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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
William S. Keesley, Circuit Court Judge

Appellate Case No. 2024-000147
Common Pleas Case No. 2018-CP-02-2208

Richard Viviano and Johnette Gunter, Plaintiffs,

Of whom Richard Viviano is the Appellant

v.

Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, Respondents.

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II. Whether the Circuit Court properly rejected Appellant's claim of fraud where there is no evidence that any information was concealed or misrepresented to Appellant and any alleged deficiency in the admission of Lot 51 to the subdivision does not render the Motion to Enforce moot?

STATEMENT OF THE CASE

This matter arises out of an Order enforcing a mediated settlement agreement that resolved an equestrian/pedestrian easement dispute in the Braeloch Subdivision ("Braeloch"), which is governed by Respondent Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association ("the HOA") in Aiken County, South Carolina.

Appellant Richard Viviano ("Appellant") and his wife, Johnette Gunter ("Gunter"), [1] filed a Complaint in the Aiken County Court of Common Pleas on September 21, 2018, asserting claims for trespass, negligence, and breach of contract, as well as seeking declaratory and injunctive relief, against the HOA and their neighbors, Respondents Fulton Jeffers ("Jeffers"), Derrick Boddy ("Boddy"), and Sandy Carroll ("Carroll").[2] (R. p.*, Compl. with Ex. 1). The easement in question runs along the shared boundary line between lots owned by Appellant and Jeffers. The Respondents all filed Answers to the Complaint, and the HOA and Jeffers asserted counterclaims.

[1] Though Appellant's brief refers to "Appellants," Viviano is the sole appellant, as Gunter did not join the Notice of Appeal or file one of her own.

[2] Boddy and Carroll were sued as individuals and in their official capacities as former HOA officers.

By way of Amended Complaint filed on February 28, 2020, Appellant added a civil conspiracy claim alleging that the individual Respondents conspired to thwart attempts at resolution of the easement issues during the initial stages of the dispute. (R. p.*, Amd. Compl.). Respondents answered the Amended Complaint and reasserted their counterclaims against Appellant and Gunter. (R. p.*, HOA Answer to Amd. Compl. & Countercl.; R. p.*, Jeffers Answer to Amd. Compl. & Countercl.; R. p.*, Carroll/Boddy Answer to Amd. Compl.).

Prior to the completion of discovery, the parties jointly agreed to engage the services of the Honorable Thomas W. Cooper, Jr., retired Circuit Court Judge, as a mediator to try to facilitate resolution. At the conclusion of the mediation on May 25, 2022, all parties and their respective counsel signed a Memorandum of Understanding ("MOU") that set forth the terms of settlement. (R. p.*, MOU [Ex. A to Mot. to Enforce]).

In accordance with its terms, certain provisions of the MOU were presented to and approved by the homeowners of the HOA on or about July 20, 2022, including approval by Appellant himself. (R. pp.*, HOA Approval Tally). Thereafter, following the exchange of several versions of a draft Settlement Agreement and Full and Final Release of All Claims ("Release"), all counsel approved of the Release as of March 20, 2023, and agreed to obtain their clients signatures to fulfill the terms of the MOU. (R. p.*, Krawczyk Email [Ex. B to Mot. to Enforce]; R. p.*, Release [Ex. C to Mot. to Enforce]). However, following a change in counsel, Appellant and Gunter refused to execute the Release, claiming that information was fraudulently concealed from them in discovery and settlement negotiations.

On May 2, 2023, Respondents jointly filed a Motion to Enforce Settlement with exhibits, which was subsequently amended on June 26, 2023, to replace the Release exhibit with one signed

by all of the Defendants.[3] (R. p.*, Amd. Mot. to Enforce Settlement). Appellant and Gunter filed responses to the original and amended Motion on May 15, 2023 and July 14, 2023. (R. p.*, Pls.' Response to Mot. to Enforce; R. p.*, Pls.' Response to Amd. Mot. to Enforce).

A hearing on the Motion to Enforce was held on July 17, 2023, before the Honorable William P. Keesley, with counsel for all parties present. (R. p.*, Hearing Tr.). On July 18, 2023, the Court entered a Form 4 Order granting the Defendants' Motion to Enforce. (R. p.*, Form 4 Granting Mot. to Enforce). On August 15, 2023, the Court entered a written Order setting forth its reasons for granting the Motion. (R. p.*, Order Enforcing Settlement).

On August 23, 2023, Appellant and Gunter filed a Motion to Alter or Amend the Order, which was supplemented on September 6, 2023, to provide two "affidavits" from Appellant Viviano with eighteen attachments. (R. p.*, Pls.' 59(e) Mot.; R. p.*, Pls.' Supp. to 59(e) Mot.). In accordance with the briefing schedule, Respondents filed a Response in Opposition to Plaintiff's Motion. (R. p.*, Form 4 Scheduling Order; R. p.*, Defs. Response to 59(e) Mot.). Appellant and Gunter filed a Response in reply. (R. p.*, Pls.' Reply to Response to 59(e) Mot.). On January 10, 2024, Judge Keesley entered a Form 4 Order denying the Motion to Alter or Amend. (R. p.*, Form 4 Denying 59(e) Mot.).

