THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2021-CP-07-01085

R.V. Resort and Yacht Club Owners' Association, Inc., Securitas Services, Inc., Mike Morales, and Sunset, Inc., — Respondent,

v.

Turner's Marina, LLC, — Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court erred in enforcing a purported settlement agreement when neither the parties nor the court complied with Rule 43(k), SCRCP.
2. Whether the trial court erred in enforcing an agreement to agree, rather than a complete and enforceable settlement contract.
3. Whether the trial court erred in finding the purported settlement agreement ambiguous where the written terms were clear, definite, and unambiguous.
4. Whether the trial court erred in its interpretation and enforcement of the lease modification provisions of the purported settlement agreement.

5. Whether the trial court erred in its interpretation and enforcement of the easement "update," including expanding the easement scope beyond the "paved roads" as set forth in the original 1984 granting.

STATEMENT OF THE CASE

A. Nature of the Action and Pleadings

Appellant Turner's Marina, LLC ("Appellant") filed this action against Respondents in the Beaufort County Court of Common Pleas on May 23, 2023. The Complaint asserted claims for Declaratory Judgment, Injunctive Relief, and Interference with a Contractual Relationship, and sought Appointment of a Receiver against Respondents and their hired security service and its officer. Answers, counterclaims, and numerous additional pleadings were filed.

B. Relevant Property and Development Background (Facts)

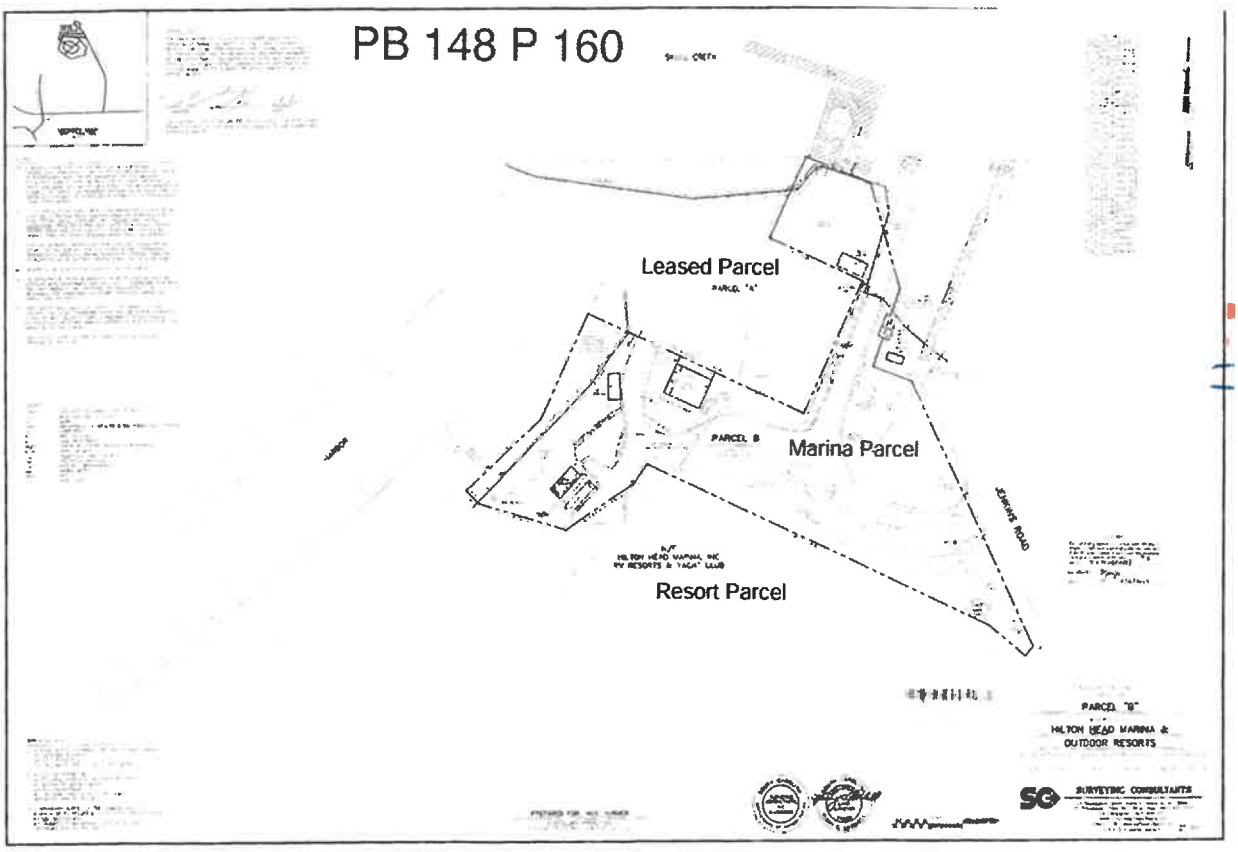
Appellant is the successor-in-interest and successor-in-title to the original developer of a 200-lot campground located on the north end of Hilton Head Island known as "Outdoor Resorts R.V. Resort and Yacht Club" (the "Development"). The Development was established in the early 1980s and governed by recorded covenants and a ninety-nine (99) year lease. (R. at ____)

