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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Carmen Mullen, Circuit Court Judge

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Appellate Case No. 2023-000924

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Karon Mitchell, Kyle Mitchell, and  
Rabon & Rabon, Inc.,

Respondents,

v.

Jack Rabon, Nicole Rabon, Lane  
Jeffries, McNair Law Firm, P.A., Atid  
Properties, LLC, Daisy Ridge, LLC,  
Friends of LBS, LLC, Sarah Ginsburg,  
Jacob Biderman, Gabriel Yosef, and  
Michelle Cohen,

Defendants,

Of Whom:

Jack Rabon and Nicole Rabon,

Appellants,

and

Atid Properties, LLC and Jacob  
Biderman,

Cross-Claimants,

v.

Michelle Cohen,

Cross-Defendant.

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**INITIAL BRIEF OF APPELLANTS**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT LACK SUBJECT MATTER JURISDICTION BECAUSE RESPONDENTS STIPULATED TO A DISMISSAL OF THE CLAIMS AGAINST APPELLANTS WITH PREJUDICE WHICH RENDERED THE MOTION FOR DECLARATORY JUDGMENT MOOT?
  
- II. DID THE CIRCUIT COURT'S DECISIONS LACK EVIDENTIARY SUPPORT THAT APPELLANTS' BREACH OF THE COVENANT WAS MATERIAL?

## STATEMENT OF THE CASE

Respondents filed this lawsuit on September 6, 2017, alleging causes of action for civil conspiracy, fraud in a Probate proceeding, fraud, breach of fiduciary duty, and seeking to avoid transactions involving the sale of property owned by Rabon & Rabon. Respondents alleged that Jack Rabon, with the help of his wife Nicole, pocketed money from the sale of properties belonging to Rabon & Rabon and did not disclose this to the individual Respondents, who were minority shareholders of Rabon & Rabon. Respondents further alleged that Defendant McNair Law Firm, PA and its employee, Defendant Lane Jefferies, represented Jack Rabon and actively participated in the sale and concealed the actual sales price. On June 10, 2018, Appellants filed an Answer generally denying the allegations of the complaint and asserting numerous defenses.

On August 28, 2018, Respondents executed a Covenant Not to Execute in favor of Appellants. Contemporaneous with executing the Covenant, the parties also executed a global Settlement Agreement in the pending Probate matter. This was accomplished after a lengthy mediation and culminated with this agreement and Appellants' providing affidavits on August 28, 2018, generally supporting Respondents' claims in this lawsuit.

Respondents continued the litigation against McNair and Jefferies. On August 3, 2021, Respondents successfully mediated this case with McNair and Jefferies. On August 30, 2021, Respondents filed a Stipulation of Dismissal of Dismissal with Prejudice. On August 23, 2022, Respondents filed an Amended Stipulation of Dismissal with Prejudice referring to McNair and Jefferies only. On August 31, 2022, Respondents filed a Motion for Declaratory Judgment seeking to the Clare the Covenant Not to Execute dated August 28, 2018, as void and unenforceable.

The Circuit Court conducted a hearing on February 6, 2023. On March 9, 2023, the

Circuit Court issued an Order Granting Declaratory Relief. On March 20, 2023, Appellants filed a Motion to Alter or Amend. on May 8, 2023, the Circuit Court issued an Amended Order Granting Declaratory Relief. Appellants filed notice of appeal on June 7, 2023.

## FACTS

Jack Rabon and Karon Mitchell are siblings. Their parents created Rabon & Rabon and then later the family formed MB Boardwalk Entertainment, LLC (MBB). Through these companies the family owned and operated several motels in Myrtle Beach. In 2014, Jack and his mother, Peggy Jo Rabon, sued Karon and Kyle Mitchell for mismanagement of the companies. MBB was struggling. Jack alleged that the Mitchells used money from Rabon & Rabon to support MBB. At that point the properties were cross collateralized meaning a failure of MBB would also bring down Rabon & Rabon. Jack uncovered mismanagement and found that the companies were on the brink of failure. By Christmas of 2014 Jack “realized there was no way to recover or save the businesses.” (Hrg. Tr. P. 69, lines 1-2). Following the advice of his attorney at the time, Jack sold Rabon & Rabon properties through Michelle Cohen and received money outside of closing that should have gone to Rabon & Rabon. (Player Testimony and Jack Affidavit dated August 28, 2018).