Appellant filed a Notice of Appeal, followed by his Brief of Appellant. This Brief of Respondent follows.

[3] Appellant's Statement of the Case would lead the reader to believe that Appellant went through a formal effort to set aside the MOU upon his alleged discovery of fraud, to which Respondents made some sort of "counterclaim." *See* IBOR pp. 2-3. It was, in fact, Respondents who filed a Motion to Enforce Settlement in the Circuit Court in May 2023, after Appellant and Gunter's new counsel advised them not to sign the Release.

STATEMENT OF FACTS

Background

The first set of Protective Covenants of the Braeloch Subdivision in Aiken County were recorded on August 13, 1987, with the Aiken County Register of Deeds at Volume 485, Page 275 and Volume 485, Page 281, at which time the neighborhood consisted of 20 lots. Additional phases of the subdivision were developed, and on October 21, 1996, the Amended Covenants and Access Agreements to Braeloch Subdivision for Phases 1, 2-A, 2-B, and 2-C, were recorded at Volume 849 Page 37. (R. p.*, Compl. at Ex. 1, pp. 20-37). On August 14, 2002, Amended Covenants to Braeloch Subdivision were recorded at Volume 1143 Page 84, changing certain provisions of the prior covenants and adding Lot 51, then owned by Pamela and Mark S., to Braeloch. (R. p.*, Compl. at Ex. 1, pp. 42-46). Subsequently in September 2002, the Thompsons sold Lot 51 to Ruth Kipnis, who later sold it to Respondent Jeffers in 2012. (R. p.*, Amd. Compl. at p. 5). Among other complaints in the underlying proceedings, Appellant maintained that the perimeter pedestrian and horse-riding trail easement provided for in the Braeloch Covenants should be moved from his property to the perimeter of Lot 51.

Mediation and Agreement

The parties mediated this matter with retired Judge Cooper over the course of two days on March 30, 2022, and May 25, 2022. The resulting MOU provided the following and was signed by all parties and their counsel on May 25, 2022:

> The Parties, having come to a proposed settlement in Mediation agree to settle all claims in the above-caption[ed] action subject to the terms in this agreement that require further action:
>
> 1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
>   a. The easement shall be reduced from 20' to 15' in width.
>   b. 10' of the easement shall be moved from lot 47 to Lot 51.

c. The alteration shall be effective for the entirety of the property line of Lot 47.

2. Defendant Fulton Jeffers shall receive payment in the amount of $20,000 which shall represent payment for the burden placed on his property.
3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 38 and 49 (the Lee/Santos Easement).
4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
5. The HOA will present for a vote to the members of the HOA whether to approve an existing access easement between lots 18, 19, 20 & Lot 49, the outcome of which will not effect the enforceability of this settlement.
6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
7. The parties will enter into a mutual non-disparagement agreement.
8. This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum.
9. Full and final release of all claims by Plaintiffs against Sandra Carroll and Derrick Boddy.
10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.
11. All parties shall bear their own attorney fees and costs.
12. Full and final settlement agreement to be draft by Mary LaFave.
13. The HOA shall bring the matter to a vote of the members within 60 days of the signed Release.

R. p.*, MOU [Ex. A to Mot. to Enforce]).

Following execution of the MOU, Judge Cooper filed the Mediation Results Report on June 6, 2022, which provided: "Fully Settled SUBJECT TO approval by the HOA in accord with the terms of the MOU signed by the parties on May 25, 2022." (R. p.*, Mediation Results Report). The terms of the settlement for which homeowner approval was required, under paragraphs 5 and

8 of the MOU, were presented to the HOA for a vote. The final vote was cast in favor of approving the MOU on or about July 20, 2022. (R. pp.*, HOA Approval Tally).

Over the next few months, the parties exchanged several versions of a draft Release finalizing the parties' agreement. During the time that the Release was being edited, former counsel for the Plaintiffs was indisposed due to medical issues resulting in some delay. ***Nevertheless, as of March 20, 2023, written communications reflect that the parties, including Plaintiffs, had all edited and approved the language of the Release through their respective counsel.*** At that time, the attorneys agreed to obtain their clients' respective signatures to fulfill the terms of the MOU. (R. p.*, Email from Krawczyk [Ex. B to Mot. to Enforce]; R. p.*, Release [Ex. C to Mot. to Enforce]).

Shortly thereafter, Appellant and his wife then relieved their longtime attorney, Charley Krawczyk ("Krawczyk"), and retained John W. Harte ("Harte") as their new counsel. (R. p.*, Order Relieving Counsel [Ex. D to Mot. to Enforce]. On April 18, 2023, counsel for Respondents sent a letter to Harte with the previously agreed upon MOU and Release, asking that the Release be executed. (R. p.*, Request for Execution of Release [Ex. E to Mot. to Enforce]). Harte responded by letters dated April 24, 2023, and May 2, 2023, rejecting the Release and attempting to reopen settlement negotiations. (R. p.*, First Letter from Harte [Ex. F to Mot. to Enforce]; R. p.*, Second Letter from Harte [Ex. G to Mot. to Enforce]).