The Development consists of three primary parcels:

1. **The Marina Parcel**, containing marina facilities including slips, a fuel dock, a launching ramp, bath house, fuel storage facilities, an access road, a marina office, and parking areas, situated between parcels owned by the Association.
2. **The Resort Parcel**, consisting of approximately 200 RV lots, amenities, roads, open space, and utilities; many lots are individually owned, with the remainder constituting common property. (R. at ____)

3. **The Leased Parcel**, owned by the Association and leased to the developer for 99 years, including a management building and related facilities. (R. at ____)

To access the Resort Parcel, owners, renters, and guests use entry roads located on the Marina Parcel. The purpose of the 1984 easement was to grant lot owners general access over the paved roads on the Marina Parcel for the limited purpose of accessing the boundaries of their lots. It was not a parcel-wide easement over the entire Marina Parcel, and it did not grant access from the lots to the Leased Parcel. (R. at ____)



C. Easement Agreement

To allow access over the Marina Parcel to the Resort Parcel, a 1984 easement was executed which provided in pertinent part:

For and in connection of the sum of TEN AND 00/100 ($10.00) DOLLARS and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby grant, bargain, sell and convey to Grantee a permanent, non-exclusive right-of-way, on, over, and across the paved roads located on that certain property owned by Grantor as more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference.

It further provided:

This Easement is restricted to the paved roadways only. Grantor may, at its option, change the location of the roadways, provided that the Grantor shall always provide access as stated above with said access sufficient for motor vehicle traffic. (R. at ____)

D. Lease Agreement

On or about June 12, 1981, the original developer entered into a ninety-nine (99) year ground lease (the "Lease") governing a portion of the Development commonly referred to as the "Leased Parcel," which is owned by the Association. (R. at ____)

The Leased Parcel contains the real estate and rental management operations for the Development and includes a management building, check-in areas, parking, a restaurant, recreational facilities, and related improvements. The Lease is a foundational document that has governed the parties' respective rights and obligations for decades. (R. at ____)

E. Mediation and the Purported "Mediated Agreement"

Mediation occurred on December 12, 2023, and continued into the early morning hours of December 13, 2023. At approximately 2:00 a.m., the parties executed a short "mediated agreement" (the "Agreement"). (R. at ____) The Agreement contemplated that the parties would later finalize at least two additional documents to be recorded: (1) a modification of an existing ninety-nine (99) year lease, and (2) an "update" to an existing 1984 easement agreement. (R. at ____) The Agreement identified certain topics and concepts for inclusion but did not contain the

complete and final terms necessary to memorialize and record the contemplated modifications. (R. at ____)

During mediation in December 2023, the parties discussed the possibility of modifying certain provisions of the Lease. The mediated document did not itself amend the Lease; instead, it contemplated that the parties would later negotiate and execute a separate lease modification. The mediated document did not contain final lease language or resolve all material terms of any proposed modification. (R. at ____)

Although an ADR Report was filed stating the case was settled, the parties never executed a stipulation of dismissal. Critically, the parties never reduced their purported settlement to a consent order or written stipulation entered into the record, nor did they place the settlement terms on the record in open court as required by Rule 43(k), SCRCP.