During litigation Attorney Player issued 38 subpoenas. Evidence from these subpoenas formed the basis of this fraud litigation. When Attorney Player confronted Jack and Nicole with this evidence they advised that they had evidence that their attorney, Jefferies, knew about and participated in Jack receiving money outside of litigation. Attorney Player determined that the fraud lawsuit had relatively little value against Jack and Nicole because there were not significant personal assets to collect against and the companies were worthless. (Hrg. Tr. P. 93). He made the strategic decision to pursue McNair and Jefferies – the deep pockets.

Attorney Player testified he came up with the idea to give Jack and Nicole a Covenant Not to Execute. The conditions of this were that Jack and Nicole had to give detailed affidavits, they had to turn over all documents they had implicating McNair and Jefferies, and Jack had to give a promissory note to Rabon & Rabon in the amount of \$310,000 which was the amount that had been withheld from Rabon & Rabon because of the scheme. This way Attorney Player's clients could have their cake and eat it too. Rabon & Rabon received the actual damages (but not punitives) from Jack and got evidence from Jack and Nicole to pursue McNair and Jefferies. The Covenant also had a "kill switch." The Covenant provided that it would be declared null and void if it was found that Jack and Nicole lied in their affidavits or provided incorrect or deceptive documentation. Attorney Player testified the reason for this was to ensure Jack and Nicole could not be impeached for bias when testifying against McNair and Jefferies (Hrg. Tr. P. 94).

Attorney Player's plan worked. He testified that Jack and Nicole provided crucial information that was needed to implicate McNair and Jefferies. In fact, the "smoking gun" was an email sent to Jefferies on his McNair email account that Nicole provided which showed his knowledge of the plan. (Hrg. Tr. P. 82). Attorney Player acknowledged that based on the testimony and documents from Jack and Nicole, Rabon & Rabon got a good result. (Hr. Tr. P. 97-98).

As far as triggering the "kill switch" is concerned, Attorney Player clearly testified that Jack did not lie in his affidavit (Hrg. Tr. P. 71 l. 4; P. 90 l 21-25; P. 99 l 20-22). And that the only lie contained in Nicole's affidavit was her statement that she did not know what was going on. Ironically, the only evidence which did show Nicole knew was going on was the same evidence that turned out to be the smoking gun against Jefferies (Hrg. Tr. P. 100 l 24 – P. 101 l. 7).

## STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "An action to construe a contract is an action at law." Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). In an action at law, the circuit court's factual findings will not be disturbed unless they lack evidentiary support; however, "this court is free to decide questions of law with no particular deference to the trial court." *Id.*

## ARGUMENTS

### I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE RESPONDENTS STIPULATED TO A DISMISSAL OF THE CLAIMS AGAINST APPELLANTS WITH PREJUDICE WHICH RENDERED THE MOTION FOR DECLARATORY JUDGMENT MOOT.

The Stipulation of Dismissal with Prejudice dated August 30, 2021 clearly dismisses all of Respondents' claims against Appellants. The Circuit Court retained jurisdiction for 10 days after the Stipulation was filed. Presumably the Stipulation could have been amended within 30 days. However, the Amended Stipulation was filed nearly a year later on August 23, 2022, immediately before this Motion for Declaratory Judgment was filed. It is clear that a Stipulation of Dismissal against Appellants was intended by the parties.

At the same time Respondents executed the Covenant Not to Execute, the parties signed a Settlement Agreement (Ex. A filed February 6, 2023, by Respondents). This Agreement is on the caption of the case entitled Estate of Peggy Jo Rabon. Paragraph 6 of this Agreement provides that all debts of the estate will be satisfied from proceeds of the litigation which is the subject of this appeal. Paragraph 13 of the Agreement provides that upon the conclusion of the probate matter, all parties will execute releases dismissing all claims against each other for all litigation

that is pending.