Motion to Enforce Settlement and Hearing

Accordingly, Respondents filed, and later amended, their Motion to Enforce Settlement. (R. p.*, Amended Mot. to Enforce). Respondents' Motion outlined the history of the mediation, MOU, homeowner approval, and Release, the last of which was drafted in accordance with the MOU and with the underlying Plaintiffs' input, edits, and acceptance from their prior counsel who

had authority to act on their behalf at that time. (*Id.* at p. 3). Appellant opposed the Motion. (R. p.*, Pls.' Response to Mot. to Enforce Settlement; R. p.*, Pls.' Response to Amd. Mot. to Enforce Settlement).

At the July 17, 2023, hearing on the Motion to Enforce, Respondents argued that any initial contingency in the MOU was fulfilled when the homeowners voted—almost unanimously with the exception of one homeowner not a party to this lawsuit—to approve the MOU. (R. p.*, Hr'g. Tr. p. 9, lines 13-22; R. p.*, Hr'g. Tr. p. 10, lines 21-25). The document memorializing the HOA approval of the MOU on or about July 20, 2022, was admitted by consent at the hearing. (R. p.*, Hr'g. Tr. p. 7, lines 4-9; R. p.* , HOA Approval Tally). Importantly, Appellant signed on behalf of himself and Gunter ***approving the MOU*** on June 30, 2022. (R. p.*, Hr'g. Tr. p. 10, line 25 – p. 11, line 2; R. p.* , HOA Approval Tally).

Respondents explained to the Court that the agreement involved a complicated process to move an easement partially onto Respondent Jeffers' property from Appellant and Gunter's property. (R. p.*, Hr'g. Tr. p. 7, lines 8-12). To effectuate this agreement would require clearing of the land, surveys, and changes to legal documents, which is why the parties and HOA members wanted the Release to be specific as to the HOA's duties. (R. p.*, Hr'g. Tr. p. 7, lines 12-17). Drafts of the Release were exchanged amongst the lawyers and finalized on March 20, 2023. Although edits were made, they pertained to the responsibilities of the HOA and the timeline that the HOA needed to be able to clear this easement and to move the horse trail and pedestrian easement over onto another piece of property. (R. p.*, Hr'g. Tr. p. 7, lines 17-23).

Appellant characterized the MOU as an unenforceable "agreement to make an agreement" and argued the Release is not consistent with the MOU. (R. p.*, Hr'g. Tr. p. 12, line 22 – p. 13, line 16; R. p.*, Hr'g. Tr. p. 14, line 20 – p. 17, line 24). Appellant then expressed "grave, grave

concern" about the legitimacy and equity of the settlement where "the evidence reflects quite clearly that it was represented throughout the mediation that sufficient signatures had been obtained to permit the joinder of this additional property [Lot 51] to the subdivision when, in fact, that was not correct."(R. p.*, Hr'g. Tr. p. 13, line 17-24). Appellant avers that though there were 35 signatures approving the original addition of a lot to the subdivision, they represented only 33 lots instead of the 34 needed to represent a 2/3 majority, and that such information was "withheld by the defendants" in discovery. (R. p.*, Hr'g. Tr. p. 13, line 25 – p. 14, line 19).

Contrary to Appellant's assertion that the delay between the MOU and Release was due to a lack of a meeting of the minds, Respondents noted that Appellant's former counsel, Krawczyk, contracted West Nile virus that required his hospitalization and a recovery of approximately three months. (R. p.*, Hr'g. Tr. p. 18, line 21 – p. 19, line 8). Further, the approval by the HOA members of the MOU in July 2022 evidenced that that parties were complying with the terms of the MOU. (R. p.*, Hr'g. Tr. p. 19, lines 9-15; R. p.*, Krawczyk Email [Ex. B to Mot. to Enforce]).

With respect to the allegation of hidden evidence, bad faith, and fraud regarding the admission of Lot 51 to Braeloch, Respondents noted that a copy of the Amended Covenants to Braeloch Subdivision dated August 9, 2002, with the property owner signatures who approved annexation of Lot 51, was attached to Plaintiff's original Complaint filed on September 21, 2018. (R. p.*, Hr'g. Tr. p. 20, line 18 – p. 19, l. 1; *see* R. p.*, Compl. at Ex. 1, pp. 42-46). So, to say that Respondents concealed this information from Appellant is disingenuous. Additionally, it is a public filing accessible from the Aiken County Register Deeds Office at Volume 1143, Page 84. (R. p.*, Hr'g. Tr. p. 21, lines 14-24). Respondents further cited to South Carolina's public policy of promoting settlement and the danger of allowing parties to set aside a settlement agreement because of information that was available but not reviewed or realized at the time of the agreement.

(R. p.*, Hr'g. Tr. p. 21, line 25 – p. 22, line 23). Moreover, Respondents noted that there was no evidence by way of affidavit or otherwise submitted by Appellant to support the allegations of fraud. (R. p.*, Hr'g. Tr. p. 23, lines 2-23).

Appellant's counsel responded with more innuendo and bald accusations of fraud. He promoted the idea that, despite the detailed MOU, there is no agreement to enforce until his clients approve of the Release. (R. p.*, Hr'g. Tr. p. 24, line 2 – p. 26, line 3).

Judge Keesley took the matter under advisement.

