a violation of Rule 4.2 related to settlement agreements is to strike all agreements and related documents. *See e.g. Weckesser*, 392 F. Supp. 3d at 638–39.

Indigo Parties' Motion to Strike sought principally to strike the Confession of Judgment. A true and correct copy of the Settlement Agreement was attached to the Indigo Parties' Motion for Reconsideration, solely for purposes of demonstrating that the language recommended in the ABA Opinion also is "notably absent" from that document. *See Weckesser*, 392 F. Supp. 3d at 638. The Indigo Parties respectfully submit that it was not necessary for the Court to consider this Settlement Agreement in determining whether the Confession of Judgment should have been stricken.

CONCLUSION

For the foregoing reasons, Appellants ask that the Court reverse the Master-in-Equity's September 9, 2022 Order Denying Motions to Strike and remand this matter with instructions that the Court of Common Pleas strike the judgments and Confessions of Judgment entered against Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel attests that all parties to this suit were served with the foregoing Appellant's Brief by emailing each a copy of same to the email address provided by their counsel-of-record in the South Carolina Attorney Information System.

Tyler J. Mitchell