The Covenant Not to Execute is moot. It was a separate standalone agreement designed to ensure the cooperation of Jack and Nicole. As attorney Player testified, it was crafted a way to protect Respondents, not to protect Jack and Nicole. When the Stipulation of Dismissal with Prejudice was filed and remained on record for nearly a year, the Covenant became moot. At that point the Covenant had served its purpose to elicit information to allow Respondents to secure a good settlement with McNair and Jefferies.

## II. THE CIRCUIT COURT SHOULD BE REVERSED BECAUSE ITS DECISION LACKED EVIDENTIARY SUPPORT THAT APPELLANTS' BREACH OF THE COVENANT WAS MATERIAL.

Settlement documents are viewed as contracts and general contract principles should be applied in construing them. Pee Dee Stores, Inc. v. Doyle, 672 S.E.2d 799, 802-803 (S.C. Ct. App. 2008). In Ackerman v. McMillan, the Court noted:

In order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract. Gibbs v. G.K.H., Inc., --- S.C. ---, 427 S.E.2d 701 (Ct.App.1993). Where the breach is not so material as to defeat the purpose of the contract, the nonbreaching party is compensated by damages. Childress v. C.W. Myers Trading Post, Inc., 247 N.C. 150, 100 S.E.2d 391 (1957).

Ackerman v. McMillan, 442 S.E.2d 618, 619-620 (S.C. Ct. App. 1994). This principle of contract construction is so ingrained in the law, our courts require any breach of a contract to be material before it will rescind or repudiate the contract – **even if the contractual provision in question provides that any breach will justify rescission of the contract.**

In Kiriakides v. United Artists Communications, Inc., 440 S.E.2d 364 (S.C. 1993), the landlord sought to enforce a provision of a commercial lease which allowed it to terminate the lease late in paying rent. The trial court applied equitable principles and refused to terminate the

lease and the landlord appealed. The South Carolina Supreme Court noted that the landlord's position would allow it to terminate the lease "no matter how trivial, inadvertent, non-prejudicial, or technical the breach." *Id.* at 366. The Court held that the lease could only be terminated in the event of a substantial or material breach.

Here, Appellants do not challenge the finding that Nicole's affidavit contains a misrepresentation concerning her knowledge of the scheme. However, there is no evidence that this misrepresentation harmed Respondents in any way or was material. The Circuit Court's March 9, 2023, Order contains absolutely no factual basis for holding that any breach of the Covenant was material. This point was raised in the Motion to Alter or Amend. In response, the Circuit Court issued an order on May 8, 2023, in an attempt to correct this deficiency. The court noted:

I find Nicole Rabon's misrepresentations in her affidavit as to her knowledge and participation in the fraudulent acts committed by Jack Rabon, Lane Jefferies, herself, and others in this case are material and caused harm to the Mitchells in their attempt to settle the case with Lane Jefferies and McNair. Lane Jefferies would have known Nicole Rabon light of her affidavit about her involvement in acting on behalf of Rabon & Rabon, and **could have** used that dishonesty to influence Jack or Nicole Rabon, or both, to change their testimony had the case not settled with Jefferies and McNair. Further, while a settlement of \$3 million may appear significant, fraud of this magnitude **might have** garnered a larger settlement against Jefferies and McNair had this misrepresentation not occurred as testified to by attorney Tucker Player.

(emphasis added.) the Circuit Court cannot cite any actual harm to Respondents. The Circuit Court engages in wanton speculation to struggle to find a way to show that Respondents have been harmed. There is absolutely nothing within Atty. Player's testimony which suggested that Nicole's misrepresentation was ever an issue during settlement negotiations. And contrary to the Court's speculation that a settlement of \$3 million is not significant, Attorney Player clearly testified that the settlement was a good result. Because there is no basis to support a finding that

the misrepresentation by Nicole was material, the Order Granting Declaratory Judgment should be reversed.

#### CONCLUSION

For the reasons stated, this Court should reverse the decision of the Circuit Court.

October 6, 2023

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