Order Enforcing Settlement Agreement

Following a Form 4 Order, Judge Keesley entered a final Order granting the Motion to Enforce on August 15, 2023. Therein, the court applied the plain language of Rule 43(k) of the South Carolina Rules of Civil Procedure and applicable case law to reject Appellant's argument that the MOU did not constitute a valid contract. (R. p.*, Order Enforcing Settlement at pp. 7-8). In addition to noting Appellant's failure to specify what material element of a contract was allegedly missing, the Court found the MOU was reflective of the offer, acceptance, and consideration that took place during a lengthy mediation process that ended in a settlement of the claims. (R. p.*, Order at p. 8). The Court found no evidence to support Appellant's arguments that the MOU was unenforceable based on the use of the word "proposed," a purported lack of meeting of the minds, and vague arguments that the Release did not comport with the MOU. (*Id*.). The Court further specifically found that the Release was consistent with the MOU. (*Id*.).

The Court next rejected Appellant's argument that the MOU contained contingencies that were not met prior to Appellant's attempt to withdraw his assent. The Court found that the only contingency in the MOU was the approval of terms of the MOU by the HOA, which was completed

in July 2022, after which time Appellant and Gunter were bound by the MOU. (R. p.*, Order at p. 9). The Court noted that Appellant himself voted for approval of the MOU in June 2022. (*Id*.).

Finally, the Court rejected Appellant's arguments that equitable doctrines, including unclean hands, waiver, and laches, rendered the MOU unenforceable. (R. p.*, Order at pp. 9-10).

Accordingly, the Court granted the Motion to Enforce and ordered Appellant and Gunter to execute the Release. (*Id.*).

Motion to Alter or Amend

On August 23, 2023, Appellant and Gunter filed a Motion to Alter or Amend pursuant to Rule 59€, SCRCP, alleging the court failed to address or consider various facts and arguments. (R. p.*, Pls.' 59(e) Mot.). On September 6, 2023, they filed and served a "Supplement to 59(e) Motion" that contained two "affidavits" of Appellant, both notarized on September 6, 2023, which primarily consist of his personal opinions and misstatements of fact. (R. p.*, Pls.' Supp. to 59(e) Mot.). There were eighteen attachments to the supplemental filing, many of which were partial documents. (*Id.*). Attachment 5 to the Supplement consisted of two emails. The first email, bates-labeled Jeffers-00087, is a February 11, 2019, email from Jeffers to Boddy noting a potential discrepancy in the number of lot owners required under the current bylaws and the number who approved the petition to add the Thompson lot (Lot 51) to the Braeloch subdivision in 2002. The second is a July 5, 2022, email from Appellant to his former counsel Krawczyk, stating: "Attached is the email we discussed. It is clear that Boddy and Jeffers knew in February 2019 that there were insufficient signatures to bring the Thompsons into Braeloch. There were two lots with two signatures instead of 'one per lot.'" (R. p.*, Pls.' Supp. to 59(e) Mot. at pp. 19-21). So, yet again, Appellant was aware of the existence of this potential issue.

Respondents filed a Response in Opposition to Plaintiff's Motion, arguing that the Motion to Alter or Amend was both procedurally and substantively deficient, as it was full of conclusory statements, devoid of any authority whatsoever, and attempted to present new arguments and evidence not presented in the original litigation of the Motion to Enforce. (R. p.*, Defs.' Response to 59(e) Mot.). Respondents argued that the Court should refuse to consider the documents and affidavits presented in the Motion. (*Id.*). Much of Appellant's motion was a mere restatement of the arguments already considered and rejected by the Court in the prior Order. (*Id.*). The further attempt to raise a dispute over whether Lot 51 was properly annexed into the neighborhood in 2002, which could have been litigated had the matter not resolved at mediation, is irrelevant to the issue of whether the MOU was a valid and enforceable agreement. (*Id.*). Accordingly, Respondents argued that the Motion to Alter or Amend should be denied.

Appellant filed a reply with some general legal citations, none of which rendered the court's ruling improper. (R. p.*, Pls.' Reply to Response to 59(e) Mot.). Appellant requested the court amend its prior Order to find Respondents "engaged in a fraudulent concealment of the truth and the Memorandum of Understanding should not be enforced." (*Id.*, at p. 3).

On January 10, 2024, Judge Keesley summarily denied the Motion to Alter or Amend in a Form 4 Order. (R. p.*, Form 4 Denying 59(e) Mot.). An original named Plaintiff and owner of the property, Johnette Gunter, does not properly appeal and, accordingly, agrees with the settlement.

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, "[the appellate] court is free to decide questions of law with no particular deference to the trial court." *Id.*

ARGUMENT

As an initial matter, many of Appellant's arguments to the Circuit Court are not asserted in his Brief and are, therefore, abandoned on appeal. *See First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating issues for which appellant fails to provide arguments or supporting authority are deemed abandoned); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n. 4, 677 S.E.2d 32, 36 n. 4 (Ct. App. 2009) (noting that issues preserved in the lower court will be waived on appeal where not argued in appellate brief).