F. Post-Mediation Breakdown and Competing Motions to Enforce

After mediation, the parties could not agree on: (1) the number of additional agreements required, (2) the meaning of the Agreement's core terms, or (3) the additional provisions necessary to finalize and record lease and easement instruments. (R. at ____) Each side ultimately filed motions to enforce its own preferred version of the purported settlement. (R. at ____) Appellant also moved to set aside the Agreement, including alternatively on mutual mistake of fact. (R. at ____)

Thereafter, the parties filed separate motions to enforce the settlement and supporting memorandum and affidavits.

G. The Orders on Appeal

On August 5, 2024, the trial court entered two substantive orders: one addressing the proposed lease amendment (the "Lease Order") and one addressing the proposed easement

amendment (the "Easement Order"). Post-trial motions under Rule 59(e), SCRCP were filed and denied.

Notwithstanding the absence of a final, mutually agreed upon lease or easement amendments, and without compliance with Rule 43(k), SCRCP, the trial court adopted Respondents' unilaterally drafted Second Amendment to the Lease and Amended and Restated Easement, and enforced them through the August 5, 2024 Orders.

In these Orders, the Trial Court essentially rubber stamped the Respondent's Lease and Easement Amendments. In doing so, the Trial Court exceeded its authority, ignored express terms, implied terms and unlawfully expanded the scope of an existing easement.

This appeal challenges the enforceability and correctness of the Lease Order and the Easement Order, as well as subsequent Rule 59 orders, because:

(1) the Agreement is unenforceable as a matter of law due to noncompliance with Rule 43(k);

(2) the Agreement is an unenforceable agreement to agree; and

(3) even if enforceable, the trial court erred by adopting Respondents' unilaterally drafted versions of the amended lease and the amended easement.

STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012). An action to construe a contract is an action at law. In an action at law tried without a jury, the trial court's findings of fact will not be disturbed unless unsupported by evidence reasonably supporting those findings. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

"This [c]ourt reviews all questions of law de novo." *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017).

Declaratory judgment actions are neither legal nor equitable; the standard of review depends on the nature of the underlying issue. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).

"The determination of the scope of an easement is a question in equity." *Hardy v. Taylor*, 369 S.C. 160, 165, 631 S.E.2d 541, 544 (Ct. App. 2006). On appeal in an action in equity, the appellate court may find facts according to the preponderance of the evidence. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

ARGUMENT

I. Dispositive Issue: The Trial Court Erred by Enforcing a Purported Settlement Agreement Because the Parties Never Complied with Rule 43(k), SCRCP

This appeal should be resolved on the threshold procedural defect: Rule 43(k), SCRCP was never satisfied, and therefore the purported settlement is unenforceable as a matter of law.

Rule 43(k) provides:

> **"No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record."**

South Carolina appellate courts enforce Rule 43(k) strictly to prevent disputes over the existence and terms of settlements. *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493–94, 458 S.E.2d 533, 534 (1995) (Rule 43(k) applies to settlement agreements and is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation). The Supreme Court has reiterated that settlement agreements must be placed on the record or entered as a written stipulation/consent order. *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006); see also *Widewater Square Assocs. v. Opening Break of Am., Inc.*, 319 S.C. 243, 245, 460 S.E.2d 396 (1995) (settlement order unenforceable where it fails to set forth settlement terms as

required by Rule 43(k)); *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 528 S.E.2d 94 (Ct. App. 2000).

Here, the parties never executed a consent order or written stipulation entered into the record, and they never placed the settlement terms on the record in open court. An ADR report stating "settled" does not satisfy Rule 43(k). Nor does post hoc motion practice substitute for the rule's requirements.

The post-mediation history in this case confirms why Rule 43(k) exists. After mediation, the parties disputed (1) how many additional agreements were required, (2) what the agreement's basic terms meant, and (3) what additional terms had to be included in documents that would later be recorded. Those disputes are the exact "perplexing" controversies Rule 43(k) is designed to prevent, so that "the time of the court should not be taken up" determining contested oral stipulations.

