

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428
S.C. Ct. App. Op. No. 4973
Filed May 16, 2012

Forrest Byrd, ... Petitioner

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Forest Byrd,

Appellant,

v.

Judy Livingston and
TIAA Timberlands, II,
LLC,

Respondents.

Appeal From Newberry County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 4973
Heard April 24, 2012 – Filed May 16, 2012

AFFIRMED

B. Michael Brackett, of Columbia, for Appellant.

Blaney A. Coskrey, III, of Columbia, and Timothy D.
Savidge, of Prosperity, for Respondents.

SHORT, J.: Forrest Byrd (Byrd) appeals from the trial court's order finding an agreement to settle a lawsuit relating to a land purchase was enforceable. Byrd argues the court erred in: (1) finding his son was not a party to the agreement; (2) concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the agreement; (3) not applying the law of joint contracts to the motion to enforce the agreement; (4) finding the agreement did not contain a condition precedent; and (5) ruling the agreement's provision that included his son was severable from the remainder of the agreement. We affirm.

FACTS

Byrd entered into a contract to purchase property from Judy Livingston (Livingston) in May 2007, after being the winning bidder at a private auction. Byrd paid the full purchase price, and Livingston executed and delivered a general warranty deed for the property to Byrd in July 2007. Two days prior to executing the deed, Livingston executed and delivered a sixty-six-foot right-of-way easement over and across the subject property to TIAA Timberland, II, LLC (TIAA). This easement was recorded a little more than two hours after Byrd's deed was recorded. Byrd filed a complaint on September 10, 2008, against Livingston and TIAA, asserting five causes of action: (1) quiet title; (2) reformation; (3) breach of contract; (4) breach of contract accompanied by a fraudulent act; and (5) fraud or negligent misrepresentation. Byrd alleged Livingston concealed the right-of-way, and he accepted the deed based on her representations that Newberry County zoning ordinances required the right-of-way. TIAA filed an answer denying the allegations and counterclaimed, seeking "a declaratory judgment that it has an easement, express, implied by prior use, implied by necessity, and/or a prescriptive easement over [Byrd's] property." Livingston also filed an answer, denying all allegations. Following pretrial discovery, Byrd, Livingston, and TIAA attended a mediation conference on November 23, 2009, which resulted in all three parties signing an "Agreement in Principle" (Agreement).¹ The Agreement stated, "this agreement will be supplanted by

¹ During discovery, Byrd's son purchased a tract of land adjacent to Byrd's parcel. The purchase on July 31, 2009, was almost ten months after Byrd had filed his complaint against Livingston and TIAA. The dirt road, the subject

a more formal and detailed written Settlement Agreement setting forth the agreement between the parties"; however, the Settlement Agreement was never signed.

On February 19, 2010, Livingston and TIAA (Respondents) filed a motion to enforce the Agreement. Byrd filed a motion in opposition. A hearing on the motion was held on June 30, 2010. Byrd asserted that because his son would not execute the proposed Settlement Agreement, he himself was no longer bound by the Agreement and was unwilling to execute the Settlement Agreement. Respondents argued the November 23, 2009 Agreement was a valid, enforceable, stand-alone contract. The trial court issued its order on July 30, 2010, finding the Agreement enforceable against Byrd, Livingston, and TIAA, and ordering the parties to prepare and execute a formal settlement document embodying the terms of the Agreement. Byrd filed a Rule 59(e), SCRCF, motion for reconsideration, which the court denied. This appeal followed.

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); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement agreement is a matter of contract law); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (stating a release agreement is a contract and contract principles of law should be used to determine what the parties intended); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement). An action to construe a contract is an action at law. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008). In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without

of Byrd's lawsuit, crosses his son's property before it crosses Byrd's property; therefore, the easement also burdens his son's property. Byrd did not move to add his son as a party to the litigation when his son purchased his land.

evidentiary support. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, this court is free to decide questions of law with no particular deference to the trial court. Silver, 376 S.C. at 590, 658 S.E.2d at 542.

LAW/ANALYSIS

I. Byrd argues the trial court erred in finding his son was not a party to the Settlement Agreement. We disagree.

Byrd maintains that because the November 23, 2009 Agreement referenced his son's parcel as well as his own, his son was intended to be a necessary party to a final agreement, and because his son did not sign the Settlement Agreement, he himself is not bound by the Agreement. The court found the Agreement was not enforceable as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement. The Agreement's three-word reference to Byrd's son's property was included in one of its paragraphs:

25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock – express grant superceding [sic] and canceling the 66' grant, son's parcel included.

The trial court noted that in Byrd's son's affidavit, he stated:

I am not, and never have been, a party to the legal action [between Byrd, Livingston, and TIAA]. . . . I did not attend, and was not represented at, the mediation conference . . . held on or about November 23, 2009. My father spoke to me about the mediation after the fact and explained to me the Agreement in Principal [sic] that was the product of the mediation. I was not involved in the negotiation of the terms of the Agreement in Principal [sic]; I did not authorize anyone to speak for me or to act on my behalf with

respect to the Agreement in Principal [sic]; and I did not sign the Agreement in Principal [sic] I do not agree with the terms of the Agreement in Principal [sic], and I will not sign either the Agreement in Principal [sic] or a more formal and detailed written settlement agreement based on the terms of the Agreement in Principal [sic].

The court found the record contained no evidence warranting a finding that Byrd acted with actual or apparent authority by including his son in the Agreement. The court also found nothing in the record to contradict his son's sworn statement. The Agreement stated "[t]he undersigned parties . . . have reached an agreement in principle" and was signed by Byrd, Livingston, and TIAA's agent. It further stated, "[l]itigation dismissed, mutual releases among all parties." We find the evidence supports the court's determination that Byrd's son was not a party to the Agreement, the Agreement was not binding as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement.

II. Byrd next argues the trial court erred in concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the Agreement. We disagree.

"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." Patricia Grand Hotel, L.L.C. v. MacGuire Enters., Inc., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). "The 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Wright v. Trask, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997).

Byrd argues the subsequent conduct of the parties to the Agreement demonstrated the intended and understood involvement of Byrd's son, and asserts as proof that his son was identified in the proposed Settlement Agreement as a party to the Agreement. However, the trial court found the subsequent actions of the attorneys show the parties' intent to settle the case: (1) the attorneys' emails "demonstrate[d] that Byrd's attorney believed the settlement to be binding but had apparently run into problems getting his own client to sign the documents," and Byrd's attorney asked to be relieved as his counsel; (2) "counsel's lack of compliance with the Scheduling Order in the case also strongly indicates that everyone believed the case to be settled"; (3) Byrd's attorney withdrew a pending motion; (4) the parties obtained and recorded a new survey as contemplated by the November 23, 2009 Agreement; and (5) Byrd paid his one-third share of the cost of the survey as contemplated by the November 23, 2009 Agreement. Therefore, the court found it was "impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound." We find no error with the court's determination 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.

III. Byrd also argues the trial court erred finding the Agreement did not contain a condition precedent. We disagree.

"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).

Byrd claims the three words used in the Agreement referencing Byrd's son's property created a condition precedent that required Byrd's son to ratify the Agreement and sign the more formal and detailed Settlement Agreement

to follow. Byrd argues the alleged condition precedent was not satisfied; therefore, his performance under the Agreement is excused. However, the trial court found there was no condition precedent to be found in the three words in the Agreement referencing his son's parcel. Further, the court found "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly," and the inclusion of his son's property was "not so essential to the Agreement as to constitute a condition precedent or to excuse [Byrd's] non-performance under the Agreement." The court continued:

[Byrd] should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his son expresses a desire to not join the [settlement agreement]. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a person who is not a party to the Agreement. . . . The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

We find no error in the trial court's ruling that the Agreement did not contain a condition precedent to his alleged obligation with respect to a final settlement agreement.

IV. As to the remaining issues, we adopt the trial court's order. See Grosshuesch v. Cramer, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

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In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant petitions the Court for a rehearing of its published Opinion no. 4973, filed on May 16, 2012. The Appellant received notice of the filing of the Opinion on May 17, 2012.