Plaintiff's Issues I and II both center around a meritless claim of fraud that Appellant failed to develop or support in his initial filings and argument before the Circuit Court. Assuming *arguendo* that there was some defect in the original admission of Lot 51 to Braeloch in 2002, the MOU remains valid and enforceable. Plaintiff's Issue III asserts that the MOU is not a valid contract because it lacks specificity regarding various terms and the "final document" contemplated by it "does not exist" and has not been approved by the HOA.

Respondents will first address the enforceability of the MOU pursuant to Rule 43(k), SCRCP, and contract principles, and then address the claims of an alleged failure to rule, fraud, and mootness. As discussed more fully *infra*, Appellant's efforts to invalidate the prior settlement agreement ignore the applicable Rules and case law and include unsupported accusations of fraud against Respondents and their counsel. The "hidden" information purportedly at issue was plainly discernable from the public documents attached to Plaintiff's own Complaint and an email

disclosed in discovery prior to mediation. So clearly, Appellant was aware of this when they participated in the mediation and executed the MOU. The Circuit Court properly ruled to enforce the settlement and ordered Appellant and Gunter to execute the Release, and further denied Appellant's Motion to Alter or Amend that attempted to provide new arguments and evidence in opposition to Respondents' Motion to Enforce.

I.

The Circuit Court properly granted Respondents' Motion to Enforce Settlement where a Memorandum of Understanding was reduced to writing and signed by the parties and their counsel at mediation, in accordance with Rule 43(k), SCRCP, containing all essential and material terms.

Applicable Law

"It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements." *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992). "Sound public policy generally requires the enforcement of contracts freely entered into by the parties." *Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 108, 420 S.E.2d 217, 221 (Ct. App. 1992).

Rule 43(k), SCRCP, provides, in pertinent part: "No agreement between counsel affecting the proceedings in an action shall be binding unless…reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCP. "Rule 43(k) plainly applies to all settlement agreements signed by counsel…." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006).

"The purpose of rules such as Rule 43(k), is to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more

perplexing than the case itself." *Ashfort Corp. v. Palmetto Constr. Group, Inc.,* 318 S.C. 492, 493–94, 458 S.E.2d 533, 534 (1995) (internal quotations omitted)).

The necessary elements of a contract, including a settlement agreement, are "an offer, acceptance, and valuable consideration." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012); *Pee Dee Stores*, 381 S.C. at 241, 672 S.E.2d at 802 (providing that settlement agreements are viewed as contracts). "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original).

Settlement agreements are reviewed in much the same way as contracts. *Patricia Grand Hotel, LLC v. MacGuire Enters.,* 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). When "an agreement is clear and capable of legal construction, the court['s] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Messer v. Messer,* 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004); *see also Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) ("To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect.").

"Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement." *Pee Dee Stores*, 381 S.C. at 242, 672 S.E.2d at 803. When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. *Patricia Grand Hotel*, 372 S.C. at 640, 643 S.E.2d at 695. "However, where 'the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court

to ascertain the intentions of the parties.'" *Id.* (quoting *Mattox v. Cassady,* 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986)).

"The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor,* 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). "Rather, interpretation of a contract 'is governed by the objective manifestation of the parties' assent at the time the contract was made,' rather than 'the subjective, after the fact meaning one party assigns to it.'" *Nichols Holding, LLC v. Divine Cap. Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) (quoting *Bannon v. Knauss,* 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984)).

Analysis

Prior to its amendment, Rule 43(k), SCRCP, provided that agreements were binding only if (1) reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or (2) made in open court and noted upon the record. *See Smith v. Fedor*, 422 S.C. 118, 125, 809 S.E.2d 612, 615 (Ct. App. 2017). In 2009, the legislature added another mechanism for enforcement, where such agreements are "reduced to writing and signed by the parties and their counsel." *Id.* "This rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation and to relieve the court of the necessity of determining such disputes." *Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini*, 426 S.C. 147, 152-53, 825 S.E.2d 748, 751 (Ct. App. 2019) (internal quotations omitted); *see also S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 521, 846 S.E.2d 861, 867 (2020) (Where Rule 43(k) applies, this Court has held its terms are mandatory….The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty.").

Subsequently, numerous published and unpublished decisions of this Court have upheld mediated settlement agreements signed by all parties and their counsel. *See, e.g.*, *Kinghorn*, *supra* (affirming order enforcing settlement where agreement was in writing and signed by the parties and their counsel); *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) (same); *Sparrow v. Fort Mill Holdings, LLC*, Op. No. 2018-UP-321 (S.C. Ct. App. filed July 11, 2018) (same); *Selph v. Boatwright*, Op. No. 2024-UP-047 (S.C. Ct. App. filed Feb. 7, 2024) (same); *see also Morgan v. Sterling Ests. Homeowner's Ass'n, Inc.*, Op. No. 2022-UP-257 (S.C. Ct. App. filed June 8, 2022) (affirming trial court order enforcing settlement placed on the record where although the parties did not specify the exact scope of the work to be done, they agreed to move the storm drain and to hire a contractor to determine the scope of the work needed to accomplish this purpose).