Because Rule 43(k) was not met, the trial court lacked authority to enforce the purported settlement, and the Lease Order and Easement Order must be reversed on that basis alone.

II. Even If Rule 43(k) Were Satisfied, the Trial Court Erred by Enforcing an Agreement to Agree

Assuming arguendo Rule 43(k) were satisfied, the trial court still erred because the Agreement is an agreement to agree on material terms of future instruments.

South Carolina law is settled: a contract provision that leaves material terms open for future agreement is void for indefiniteness. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds on all essential and material terms. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Material terms cannot be left for future agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986).

The Agreement expressly contemplated future agreements to (1) amend a 99-year lease and (2) "update" the 1984 easement. But after mediation, the parties could not agree on what the basic terms meant, much less the full terms required to finalize and record those modifications. That is the hallmark of an unenforceable agreement to agree.

By enforcing Respondents' preferred versions of documents that were never mutually agreed upon, the trial court supplied missing terms and imposed obligations not actually agreed to, something South Carolina contract law does not permit.

III. The Trial Court Erred in Finding the Purported Settlement Agreement Ambiguous and Then Adopting Respondents' Unilaterally Proposed Documents

The trial court's approach rested on ambiguity, yet it enforced Respondents' unilateral drafting as though the parties had agreed to it. That is reversible error.

If the Agreement was unambiguous, it must be enforced as written, without judicial supplementation. If it was ambiguous, the trial court still could not rewrite the parties' bargain by adopting one side's preferred language on disputed material terms, especially where post-mediation conduct shows no meeting of the minds. Enforcing Respondents' unilateral drafting is not "construction" of a contract; it is a judicial reformation of a disputed, incomplete Agreement to agree.

For example, the Trial Court limited the term "business hours" to parking when in fact the Mediation Document expressly states "As used in this agreement, Business Hours are agreed to be Tuesday through Sunday 5:00pm to 10:00pm and Sunday 10:30am to 2:00pm."

In another example, paragraph 8 of the Second Amended to the Lease provides "Drafting to the Agreement", and yet this is a Court imposed agreement that Appellant never agreed to.

In **contract interpretation**, courts are required is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the **contract**. *United Dominion Realty*

Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). If a **contract**'s language is clear and capable of legal construction, this court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001).

Where the language used in a **contract** is clear and unambiguous, the court will be guided by the language of the **contract**, taken and understood in its plain, ordinary, and popular sense, to determine the **contract**'s force and effect. *See Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983); *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993). Courts do not have the authority to make new contracts for parties. Rather, their duty is limited to **interpretation** of the **contract** made by parties, regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988).

IV. The Trial Court Erred in Its Interpretation and Enforcement of the Easement "Update" by Expanding the Scope Beyond the Original Grant

Paragraph 9 of the Agreement contemplated updating the 1984 easement recorded at Book 397 at Page 1612 to include access to Parcel B. The original 1984 easement's granting clause is limited to "a permanent, non-exclusive right-of-way, on, over, and across the paved roads" located on the Grantor's property.

The trial court's Easement Order improperly disregarded the "paved roads" limitation and adopted Respondents' unilateral, parcel-wide easement language granting rights "on, over, and across" Parcel B itself, an expansion far beyond the scope of the original grant and beyond what Paragraph 9 states.

Under South Carolina law, the controlling element in construing a deed is the grantor's intent, found within the four corners of the instrument. *Windham v. Riddle*, 381 S.C. 192, 201, 672

S.E.2d 578, 582–83 (2009). The parties' Agreement contemplated an update to add a parcel to the existing easement framework; it did not authorize rewriting the original scope from a paved-roads right-of-way into a parcel-wide access easement.

If the parties intended to eliminate the paved-roads limitation, the Agreement would have said so. It did not. The trial court therefore erred by expanding the burden on the servient estate beyond the original easement's scope and beyond the Agreement's text.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court REVERSE the Lease Order and Easement Order (and the related Rule 59 orders), and REMAND with instructions to deny enforcement of the purported settlement for failure to comply with Rule 43(k), SCRCP, or alternatively to deny enforcement because the Agreement constitutes an unenforceable agreement to agree.

Respectfully submitted,

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January 6, 2025.