The Appellant respectfully requests that the Court rehear the following matters, which the Appellant respectfully submits were misapprehended by the Court and wrongly decided, and alter or amend the Opinion to:

1. reverse the trial court, and correct the this Court's ruling, that the inclusion of Byrd's son as a party was not a condition precedent to contract formation;

2. reverse the trial court's conclusion, and correct this Court's ruling, that "Byrd's son was not a party to the Agreement [Agreement in Principle], the Agreement was not binding as to Byrd's son, and the inclusion of the three-word reference to Byrd's son property does not release Byrd himself from the Agreement" because the issue presented is not whether Byrd's son was a party to the Agreement in Principle, but rather whether it was the intent of the signatories to the Agreement in Principle that Byrd's son would become a party to the subsequent, more formal Settlement Agreement before an actual, enforceable agreement was established;
3. reverse the trial court's conclusion, and correct this Court's ruling, that with respect to the subsequent conduct of the parties "it was 'impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound.:'"
4. reverse the trial court's conclusion, and correct this court's ruling, that the law of joint contracts does not require that the trial court be reversed; and
5. reverse the trial court's conclusion, and correct this Court's ruling, that the Byrd's-son provision of the Agreement in Principle is severable from the Agreement in Principle, leaving the remainder of the Agreement in Principle as an enforceable agreement.

Argument and Authorities

Appellant respectfully submits that the Opinion is dismissive of long-standing contract law and establishes dangerous precedent allowing courts to accept or ignore terms that the parties have expressly agreed to include and/or require in order to reach a meeting of the minds.

1. Contract law is based first and foremost on actual agreement manifested by a meeting of the

minds. If a required condition is not met, there is no contract. The trial court was quoted with approval by this Court: “[Byrd should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his son expresses a desire to not join the [settlement agreement . . . the law does not and should not sanction a party’s own request that a term be included, only to later argue that its inclusion renders an agreement unenforceable.” This misses the point. The argument is not that the mere inclusion of the term itself regarding the son’s property makes the Agreement in Principle unenforceable. The point is that all of the signatories agreed that the son’s property was to be included and when that term [condition] failed, there was no agreement to enforce. Why the son’s property was to be included is not relevant or determinative; what is determinative is that all of the signatories agreed to the term as evidenced by their having executed the Agreement in Principle. Inclusion of Byrd’s son was an express condition to the formation of a settlement agreement. Appellant incorporates herein the authorities cited in his Brief and Reply Brief.

The Court’s Opinion implies that the reason for inclusion of Byrd son’s property was not essential to the Agreement in Principle and was a meaningless add-on term. Again, the motivation of the parties for having Byrd son’s interests included are not relevant. Whatever the particular motivations were for having agreed to require Byrd son’s agreement and participation, the key point is that the three signatories agreed to it. The consideration/benefit for a contract does not have to be “essential;” a peppercorn will suffice. Lawrence v. Clark, 115 S.C. 67, 104 S.E. 330 (1920); Sfredde v. Sfredde, 720 S.E.2d 145, (Va. App. 2010) (under the peppercorn theory, “ [i]t matters not to what extent the promisor is benefitted or how little the promisee may give for the promise. . . A very slight advantage to the one party or a trifling inconvenience to the other is generally held sufficient to

support the promise.” (Internal citations omitted.)

2. In its Opinion, the Court misconstrued the “missing party” issue as being whether Byrd’s son was a party to the mediation “Agreement in Principle,” when the issue presented is whether the signatories to the Agreement in Principle intended that a subsequent, more formal, binding Settlement Agreement would not be created unless and until Byrd’s son agreed to become a party. The Opinion treats very superficially the fact that Respondents’ attorneys prepared the subsequent more formal Settlement Agreement, and related documents, in which Byrd’s son was expressly identified as a party.

The Court wrote that there was no evidence warranting a finding that Appellant acted with actual or apparent authority by including his son in the Agreement. It was not just the Appellant who included the son in the Agreement in Principle; **each and every signatory to the Agreement in Principle included the son interests and made the son’s inclusion a condition to an actual Settlement Agreement.** If the other signatories objected, they did not have to sign the Agreement in Principle, because no one was coercing them. It can just as easily be said that Respondents should not be rewarded by agreeing to include a term in an Agreement in Principle and thereafter disavowing the inclusion of the term when it does not suit them. Appellant incorporates herein the authorities cited in his Brief and Reply Brief.

3. The result reached in the Opinion is based in part on the court’s inability to reconcile Appellant’s post-Agreement in Principle actions with his current position that he did not intend to be bound. The other side of that coin was ignored. What cannot be reconciled are the actions of Respondents’ attorneys in preparing the subsequent, more formal Settlement Agreement and related documents expressly identifying Byrd’s son as a party with their current position that inclusion of

Byrd's son was done on a lark and that he was never intended to be a party. It is important to remember that the inclusion of Byrd's son was done in writing, and was agreed to by all signatories. This is not a case of trying to argue that something was intended to be included that was not expressly reflected in the writing; no, this is a case where something was expressly included in the writing, and agreed to by all signatories, that now is being treated as essentially invisible. Appellant incorporates herein the authorities cited in his Brief and Reply Brief.

4. For the reasons addressed hereinabove, incorporated herein by reference, the law of joint contracts that requires such an agreement to be signed by all intended parties, should operate to render the Agreement in Principle unenforceable. Appellant incorporates herein the authorities cited in his Brief and Reply Brief.

5. For the reasons addressed hereinabove, incorporated herein by reference, the law on severability of contract provisions was misapplied to permit the term regarding Byrd's son to be severed from the Agreement in Principle contrary to the intent of the parties as evidenced by their having signed the Agreement in Principles. Appellant incorporates herein the authorities cited in his Brief and Reply Brief.

Conclusion

The Court should not allow the Respondents to escape the condition in their Agreement in Principle, expressly agreed to by them, that the final Settlement Agreement would have to include Byrd's son or not be final and enforceable.

Accordingly, the Court should amend its Opinion to reverse the trial court's granting of Respondents' motion to compel settlement, and remand the case to the circuit court for further proceedings.

A handwritten signature in black ink, appearing to read "B. Michael Brackett", is written over a horizontal line.

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May 31, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd Appellant

v.

Judy Livingston and TIAA Timberlands, II, LLC Respondent

RESPONDENTS' RETURN
TO PETITION FOR REHEARING

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Respondents Judy Livingston and TIAA Timberlands II, LLC (“TIAA”) respectfully submit this Return to the Petition for Rehearing filed by Appellant Forrest Byrd.

I. Introduction

Rule 221(a) states that a Petition for Rehearing “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” This Petition merely restates the same arguments that have been rejected by the lower court and now this Court, and it further extends meritless litigation that has been ongoing for almost four years. This Court’s decision contains no error and correctly applies the applicable law. The Petition should therefore be denied.

II. Appellant continues to argue for a legally erroneous effect of including an offer to be made to the son.

This Court correctly ruled that “[t]he inclusion of the three-word reference to Byrd’s son’s property does not release Byrd himself from the Agreement.” *Byrd v. Livingston*, Op. No. 4973 (S.C. Ct. App. filed May 16, 2012). Counsel for Appellant conceded at oral argument that the Appellant requested that his son be offered the beneficial narrowing of the easement across the son’s adjacent property. As a result of that request, the parties agreed that the offer would be made to the non-party son. Contrary to Appellant’s continued mischaracterization, there was no “condition” that had to be satisfied before Appellant was bound. There is no language suggestive of a condition precedent anywhere in the Agreement. Rather, there was simply, at Appellant’s own insistence, an agreement to make an offer extending the benefit of a narrowed easement to adjacent property not owned by Appellant. That adjacent property was owned by Appellant’s son, who subsequently rejected that opportunity. Nothing in the settlement agreement signed by Appellant on November 23, 2009 suggests

that Appellant considered himself bound only if the non-party also accepted the offer. This Court correctly found ample support for the lower court's conclusion that found "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly." *Byrd v. Livingston*, Op. No. 4973 (S.C. Ct. App. filed May 16, 2012).