Here, it was the intention of the parties at mediation to settle the case according to the unambiguous terms in the MOU agreement. Appellant now attempts to use his own refusal to perform as a way to avoid the settlement in hopes of obtaining some different outcome. He cannot avoid that MOU is enforceable pursuant to Rule 43(k), SCRCP, as it is a written agreement signed by the parties and their counsel. Instead, Appellant attempted a litany of failed attacks used by litigants before him in his effort to avoid enforcement of the MOU in the Circuit Court.

On appeal, Appellant continues with the most basic of these attacks, asserting that the MOU is "not a valid contract" because it is not a "final document." Brief of App., at pp. 11-12. Appellant's reliance on *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014), is misplaced, as it involved an MOU entered privately by the parties related to development of a publicly funded hotel, which the Court found left "numerous material terms" undefined. The MOU in the present case contemplated the preparation and execution of an

additional document, which is referenced in Paragraphs 12 of the MOU as a "full and final settlement agreement" and referred to herein as the Release. However, contrary to Appellant's assertion, the MOU itself contained all essential and material of the agreement to be memorialized in the Release, as discussed more fully *infra*. Appellant's erroneous arguments otherwise appear grounded in a misapprehension of the terms of the MOU, as his Brief focuses on only paragraphs 4, 7, and 8 (the latter of which is also misstated), instead of the agreement as a whole.[4]

This Court's opinion in *Byrd* is instructive, as it involved a written and signed Rule 43(k) agreement at mediation that was to be followed by a more formal agreement. 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In *Byrd*, the parties resolved their land dispute between the seller, purchaser, and the holder of a right-of-way easement over real property at mediation in November 2009, resulting in a written and executed "Agreement in Principle." *Id.* at 240, 727 S.E.2d at 621. The Agreement stated, "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties." *Id.* Byrd opposed a subsequent motion to enforce. *Id.* at 240-241, 727 S.E.2d at 621. This Court agreed that while Byrd's was son was not a party to the litigation or Agreement, that did not release Byrd himself from the Agreement. *Id.* at 242-43, 727 S.E.2d at 622. The Court found that "the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement" and rejected Byrd's argument that his son's ratification of the Agreement was a condition precedent excusing Byrd from his obligation to sign the more formal and detailed Settlement Agreement to follow. *Id.* at 243-45, 727 S.E.2d at 622-24.

[4] Appellant argues Paragraph 4 of the MOU is not specific enough when it provides: "The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement." Brief of App., at pp. 12. He further argues that the agreement to a mutual non-disparagement in Paragraph 7 of the MOU is incomplete because its specific terms are not set forth in the MOU. *Id.* at pp. 11-12.

Though Appellant fails to utilize the term or cite to any relevant case law, he is essentially arguing that HOA approval of the Release was a condition precedent to the enforceability of the agreement between the parties. "A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.'" *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.,* 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (quoting *Worley v. Yarborough Ford, Inc.,* 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* (internal quotation marks omitted).

Here, the terms of the MOU entered into by the parties on May 25, 2022, required two matters be presented to the members of the HOA for a vote, only one of which was a condition precedent to enforcement of the agreement. (R. p.*, MOU [Ex. A to Mot. to Enforce]). First, Paragraph 5 of the MOU required a vote on whether to approve an existing access easement between lots 18, 19, 20 & Lot 49. (*Id.*). This issue was rejected by the HOA membership, but the MOU expressly provided that the outcome of the vote required under Paragraph 5 "will not effect the enforceability of this settlement." (*See id.*; R. p.*, Release at p. 3 [Ex. C to Mot. to Enforce]). Second, Paragraph 8 of the MOU provided: "This settlement is contingent upon the HOA getting homeowner approval of their obligations under Paragraphs 1 and 3 of this memorandum." (R. p.*, MOU [Ex. A to Mot. to Enforce]).[5] This vote required in Paragraph 8 was the ***only contingency***

[5] Appellant misstates the requirements of Paragraph 8 of the MOU in his brief, writing: "To further support the fact that the Memorandum of Understanding is not a contract, reference should be made to Paragraph 8 of the document which provides that the 'Understanding' is contingent and requires that the final contract (which was never signed) must be approved by the mechanism required by the subdivision bylaws and covenants." *See* Brief of Appellant, at p. 12. Paragraph 8 makes no reference to a "final contract" and specifically only required approval of the alterations of the easement outlined in paragraphs 1 and 3 of the MOU.

listed in the MOU and it was fully accomplished by July 20, 2022. (R. pp.*, HOA Approval Tally). Appellant did not communicate any withdrawal of his assent to the MOU agreement prior to the satisfaction of this sole contingency. Moreover, on June 30, 2022, Appellant himself voted to approve those terms of the MOU. It was not until months later that attorney Harte communicated his clients' desire to repudiate the settlement. Accordingly, the Circuit Court properly found that once the HOA's approval vote was final, the parties were bound by the MOU. (R. pp.*, Order Enforcing Settlement at p. 9).