This point does not make, as Appellant suggests, the three words referencing the son "a meaningless add-on term." It was simply an agreement by Respondent TIAA to offer the benefit of a narrowed easement to a non-party adjoining landowner as Appellant requested. That does not make the term meaningless at all, and the offer was in fact made. The term also has little to do with the question of whether Appellant was himself bound.

Appellant's argument regarding joint contracts and joint obligations might be persuasive if the facts involved a single parcel with joint owners. If, for example, a parcel of property were owned jointly by father and son, and only one of them agreed to the settlement, Appellant's argument would be more persuasive. Then, the joint ownership of the affected parcel would result in the absence of an essential party. Here, the Agreement clearly bound the three parties who signed it on November 23, 2009, and it included a term requiring TIAA to *offer* a narrowed easement to the son. That offer was made. The Agreement was at all times binding on the parties to it: Byrd, Livingston, and TIAA.

III. Appellant continues to misconstrue the significance of the later formal documents.

The Settlement Agreement of November 23, 2009 anticipated that documents would be created to carry out its terms. Such formal documents are not unusual in mediated settlements and have little to do with the question of whether the actual Settlement Agreement entered into on November 23 is enforceable. It was especially necessary to create such documents in a case involving real estate. Those documents were created based on the assumption that the non-party son would want the benefit

being offered him at his father's request. They have no other significance, and do not, as Appellant argues, somehow retroactively render unenforceable the November 23 Agreement signed by Appellant. They simply reflect the assumption that the son would accept what was being offered, a narrowed easement. He did not. The question remains, then, whether Appellant intended to bind himself. As this Court noted, the evidence is abundant that he did.

IV. Conclusion

In conclusion, Appellant's hodgepodge of contractual doctrines reveal a continued misunderstanding of several key points. The Court properly and correctly understood those main points: The Agreement to be enforced is the November 23, 2009 Agreement. The parties to that Agreement were Byrd, Livingston, and TIAA. Those parties manifested an intent to be bound to the terms of that November 23 Agreement. The Agreement required TIAA to make the offer of a narrowed easement to a nonparty, which it did. The nonparty's decision not to accept the offer to apply the narrowed easement for his separate parcel had no legal effect on the question of whether the actual parties to the Agreement were bound. The Agreement presents no conditions precedent or missing signatories. Therefore, this Court was correct in upholding the lower court's finding 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." *Byrd v. Livingston*, Op. No. 4973 (S.C. Ct. App. filed May 16, 2012).

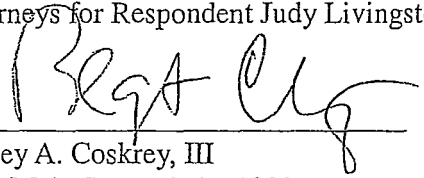
For the reasons described herein, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

Respectfully submitted,



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Columbia, S.C.
June 13, 2012

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APPELLANT'S REPLY TO RESPONDENTS'
RETURN TO PETITION FOR REHEARING

In determining the parties' intent and the purpose of an agreement, the court must look to the contents of the whole instrument and not to a particular clause or provision in isolation. Cullen v. McNeal, 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010); Holden v. Alice Mfg., Inc., 317 S.C. 215, 462 S.E.2d 628 (Ct. App. 1994). Every term contained in a contract must be considered and given effect if possible. Valley Public Service Authority v. Beech Island Rural Community Water District, 319 S.C. 488, 462 S.E.2d 296 (Ct. App. 1995).

In their Brief and Return to Petition for Rehearing, Respondents persist in referring to the "Agreement in Principle" as a settlement agreement. This Court's Opinion No. 4973 does not

address the parties' express use of the term "Agreement in Principle" to describe the parties' intent with respect to the November 23, 2009 writing. The Opinion noted that the parties signed an "Agreement in Principle" but then referred to the Agreement in Principle thereafter in the opinion as "the Agreement." This is unfair and somewhat misleading. The intentional decision of the three parties at the mediation to name or title the document as an "Agreement in Principle" must have significance. If not, the Opinion does not explain why not.

The Court apparently adopted the Respondents' argument that the three words "son's parcel included" was intended only to provide that an offer to narrow the easement across the son's adjacent parcel would be offered to the son without affecting the "agreement in principle." But, the intent and purpose of the writing is determined by the intent of the three signatories and not by the intent of the son. Appellant had sued to have the alleged easement declared to be of no effect. The Agreement in Principle, if it evolved into a final agreement, would result in Appellant conceding a 25 foot easement where he believed that no easement rights existed, in return for a 44 foot narrower easement across his son's property. These adjustments in the size of the disputed easement are not trivial, and for the Court to conclude that the inclusion of the son's property was not essential to the Agreement in Principle ignores the fact that Appellant was conceding the central issue in his case (the existence of a 25 foot easement) if his son agreed to become a party.

Appellant has consistently argued that when the writing is considered as a whole: the abbreviated terms, the inclusion of the son who was not a party to the case and was not a signatory to the November 23, 2009 writing, the intentional use of the term "Agreement in Principle," the express provision for a subsequent and more formal written agreement, and the content of the subsequent and more formal settlement instruments (all prepared with Byrd son as a signatory), the

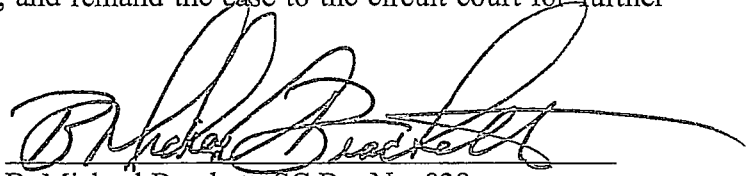
big picture, giving effect to every term, demonstrates that the Agreement in Principle was no more than an agreement to agree (or not) in the future.

Respondents argue in their Return that "There is no language suggestive of a condition precedent anywhere in the Agreement." Wrong. "Agreement in Principle" is more than merely suggestive. Respondents argue that the Agreement in Principle was a fully final and enforceable agreement that provided only that an offer would be made to Byrd son to extend the benefit of a narrowed easement. Wrong. "Agreement in Principle" does not indicate a final, enforceable meeting of the minds. The Agreement in Principle says nothing about extending an offer to Byrd son that can be accepted or not without effect on the Agreement in Principle. The big picture - giving effect to every term and construing the agreement as a whole without rendering terms void or meaningless - can only result in this court reversing course and reversing the trial court.

Conclusion

The Court should not allow the Respondents to escape the condition in their Agreement in Principle, expressly agreed to by them, that the final Settlement Agreement would have to include Byrd's son or not be final and enforceable.

Accordingly, the Court should amend its Opinion to reverse the trial court's granting of Respondents' motion to compel settlement, and remand the case to the circuit court for further proceedings.



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June 18, 2012

The South Carolina Court of Appeals

Forest Byrd, Appellant,

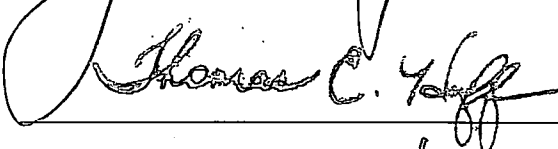
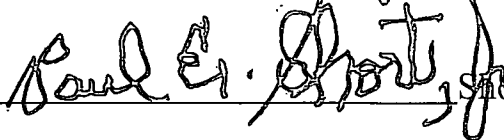
v.

Judy Livingston and TIAA Timberlands, II, LLC,
Respondents.

Appellate Case No. 2010-180569

ORDER

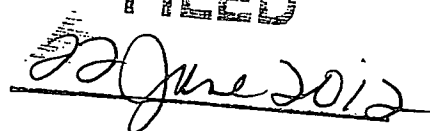
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 _____ Few, C.J.
 _____ Huff, J.
 _____ Short, J.

Columbia, South Carolina

cc:

B. Michael Brackett
Timothy D. Savidge
Blaney A. Coskrey, III

FILED


19155

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF NEWBERRY

C.A. No. 2008-CP-36-428

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON and TIAA TIMBERLANDS,
II, LLC,

Defendants.

I, Jackie S. Bowers, Clerk of Court, Newberry,
South Carolina, do hereby certify that this is a true
copy of the original on file in this office.

AUG 05 2010

Jackie S. Bowers
Clerk of Court

ORDER

This matter came before the Court on the Motion filed by Defendants Judy Livingston ("Livingston") and TIAA Timberlands, II, LLC ("TIAA") to Enforce a Settlement Agreement filed on February 19, 2010. Following a hearing on the Motion on June 30, 2010, the Court has determined that the Motion should be granted as described herein.

FACTS/BACKGROUND¹

Plaintiff Forrest Byrd ("Byrd") entered into a contract with Livingston on May 31, 2007 to purchase approximately 53 acres (the "Parcel") from her. This contract resulted from Byrd being the high bidder on the Parcel at an auction conducted by J. Duncan & Associates, Inc. The Parcel contains a dirt road that crosses it leading to TIAA's property. According to the Defendants, the road has been used for decades to access Defendant's property. The closing set for June 27, 2007 did not take place, and Defendants allege that this was due to survey errors and an imprecise acreage description.

A new survey was subsequently obtained showing the 66' wide right-of-way, and the parties met on July 10, 2007 to close on the sale. Byrd's deed was recorded on the morning of

¹ These background facts are taken largely from the parties' pleadings and other filings and were not contested in connection with the present Motion. Moreover, the facts in this section are helpful background and are

July 13, 2007. Byrd's deed stated: "This conveyance is made subject to right of way easement as shown on above mentioned plat." Complaint Exhibit C. The "above mentioned plat" clearly showed the 66' easement. Two days prior to the closing, Livingston executed a formal "Right-Of-Way Easement" document ("Easement Document") on July 8, 2007 which granted a 66' wide right-of-way to TIAA across the existing dirt road. The Easement Document was recorded on the afternoon of July 13, 2007, a few hours after Byrd's deed was recorded.

Byrd filed his Summons and Complaint on September 10, 2008 alleging various theories based primarily on the fact that the Easement Document was recorded shortly after his deed. He sought damages from Livingston for breach of warranty, as well as reformation of the deed and cancellation of the easement. Both Livingston and TIAA answered, including in their defenses the fact that Byrd had actual notice of both the easement itself and its 66' width. TIAA also asserted several theories of implied easements, including easement by prescription, easement by necessity, and easement by prior use.

The need to decide the implied easement theories would arise only if Byrd were to succeed in convincing the Court to extinguish the 66' easement referenced in his deed. As a result, the Honorable D. Garrison Hill, with the consent of all parties, bifurcated the case, providing a schedule for first dealing with the 66' easement, and then depending on how that issue was resolved, a discovery period and trial on the implied easement theories. *See* Scheduling Order filed November 2, 2009.

While the case was pending, Byrd's son, Forrest S. Byrd, II ("Byrd Son"), purchased a tract of land adjacent to Byrd's Parcel. That purchase took place on July 31, 2009, some ten months after his father had filed this lawsuit. The dirt road that is the subject of this litigation

not essential to the Court's conclusions.

crosses the Son's property before it crosses Byrd's Parcel leading to TIAA's property. The written Easement Document burdens the Son's property as well. In this lawsuit, Byrd did not join as parties the prior owners of that parcel, Paul M. Saucier and Robert L. Rachals, nor did he add his Son as a party when the purchase took place. The Son, therefore, is not a party to these proceedings.

MEDIATION/ SETTLEMENT

Following discovery, the parties voluntarily took part in a mediation² of this case on November 23, 2009. The Hon. Clyde N. Davis, Jr. served as mediator. All parties in the case were present and represented by counsel. After extended negotiations, the parties eventually reached a compromise on the underlying issues. As a result, they signed a document setting forth the terms of their agreement ("Settlement Agreement"). Byrd does not contest that he signed the two (2) page Settlement Agreement.

The contents of the Settlement Agreement were:

- X 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and cancelling the 66' grant, son's parcel included.
- X maintenance/repair - SC voluntary forestry best management practices shall be followed - Each of the parties, after use, will put the road and/or property back in good or better condition than prior to use.
- X TIAA/Hancock lessees, including hunt clubs, will be required to abide by the

² Pursuant to court rules in effect at the time this case was filed, Alternative Dispute Resolution was not mandatory for cases filed in the Newberry County Circuit Court. South Carolina Supreme Court Order 2007-11-15-02.

code of ethics in the lease currently used by TIAA/Hancock.

- X double lock gate system will be employed.
- X this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.
- X any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the parties.
- X Litigation dismissed, mutual releases among all parties.

The Settlement Agreement contemplated that several other documents would be required, including a new plat, a document canceling the existing easement, a document creating the new easement, and a hunt club code of ethics. It also contemplated a more formal document which would contain standard settlement language, including detailed mutual releases.

Immediately following the mediation, the parties' attorneys and other representatives (such as a surveyor) began preparing these documents. Once all these documents were prepared, they were sent to the Plaintiff's then-attorney, Kyle B. Parker, for his client's signature and also for him to obtain Byrd Son's signature. Over two months went by without any specific substantive response from Plaintiff's counsel about the contents of the documents. In February, 2010 Defendants first learned that the Plaintiff intended to repudiate the Settlement Agreement. Shortly thereafter, Parker filed a Motion to be Relieved as Counsel, which was granted, followed by a Notice of Appearance filed by Byrd's new counsel, B. Michael Brackett.

Defendants Livingston and TIAA jointly filed this Motion to Enforcement the Settlement on February 19, 2010. Plaintiff filed his Memorandum of Law in Opposition to the Defendants' Motion on June 1, 2010. Defendants filed their Memorandum of Law in Support of the Motion on June 10, 2010, as well as the Affidavits of Blaney A. Coskrey, III and Henry Bufkin.

The Court considered all of these materials, as well as the pleadings and other materials filed in this case. It has also considered the argument of counsel at the hearing on June 30, 2010.

DISCUSSION

A. Law Applicable to Settlement Agreements Generally

The South Carolina appellate courts have made clear that issues relating to settlement agreements, including their enforceability, are to be analyzed under general contract principles. *Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC*, ___ S.E.2d ___ (Opinion 4446, Ct.App. Jan. 9, 2009); *Patricia Grand Hotel, LLC v. MacGuire Enterprises, LLC*, 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007). “South Carolina common law requires that, in order to have a valid 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). *See also Vessell v. DPS Assocs. Of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998) (applying South Carolina law). Where the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intention of the parties. *Id.*; *see also Mattox v. Cassidy*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986).

The critical question of whether there was mutual assent to be bound to the essential and material terms “is based upon the intent and purposes as shown by all the circumstances.” *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996); *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999) (applying South Carolina law). Those circumstances may include the actions of the parties themselves, as well as their attorneys. *Id.*, 66 F.Supp.2d at 761. This Court’s task, therefore, is to look at all the circumstances, both at the time of the settlement and following, to determine if the parties intended to be bound and if they

stated the material and essential terms of their settlement in the November 23, 2009 Settlement Agreement.

B. Effect of a Formal Agreement to Follow

In opposing enforcement of the November 23, 2009 Settlement Agreement, Byrd argues first that the settlement was not final and binding because the parties indicated in the Agreement signed on November 23, 2009 that “this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.” This argument raises the issue of whether the parties to the Agreement intended to bind themselves as of November 23, 2009. The Court is satisfied based on all the evidence that they intended to be bound.

Formal settlement documents almost always follow mediations. If that mere fact alone were enough to negate a settlement, all settlements reached in mediations would be unenforceable. This result is clearly not supported by the law or the policy of encouraging settlements. The anticipation that another formal document will follow does not render the settlements reached at those mediations unenforceable. This very argument was rejected by the U.S. District Court in *Sadighi*. In that case, the settling document stated that it “was not intended as a final expression of the terms of the settlement. The exact terms will be expressed in a more comprehensive Settlement Agreement.” 66 F.Supp.2d at 756. Based on that language, the party opposing enforcement had argued, as Byrd does here, that the letter was not an expression of intent to be bound, but simply a preliminary, unenforceable statement.