While Paragraph 12 of the MOU further provides for the subsequent drafting of a Release, the settlement agreement contained in the MOU was not itself conditional on the execution of that document. (R. p.*, MOU [Ex. A to Mot. to Enforce]). Rather, the essential and material terms of the settlement to be encompassed in the Release were set forth in the remainder of the MOU:

> 1. The 20' equestrian/pedestrian easement which is located along the back perimeter of Lot 47 shall be altered as follows:
>   d. The easement shall be reduced from 20' to 15' in width.
>   e. 10' of the easement shall be moved from lot 47 to Lot 51.
>   f. The alteration shall be effective for the entirety of the property line of Lot 47.
> 2. Defendant Fulton Jeffers shall receive payment in the amount of $20,000 which shall represent payment for the burden placed on his property.
> 3. The HOA agrees to remove/release the 10' access easement described in the covenants between lots 38 and 49 (the Lee/Santos Easement).
> 4. The HOA will pay for and clear whatever portion of the equestrian/pedestrian easement now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement.
>
> …
>
> 6. The parties will sign a non-waiver agreement agreeing that the settlement does not create a waiver of the enforcement of the covenants.
> 7. The parties will enter into a mutual non-disparagement agreement.
>
> …

9. Full and final release of all claims by Plaintiffs against Sandra Carroll and Derrick Boddy.

10. The HOA shall pay for and prepare all surveys, plats documents and costs with filing.

11. All parties shall bear their own attorney fees and costs.

(*Id.*).

Paragraph 13 of the MOU provided that the HOA "shall bring the matter to a vote of the members within 60 days of the signed Release." (*Id.*). By its plain language, this remaining HOA vote is to occur *after* the Release is signed, not before. Accordingly, it is not a condition precedent. This is consistent with this Court's opinion in *Kinghorn*, where one of the neighbors in a boundary dispute attempted to repudiate the mediated settlement agreement by arguing that it was not ripe for enforcement because "not all contingencies had been met" where it was not yet approved by the HOA. 426 S.C. 147, 825 S.E.2d 748 (Ct. App. 2019). In affirming the court's enforcement of the written and signed agreement in *Kinghorn*, this Court found that it was valid and enforceable pursuant to Rule 43(k). *Id.* at 153, 825 S.E.2d at 751. Additionally, the Court found that agreement's enforcement "does not remove any of the contingencies which must be met for the settlement to be completed." *Id*. Here, the only reason that the additional vote has not occurred is because of Appellant and Gunter's failure to execute the Release.

Appellant also complains that the MOU does not include a "time limit" for "the creation of the final agreement," which Respondents assume is a reference to the Release in Paragraph 12. *See* Brief of Appellant, at p. 12. However, Appellant provides no argument or supporting authority for the proposition that the absence of this from the MOU invalidates the agreement. *See Bennett v. Investors Title Ins. Co.,* 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting that when an appellant fails to cite any supporting authority for their position and makes conclusory arguments, the appellant abandons the issue on appeal); *State v. Crocker,* 366 S.C. 394, 399 n. 1,

621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) (holding that conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review and noting that failure to provide such argument and citation renders an issue abandoned).

Finally, similar to *Byrd*, the parties' subsequent conduct here is further evidence of the parties' intent to settle the case. The Mediation Results Report filed by the mediator referred to the case as "Fully Settled SUBJECT TO approval by the HOA in accord with the terms of the MOU signed by the parties on May 25, 2022." (R. p.*, Mediation Results Report). Thereafter, the parties complied with the MOU by presenting the necessary terms to the HOA for a vote, obtaining approval from HOA (at which time Appellant reaffirmed his assent by his affirmative vote), and preparation of the Release.

In sum, the MOU itself is a valid and enforceable settlement agreement. Its terms are not ambiguous and there is no outstanding condition precedent to its enforcement. Accordingly, the Circuit Court's Order enforcing settlement should be upheld, as Respondents established a meeting of the minds and intention to be bound.

II.

The Circuit Court properly rejected Appellant's claim of fraud where there is no evidence that any information was concealed or misrepresented to Appellant and any alleged deficiency in the admission of Lot 51 to the subdivision does not render the Motion to Enforce moot.

"A compromise settlement may be invalidated by false representations as to a material matter which were made to induce and did induce the other party to make the contract, while ignorant of the truth and reasonably relying upon the representations." *White v. Hewitt*, 86 S.C. 576, 68 S.E. 820, 822 (1910); *see also Arnold v. Yarborough,* 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) ("Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement."). In his effort to set aside the MOU,

Appellant suggests that a discrepancy in obtaining one less than the required number of signatures for approval of the 2002 Amended Covenants that added Lot 51 to Braeloch was known to and concealed by Respondents to "trick" Appellant and Gunter into settlement. Brief of Appellant, at pp. 5-8. This claim was properly rejected by the court where Appellant failed to present any competent evidence to support it, and the issue of whether Lot 51 was properly admitted twenty years earlier has no bearing on the enforcement of the MOU.

Appellant first complains that the court did not rule on issues presented because the Orders "did not mention the insufficiency of signatures on the Petition…or acknowledge the fact that Respondents fraudulently concealed that material fact in order to obtain the Appellant's consent to the MOU." Brief of Appellant, at p. 7. The court is not required to make an affirmative statement that it did not rely on incompetent evidence in rendering its decision. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). Nonetheless, the Order Enforcing Settlement references the various theories advanced by Appellant, including "a lack of good faith" and claims that "the principles of equity bar enforcement under the doctrines, *inter alia*, of unclean hands, waiver, and laches." (R. p.*, Order Enforcing Settlement, at pp. 4-5). The Court rejected these equitable challenges, which would have inherently included the fraud claim, in the final paragraph of the Findings of Fact and Conclusions of Law. (*Id.* at pp. 9-10).