Despite the inclusion of this anticipatory language, the Court in *Sadighi* nevertheless enforced the settlement. Applying South Carolina law, the Court explained:

Failure to complete formal settlement papers does not indicate that a settlement agreement was not in fact reached. . . . Indeed, an

intent to memorialize a contract in a subsequent writing will not prevent a reviewing court from finding an enforceable contract so long as the parties intended to be bound by the earlier documents. . . [T]he actual signing of the formal settlement documents was a "mere formality," a memorialization of previously agreed upon terms, as the parties intended to be bound, regardless of an agreement to subsequently execute a formal Settlement Agreement.

Sadighi, 66 F.Supp2d at 763-64 (D.S.C. 1999) (citations omitted).

The Court's reasoning in that case controls here as well. The Court finds that the mere fact that a formal agreement would follow is not fatal to the enforceability of the settlement. The fact that the parties intended to carefully embody the terms of the settlement in a subsequent formal document is a common practice. The question remains one of intent: Did the parties intend to be bound by the document that they signed on November 23, 2009? The contents of the document, as well as the circumstances of its execution, indicate that they did intend to be so bound. Byrd's argument regarding the alleged preliminary nature of the Settlement Agreement is without merit.

C. Subsequent Actions of the Parties

Where there is doubt about the parties' intent to be bound, Courts rely heavily on the subsequent actions of the parties in determining whether they intended to be bound at the time of the initial agreement. See, e.g., *Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222, 226 (Ct. App. 1997) ("[S]ubsequent acts are relevant to show whether a contract was intended.") As the *Sadighi* Court explained, intent can be discerned through the subsequent actions of the attorneys. The Court noted in that case that the attorneys acted in ways to indicate that they thought they had achieved a binding settlement. After the settlement was reached, discovery deadlines passed, no more depositions were taken, and deadlines for amendments to the pleadings passed. As the *Sadighi* Court noted: "This conduct speaks volumes." *Sadighi*, 66 F.Supp.2d at 761.

In this case, the actions of the attorneys can be found in part in their subsequent emails exchanges. Byrd's attorney inquired by email as to where the formal agreement document was, noting on December 7, 2009: "The quicker we can get this done, the better for everyone." Coskrey Affidavit, Exhibit 1. After receiving the formal document, Parker later indicated on December 15, 2009 that he was going to send some revised language, then added: "Nothing game changing or anything." *Id.* On January 4, 2010, Parker wrote: "I have heard only a little from Byrd Son w/ respect to any changes he may have to the agreement" On January 19, 2010, Parker, having received another frustrated email from defense counsel about the delays, wrote: "I'm still trying over here. I'll let you know the moment I have something for you. Believe me, I empathize with your position. Indulge me a little longer, however." *Id.* On January 25, 2010, more than two months after the settlement, Parker wrote: ". . . I hope to get something to you this week. I am supposed to meet with Mr. Byrd again in the coming days, and will get back with you and Blaney then." *Id.* A few days later, on January 29, 2010, Parker wrote that his client had been busy and he was going to meet with him the following Monday. *Id.*

These emails demonstrate that Byrd's attorney believed the settlement to be binding but had apparently run into problems getting his own client to sign the documents. It is also worth noting in this regard that Parker served a Motion to Be Relieved as Byrd's counsel on February 16, 2010.

In addition to the emails, counsel's lack of compliance with the Scheduling Order in the case also strongly indicates that everyone believed the case to be settled. The Scheduling Order required substantive Motions to be filed by December 15, 2009 and to be heard during the term of Court beginning January 4, 2010. Those dates passed with no action by any of the parties in

this case. See Scheduling Order filed November 2, 2009. Moreover, Byrd's attorney withdrew a pending Motion for Protective Order and to Quash Subpoena by letter to the Clerk of Court dated January 5, 2010. As in the *Sadighi* case, "this conduct speaks volumes."

Moreover, significant portions of the Settlement Agreement were actually carried out. For example, the parties obtained and recorded the new survey contemplated by the Agreement signed on November 23, 2009. See Motion to Enforce Settlement Exhibit B. The Agreement had provided that "any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the parties." Significantly for purposes of the intent question, Byrd's attorney paid his one-third share of that survey. See Affidavit of Henry Bufkin. It is impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound.

D. "Agreement in Principle"

Byrd also argues that the heading "Agreement in Principle" on the November 23 document indicates an intent not to be bound. Although relevant to the analysis of intent, the Court cannot agree with Byrd that the use of the words "Agreement in Principle" is synonymous with a mere preliminary "Agreement to Agree," which would be unenforceable. Because the conduct of the parties subsequent to the Agreement so clearly indicates their intent to be bound, the Court concludes that this phrase was merely intended to indicate that a more formal agreement would follow, as is customary in mediations such as this. It is an established rule in both contract and statutory construction that headings may not be used to create ambiguity where otherwise none exists. *McInnis v. McInnis*, 348 S.C. 585, 560 S.E.2d 632 (Ct.App. 2002). The Court finds that the parties clearly expressed their intent to be bound on November 23, and that under the totality of the circumstances, the heading "Agreement in Principle" does not change

their clear intent.

E. Inclusion of Byrd Son in the Agreement

The parties have informed the Court that Byrd Son purchased an adjacent parcel of property more than ten months after Byrd filed this lawsuit. Because the November 23, 2009 Settlement Agreement referenced the Son's parcel as well as his own, Byrd now argues that he is not bound. The Court finds that while the Agreement is not enforceable as to the Son, the inclusion of the reference to the Son's property does not unbind Byrd himself.

The November 23, 2009 Agreement included in one of its paragraphs a three-word reference to Byrd Son's property:

25' easement (measured equally from center of the existing road)
for purposes of ingress and egress, runs with land, subject to
verification of feasibility by TIAA/Hancock - express grant
superceding and canceling the 66' grant, son's parcel included.

Exhibit A to Motion to Enforce. Byrd Son states in an Affidavit that he "did not authorize anyone to speak for me or to act on my behalf." Affidavit of Byrd Son ¶ 3. The record contains no evidence that would warrant a finding that Byrd acted with actual or apparent authority by including his Son in the Agreement and nothing to contradict this sworn statement. Clearly, the November 23, 2009 Agreement is not enforceable as to the Son, and I so find.

That conclusion does not, however, resolve the question of whether the Agreement remains enforceable as to Byrd, the party who brought this lawsuit and signed the November 23 Agreement. For the reasons described herein, while the Agreement of November 23, 2009 is not binding on Byrd Son, it is still binding on Byrd.

In seeking to avoid the Agreement himself, Byrd focuses on the fact that the subsequent formal documents anticipated that Byrd's Son would sign. He argues that the Son is therefore somehow a party to the Settlement Agreement. The proper focus of the enforceability question,

however, is not the subsequent documents, but the November 23, 2009 Settlement Agreement. The Court has already concluded that Byrd Son was not a party to or bound by the Settlement Agreement. This conclusion is buttressed by the use of the term "parties" in the Settlement Agreement. The "parties" to that Agreement were Byrd, Livingston, and TIAA. The Agreement referenced "the undersigned parties," which do not include Byrd Son. It states that the costs of a new survey will be borne equally by the parties. The record reflects that the cost was split three ways and was actually paid by Byrd, Livingston, and TIAA. Byrd Son did not pay a portion of the survey cost. Finally, the Agreement provided: "litigation dismissed, mutual releases among all parties." Obviously, litigation dismissals are only made between litigants, which Byrd Son was not. Clearly, therefore, the use of the term "parties" in the November 23, 2009 Settlement Agreement referred to Byrd, Livingston, and TIAA, but *not* Byrd Son.

Entirely apart from the issues related to his Son, Byrd clearly bound *himself* with his signature on November 23, 2009. He personally agreed on behalf of himself to the terms of the document, and those terms are still binding on *him*. Contrary to Byrd's argument, the inclusion of the three words referring to his Son's property in the first paragraph of the Settlement Agreement has absolutely no effect on the enforceability of the settlement as to Byrd himself. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a person who is not a party to the Agreement.

Byrd argues in opposing this Motion that Son's full participation in this Agreement was a condition precedent to his own obligations. "Condition precedent" appears to be the wrong contract analysis of the three words referencing the Son's property. 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) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)). There is no condition precedent to be found in the three words referencing Son's parcel. Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly. I further find that inclusion of the Son's property is not so essential to the Agreement as to constitute a condition precedent or to excuse Plaintiff's non-performance under the Agreement.

While the Settlement Agreement cannot be enforced against Byrd Son, the Court finds noteworthy the fact that the effect of binding the Son to the settlement would bestow only benefits upon him. The Agreement would, if enforced as to the Son, *narrow* the easement to less than half the width that currently applies to the Son's property. It would also provide other benefits to Son (e.g. joint maintenance agreement). It is apparent that Byrd desired the Son's parcel to be bound at the time of the November 23, 2009. He should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his Son expresses a desire to not join the Agreement. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a person who is not a party to the Agreement. The Affidavit of Byrd Son was filed by Byrd in opposing this Motion to nullify Byrd's own binding obligation. *See* Affidavit of Byrd Son ¶ 3. The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.³

The Court concludes that the three words referencing the Son's property are easily

³ While the record (Affidavit of Henry P. Bufkin as well as the logical inferences to be drawn from the circumstances) supports the conclusion that Byrd advocated including his Son on November 23, 2009, the Court's conclusion that the Agreement is enforceable against Byrd does not rest on this conclusion. For the reasons stated herein, the agreement is enforceable entirely apart from how the three words referencing the Son made their way into the Agreement.

severable without affecting the obligations of the parties to the Agreement. A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent. *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Whether a provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). Here it is clear that the parties fully intended to settle this litigation between the litigants entirely apart from the three words mentioning the Son's parcel. If, as Byrd now claims, he had no authority to act on his Son's behalf, then he could only have been acting on his own behalf. He was clearly agreeing to the terms of a settlement that addressed the rights and obligations of the three parties to that Agreement: Byrd, Livingston, and TIAA.

Byrd relies heavily on the case of *Engineered Data Products v. Art Style Printing*, 71 F. Supp.2d 1073 (D. Colo. 1999). However, his reliance is misplaced. The facts of this case more clearly resemble the case of *Sadighi* than they do *Engineered Data*. *Engineered Data* is distinguishable in that the court was clearly troubled by one party's inclusion of unnegotiated terms in the draft agreement. Moreover, there was no subsequent conduct in *Engineered Data* which would evidence an intent by the parties to be bound. The court stated in *Engineered Data* that one of the parties had "attempted to negotiate a better deal by way of its Draft Agreement." That is not the case here. In addition, the Court in *Engineered Data* found an agreement unenforceable because it was too cursory a treatment of complicated patent law issues that the parties could not have intended it to be binding. In this case, all the essential elements of the November, 2009 Settlement Agreement were present, and they are fully enforceable without any conjecture or speculation as to what was intended because they are clearly defined. The Court

finds the *Sadighi* case, which applied South Carolina law, to be much closer factually to the present case.

CONCLUSION

The Court has carefully considered the remaining arguments made by Byrd and finds them to be without merit. This appears to be a case of “buyer’s remorse” on the part of Plaintiff several months after the Settlement Agreement was entered into. All parties to this litigation freely and voluntarily mediated this case in November, 2009 with the presence and advice of their respective counsel. The parties entered into a binding contract on that day that set forth all the material terms of a settlement of the case. The Court finds and concludes that the language of the Settlement Agreement is not susceptible to more than one interpretation and that there was a meeting of the minds between the parties on all the essential and material terms of the Agreement. The Court finds and concludes that the November 23, 2009 Settlement Agreement is enforceable against Byrd, Livingston, and TIAA.

The Court hereby orders the parties to prepare, execute, and record documents reflecting the contents of this Order. Those documents will omit Byrd Son and will include a cancellation of easement reflecting that the written 66’ wide easement is cancelled only as to Byrd’s property (not Byrd Son’s property), a new easement document reflecting a 25’ wide easement only as to Byrd’s property (not Byrd Sons’ property), a new survey reflecting a 25’ wide easement as to Byrd’s property and the status quo (66’ wide easement) as to Son’s property, and a formal settlement document embodying the terms of the November 23, 2009 Settlement Agreement as they apply to the parties in this case. The cost of preparing, filing, and recording the new survey shall borne equally by the parties: 1/3 each to Byrd, Livingston, and TIAA. Finally, the Newberry County Clerk of Court is ordered to clearly, boldly, and legibly affix or inscribe the

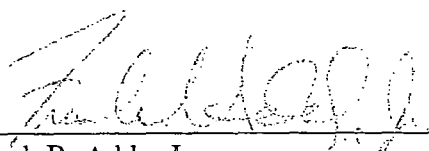
following legend upon the face of the Plat recorded on December 23, 2009 in Newberry County
Plat Book C230 at Page 4:

"This plat, and certain dimensions of the easement and right-of-way shown therein, have been affected and superseded by Order of the Honorable Frank R. Addy, Jr., Judge of the Eighth Judicial Circuit, dated July 30, 2010 rendered in the civil action known as *Byrd v. Livingston, et al.* (C.A. No.: 2008-CP-36-428). Please refer to said civil action file for more information. See also Newberry County Plat Book _____ at Page _____."

Defendants' request for costs and attorneys' fees is denied.

This Court retains jurisdiction over the matter until these documents have been executed and filed. Should there be further dispute in carrying out this ruling or the settlement, any party may petition this Court for its intervention.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Judge, Eighth Judicial Circuit

July 30, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

) IN THE COURT OF COMMON PLEAS
) EIGHTH JUDICIAL CIRCUIT
)

CA No. 2008-CP-36-428

FORREST BYRD

Plaintiff,

vs.

JUDY LIVINGSTON,
TIAA TIMBERLANDS, II, LLC

Defendant

SCHEDULING ORDER

FILED
NEWBERRY COUNTY
2009 NOV - 2 P 12:05
JACKIE S. BOWERS
CLERK OF COURT

The Court held a status conference in this matter on October 13, 2009. Counsel for all three parties participated by telephone. All parties are in agreement that this case can be most expeditiously handled through a bifurcation of issues and entry of a scheduling order. The Court agrees. For that reason, the following schedule is hereby imposed:

1. The issue related to whether an express easement exists (from any source, and including any claims and defenses) shall be addressed first. In that regard, the discovery on those issues shall be completed by December 1, 2009. All dispositive motions shall be served (and mailed for filing) no later than December 15, 2009. Those motions shall be heard at the nonjury term of court scheduled for January 4, 2010.
2. If the Court rules that there is an express easement, the parties agree that the remaining claims are mooted, and the Court shall enter final judgment.
3. If the Court determines in ruling on the Motions that there is no express easement, or that an issue of fact exists as to the existence of an express

1 of 2

easement, the following schedule shall apply to all other claims in the case:

- a. An additional sixty days of discovery shall be allowed in the case, to include the implied easement theories. Those sixty days shall be calculated from the entry of the Order reference in item 2.
- b. Additional motions and/or trial of the remaining issues shall take place following the sixty day period described in item 3(b).

IT IS SO ORDERED.

Garrison Hill

D. Garrison Hill
Circuit Judge

Oct. 29, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF NEWBERRY) CIVIL ACTION NO. 2008CP36

2008CP36-428

FORREST BYRD)

Plaintiff,)

JUDY LIVINGSTON,)
TIAA TIMBERLANDS, II, LLC)

Defendants.)