To the extent there was any deficiency in the articulation of the written orders below, remand is unnecessary because there is no evidence in the record to support a finding of fraud. *See generally Horton v. Jasper Cnty. Sch. Dist.*, 423 S.C. 325, 331-32, 815 S.E.2d 442, 445 (2018) (declining to remand where there was no evidence in the record to support a reduction of hourly rate in award of attorney's fees). It is well-settled that "arguments made by counsel are not evidence," yet that was all that Appellant chose to rely upon to support his allegation fraud. *S.C.*

Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003); *McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Neither Appellant's filed responses to the Motion to Enforce nor his presentation at the hearing included any exhibits, affidavits, or testimony to support his claim of fraud. This lack of any supporting evidence was raised by Respondents at the hearing before Judge Keesley. (R. p.*, Hr'g. Tr. p.23, lines 7-23).

The court was made aware of the Amended Covenants to Braeloch Subdivision, which were recorded at Volume 1143 Page 84, on August 14, 2002, and included in Exhibit 1 to Appellant's original Complaint. (R. p.*, Compl. at Ex. 1, pp. 42-46). ***However, rather than providing evidence in support of Appellant's fraud claim, this document and its filing with the Complaint only exemplifies that the information supposedly "concealed and withheld" was not only publicly available but in the actual possession of Appellant from the outset of the litigation in September 2018***. *See S.C. State Highway Dep't v. Metts*, 270 S.C. 73, 76, 240 S.E.2d 816, 817 (1978) (finding appellants were charged with constructive notice where easement was recorded and indexed). "Courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion." *New v. Collins*, 126 S.C. 294, 119 S.E. 835, 836 (1923) (citations omitted).

Appellant further attempts to rely on an email that was first presented as an attachment to the "Supplement" to Appellant's Motion to Alter or Amend, filed on September 6, 2023. (R. p.*, Pls.' Supp. to 59(e) Mot. at Attachment 5). Respondents' opposition to the Rule 59(e) motion argued that Appellant's motion consisted of the same conclusory statements, failed to cite any authority whatsoever, and improperly attempted to introduce new evidence in the form of the

"affidavits" and exhibits. "A party cannot use Rule 59(e)[, SCRCP] to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *see Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (holding the court could not consider financial document appearing only as an attachment to father's post judgment motion to alter or amend judgment). However, even if considered, the email clearly displays a bates-label applied when it was produced in discovery by Jeffers.[6] Thus, like the 2002 Amendment, this document was in the possession of Appellant prior to the mediation.

Thus, the only documents referenced by Appellant in support of his fraud claim undermine it by showing that the information was in Appellant's possession. Appellant presented no evidence that any false representation was made by any of the Respondents, much less any of the other elements that would traditionally be necessary to prove a claim of fraud. To the extent Appellant's claim is essentially that he was ill- or misinformed, "where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney." *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 70, 488 S.E.2d 334, 335 (1997); *see also Shelton v. Bressant*, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993) (quoting *Petty v. The Timken Corp.,* 849 F.2d 130, 133 (4th Cir. 1988) ("When a litigant voluntarily accepts an offer of settlement, either *directly* or *indirectly* through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the

[6] Specifically, this email was produced by Jeffers to Plaintiff on October 30, 2019, over two (2) **years** before the mediation.

litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.")).

Finally, Appellant argues in his brief that because Lot 51 was never "legally" added to Braeloch, the issue of enforcement of the settlement agreement is moot. Brief of Appellant, at pp. 9-10. Again, Appellant cites no supporting authority for this position. *See First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating issues for which appellant fails to provide arguments or supporting authority are deemed abandoned). Moreover, this argument presupposes that the deficiency of one signature on the 2002 Amended Covenants invalidates Lot 51's addition to the Neighborhood, ignoring potential equitable principles that may apply and that Jeffers was a bona fide purchaser for value of Lot 51. Furthermore, if necessary, the HOA can include in the documents and plats that will be prepared following execution of the Release additional language to ratify Lot 51's inclusion in Braeloch. Regardless, this does not relieve Appellant of the obligations he owes under the MOU. *See generally Byrd v. Livingston*, 398 S.C. 237, 241-42, 727 S.E.2d 620, 622 (Ct. App. 2012) (upholding finding that though Agreement was not enforceable as to Byrd's son, this did not release Byrd himself from the Agreement).

Accordingly, the Circuit Court's Order enforcing settlement should be upheld, as there is no evidence to support a finding of fraud or misrepresentation.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Circuit Court's Order Enforcing Settlement be affirmed.

Respectfully submitted,

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August 26, 2024

CERTIFICATE OF SERVICE
(Appellate Case No. 2024-000147)

I, the undersigned, attorney for Respondents Sandy Carroll and Derrick Boddy, do hereby certify that I have on this date, August 26, 2024, served the foregoing **Initial Brief of Respondents** upon all parties by electronic mail, addressed to the following:

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