COMPLAINT

FILED
NEWBERRY COUNTY
2008 SEP 10 P 2:09
JACQUELYNNE
CLARK, CLERK

The Plaintiff, Forrest Byrd, by and through the undersigned counsel, and complaining of the above named Defendants, would allege and show unto this honorable Court the following:

1. Plaintiff is a citizen and resident of Lexington County.
2. Defendant, Judy C. Livingston, is, upon information and belief, a citizen and resident of Newberry County.
3. Defendant, TIAA Timberlands, II, LLC, is upon information and belief, a limited liability company organized and existing under the laws of the state of Delaware, and the owner of a tract of land located in Newberry County bearing Newberry County Tax Map Service No. 5-17-12.
4. This action involves title to or an interest in, real estate located in Newberry County, along with a contract for the sale and purchase of such real estate.
5. The Court, therefore, has jurisdiction of the action, and venue is proper in Newberry County.
6. The property which is the subject of this action is referred to hereinafter as "the subject property" and is described as follows:

All that certain piece, parcel, or tract of land, together with any improvements

thereon, lying and being situate in the County of Newberry, State of South Carolina, containing 53.07 acres bearing Newberry County TMS No. 460-68, and being bounded on the north by lands now or formerly of James L. Cook; on the south and east by lands now or formerly of TIAA Timberlands, II, LLC; and on the west by lands now or formerly of Judy C. Livingston and lands now or formerly of Steve Shealy. Reference is further made to that certain plat recorded in the Office of the Clerk of Court for Newberry County in Plat Book C178 at Page 1.

BACKGROUND

7. The Plaintiff entered into a contract for the purchase of the property described herein above from defendant Judy C. Livingston on or about May 31st, 2007. A copy of such contract is attached hereto as Exhibit "A" and incorporated herein.

8. The Plaintiff was the successful bidder at a private auction of the subject property commissioned by defendant Judy C. Livingston, held on or about May 31st, 2007.

9. The contract provided that,

"Seller shall convey the property by marketable title to the Purchaser...free from all liens and encumbrances, except as are herein agreed to. The purchaser agrees to accept the property subject to any zoning ordinances and regulations, building restrictions and conditions, restrictions and easements of records." (emphasis added).

10. Prior to entering into the said contract or bidding in the aforementioned auction, the Plaintiff was presented with the terms and conditions of the said auction. Such terms and conditions(a copy of which is attached hereto as Exhibit "B") provided that,

"the property is being sold subject only to all Newberry County and State of South Carolina laws, ordinances, and regulations. Also selling subject to any restrictions or covenants of record along with all recorded easements..."

11. Upon payment of the full purchase price, Defendant Judy C. Livingston executed and delivered a general warranty deed conveying the subject property to the Plaintiff on July 10, 2007. A copy of such deed, recorded on July 13, 2007 at 11:01:20 AM, is attached hereto as Exhibit "C" and incorporated herein.

12. Apparently, and unbeknownst to the Plaintiff, defendant Judy C. Livingston had two days prior to executing and delivering the deed attached as Exhibit "C" executed and delivered a sixty-six (66) foot Right of Way Easement over and across the subject property to defendant TIAA Timberland, II, LLC. A copy of such Right of Way Easement, recorded on July 13, 2007 at 1:50:07 PM, is attached hereto as Exhibit "D" and incorporated herein.

13. Defendant Judy C. Livingston and/or her agents concealed, or otherwise failed to disclose where she had a duty to disclose, the said Right of Way Easement.

14. The survey referenced in the deed attached as Exhibit "C" depicts a "66' Right of Way along existing dirt road." Said survey is attached as Exhibit "E" incorporated herein.

15. Upon being shown the survey at the closing of the aforementioned contract, Plaintiff inquired as to the purpose of the depicted right of way as shown on the said survey, and it was represented by defendant Judy C. Livingston and/or her agents that its depiction was required by Newberry County zoning ordinances.

16. Relying on such representations, Plaintiff accepted the deed attached as Exhibit "C".

17. Subsequent to the aforementioned closing, Plaintiff inquired of Newberry County's zoning requirements related to the Right of Way Easement shown on the attached survey. A copy of the letter from the Newberry County Attorney in response to such inquiry is attached hereto as Exhibit "F" and incorporated herein.

18. The aforementioned contract set forth that a party defaulting of his or her obligations thereunder shall be responsible for the non-defaulting party's expenses, including attorney's fees.

FIRST CAUSE OF ACTION
(Quiet Title)

19. Plaintiff re-alleges and incorporates each and every allegation contained in paragraphs 1-18 as if the same were fully set forth herein.

20. Plaintiff is the owner of the subject property by virtue of the attached Exhibit "C".

21. Upon information and belief, Defendant TIAA Timberlands, II, LLC claims, or may claim, an interest in the subject property by virtue of the attached Exhibit "D".

22. Plaintiff had no notice, actual or constructive, of the instrument attached as Exhibit "D".

23. The existence of such instrument was concealed or not disclosed by Defendant Judy C. Livingston and/or her agents.

24. As the Right of Way Easement attached as Exhibit "D" was recorded after the Plaintiff's purchase of the subject property and after the recording of the Plaintiff's deed, such Right of Way Easement is ineffective against the Plaintiff and is null and void.

25. Plaintiff is informed and believes that he is entitled to an order of this Court quieting title in the Plaintiff of that portion of the subject property which would be effected by the said Right of Way Easement, and setting forth that Defendant TIAA Timberlands, II, LLC does not have the easement set forth therein.

26. Plaintiff is further informed and believes that he is entitled to an Order of this Court taxing the costs of this action, including reasonable attorney's fees, against Defendant Judy C. Livingston pursuant to the attached general warranty deed and the terms of the attached contract.

**FOR A SECOND CAUSE OF ACTION
(Reformation)**

27. Plaintiff re-alleges and incorporates each and every allegation contained in paragraphs 1-26 above as if the same were fully set forth herein.

28. Plaintiff's deed, attached as Exhibit "C", further recites that "the conveyance is subject to the Right of Way Easement as on the above mentioned plat [Exhibit "D"]."

29. The contract between the Plaintiff and Defendant Judy C. Livingston states that the conveyance would be free of all encumbrances, except those of record.

30. The Right of Way Easement, attached as Exhibit "D", was not of record as of the date of the said contract, nor was it of record at the time Defendant Judy C. Livingston executed the deed attached as Exhibit "C" and it was further not of record at the time such deed was recorded.

31. The existence of the instrument attached as Exhibit "D" was concealed from the Plaintiff, or was otherwise not disclosed where Defendant Judy C. Livingston had a duty to disclose the same.

32. When inquiring as to the purpose the right of way depicted on the plat attached as Exhibit "B", Defendant Judy C. Livingston and/or her agents represented to the Plaintiff that the only reason it was shown in such a manner was in order to comply with Newberry County zoning ordinances, which was false.

33. The Plaintiff is, therefore, informed and believes, in such circumstances, he is entitled to an order of this Court reforming the deed attached as Exhibit "C" to delete the language quoted in paragraph 29 above, and further to set forth that there is no sixty-six (66) foot right of way running over and across the subject property.

34. The Plaintiff is further informed and believes he is entitled to an Order of this Court taxing the costs of this action, including reasonable attorney's fees, pursuant to the attached general warranty deed and the attached contract.

**IN THE ALTERNATIVE AND FOR A THIRD CAUSE OF ACTION
(Breach of Contract)**

35. The Plaintiff re-alleges and incorporates each and every allegation contained in paragraphs 1-34 above as if fully set forth herein.

36. The contract of sale between the Plaintiff and Defendant Judy C. Livingston provided that Defendant Judy C. Livingston would convey the subject property to the Plaintiff "free from all liens and encumbrances."

37. The Plaintiff fully and completely performed under the said contract.

38. To the extent that it is found that the aforementioned Right of Way Easement is valid, a proposition that the Plaintiff vehemently denies, Defendant Judy C. Livingston materially breached the said contract by the grant of such Right of Way Easement.

39. As a result thereof, the Plaintiff has suffered injury, and is entitled to actual, consequential and incidental damages, as well as attorney's fees and costs.

**IN THE ALTERNATIVE AND FOR A FOURTH CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)**

40. The Plaintiff re-alleges and incorporates each and every allegation contained in paragraphs 1-39 above as if fully set forth herein.

41. Defendant Judy C. Livingston concealed from the Plaintiff the existence of the instrument attached as Exhibit "D" or otherwise failed to disclose it where she had a duty to disclose.

42. When closing the transaction with the Plaintiff (two days after granting the said Right

of Way Easement) Defendant Judy C. Livingston and/or her agents falsely represented to the Plaintiff the purpose of a sixty-six (66) foot right of way shown on the plat attached as Exhibit "E".

43. Such acts evidence Defendant Judy C. Livingston's fraudulent intent, and constitute fraudulent acts accompanying the aforesaid breach.

44. As a result, the Plaintiff has suffered injury, and is entitled to actual, consequential, incidental, and punitive damages, as well as attorney's fees and costs.

**IN THE ALTERNATIVE AND FOR A FIFTH CAUSE OF ACTION
(Fraud/Negligent Misrepresentation)**

45. The Plaintiff re-alleges and incorporates each and every allegation contained in paragraphs 1-44 as if fully set forth herein.

46. Defendant Judy C. Livingston had a pecuniary interest in concealing the existence of the Right of Way Easement instrument attached as Exhibit "E" as well as falsely representing the purpose of the of the right of way depicted on the plat attached as Exhibit "B". Both the concealment and misrepresentations are material.

47. Defendant Judy C. Livingston had a duty to disclose the existence of the Right of Way Easement to the Plaintiff and to communicate truthfully with the Plaintiff.

48. The Plaintiff had the right to rely on the representations of Defendant Judy C. Livingston and/or her agents.

49. Defendant Judy C. Livingston intended that the Plaintiff rely on such representations.

50. The Plaintiff was ignorant to the falsity of such representations.

51. The Plaintiff justifiably relied on such representations, and was damaged as a result of such reliance.

52. Such concealment and misrepresentations in these circumstances constitutes fraud, or, in the least negligent misrepresentation, and the Plaintiff has been damaged as a result thereof.

53. The Plaintiff is, therefore, entitled to actual and punitive damages, as well as costs and attorney's fees.

WHEREFORE, the Plaintiff prays the Court inquire into the matter, and issue its Order as follows:

- a. Granting the Plaintiff a trial by jury; and,
- b. Quieting title in the Plaintiff to the portion of the subject property which would be affected by the Right of Way Easement; and,
- c. Reforming the Plaintiff's deed to reflect the correct property description; and,
- d. Reforming the Plaintiff's deed to delete any reference to the right of way depicted on the plat referred to therein; and,
- e. Awarding the Plaintiff actual, consequential, incidental, and punitive damages in an amount determined by a jury; and,
- f. Awarding the Plaintiff reasonable attorney's fees; and taxing the costs of this action against the Defendant, Judy C. Livingston.
- g. For such other and further relief as the Court deems necessary and appropriate.

Respectfully Submitted,

POPE & HUDGENS, P.A.



Kyle B. Parker
P.O. Box 190
1508 College Street
Newberry, South Carolina 29108
(803) 276-2532
Attorneys for Plaintiff

September 9, 2008

J. DUNCAN & ASSOCIATES, INC.
an Auction Management Corporation affiliate
POST OFFICE BOX 721
CLINTON, SOUTH CAROLINA 29325
(864) 833-7700

REAL ESTATE AUCTION
CONTRACT OF PURCHASE

This CONTRACT OF PURCHASE made this May 31st, 2007
between Judy C. Livingston (herein called
"Seller"), and FORREST BYRD Bidder # 919 (herein called
"Purchaser") provides that Purchaser agrees to buy through J. Duncan & Associates, Inc. (herein called "Auctioneer")
with Major & Company as Cooperating Broker as agents for Seller, and Seller agrees to sell the following described
real estate, together with all improvements therein, located in the County of Newberry:

PROPERTY DESCRIPTION: TRACTS A & C in Newberry County, South Carolina, containing
53.71 acres +/- (subject to final survey), located at the terminus of Langford Street just outside of the Town
of Prosperity, and more particularly described on the plat prepared for George H. Caldwell by Anderson &
Associates, Jack O. Anderson, RLS# 13515, dated 2 February 1993, and recorded in the Office of the Newberry
County of Clerk of Court in Plat Book S283 at Page 7. Tax Map Number 460-00-00-010.

1. PURCHASE PRICE:

The purchase and sale price is One hundred eighty thousand one hundred sixty two & 00/100
(\$ 118,162.00) to be paid in the following manner:

\$ <u>11,816.20</u>	Escrow Deposit (10% of the Total Contract Price)
@ \$ <u>3,500.00</u>	Survey Expense <u>DUE AT CLOSING - ACTUAL EXPENSE IF LESS</u>
\$ <u>11,816.20</u>	Total Paid with this Contract

The deposit held herewith, in the form of CHECK (method), receipt of which is hereby acknowledged, shall be
held in escrow until the date of closing/settlement at which time it shall then be applied to the purchase price.

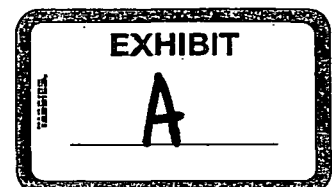
Escrow deposit will be held in trust by J. Duncan & Associates, Inc., with the balance of the purchase price due upon
delivery of the deed. The Purchaser may be required to have cashier's check or certified funds when completing this
transaction.

2. Seller shall convey the property by marketable title to the Purchaser, their heirs, successors or assigns free
from all liens and encumbrances, except such as are herein agreed to. The Purchaser agrees to accept the property
subject to any zoning ordinances and regulations, building restrictions and conditions, restrictions and easements of
record, including any shown on a recorded plat.

3. Seller agrees to pay the expenses of commission to broker and prorated property taxes through the day of
closing. Purchaser shall be responsible for all other closing costs in connection with this transaction, including the
costs of survey.

4. The closing shall take place on or before 30 days from today, at which time the Seller will deliver the
deed as is herein provided and Purchaser shall comply with the Terms and Conditions herein and as attached as
"Exhibit A". Written consent of all parties hereto, including the Auctioneer, is necessary in order for this agreement to
be amended. Time is of the essence in this transaction.

5. Seller and Purchaser agree that the property is being sold in an "AS IS-WHERE IS, WITH ALL
FAULTS" basis, with no warranty, expressed or implied, made by the Seller or Auctioneer. Purchaser acknowledges
that a diligent examination of the premises has been made prior to bidding, and the Purchaser has taken all deficiencies
and defects, if any, into consideration in making his/her bid.



6. All risk of loss or damage to the property by fire, windstorm, casualty, or other causes is assumed by the Seller until settlement. In the event of substantial loss or damage to property before settlement, Purchaser shall have the option of either (1) terminating the Contract of Purchase and recovering any deposit made, or (2) affirming the Contract of Purchase, in which event, Seller shall assign to Purchaser all of Seller's rights under any policy or policies of insurance to the property.

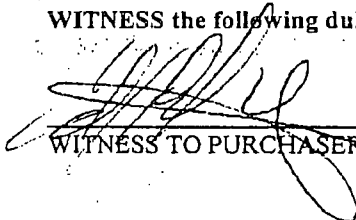
7. Seller and Purchaser agree that Auctioneer was the sole procuring cause of this Contract of Purchase, and Seller agrees to pay Auctioneer a commission for services rendered as per the Auction Contract between Seller and Auctioneer. If either the Seller or Purchaser defaults under this Contract of Purchase, such defaulting party shall be liable for the commission due to the Auctioneer and for any expenses incurred by the non-defaulting party and the Auctioneer, such expenses including their respective attorney's fees, if any, in connection with this transaction and the enforcement of such Contract. Also, if Purchaser defaults under this Contract of Purchase, any deposit made by Purchaser shall be applied to any expenses incurred by the Auctioneer, with the balance divided equally between the Seller and the Auctioneer.

8. **ACKNOWLEDGEMENT OF AGENCY DISCLOSURE:** Purchaser and Seller acknowledge receipt of a copy of the South Carolina Agency Disclosure Brochure and acknowledge that agency relationships have been explained by the respective agents involved in the transaction.

For the purpose of this transaction, the Purchaser is a client _____ or customer XX and the Seller is a client XX or customer _____ (Initial applicable choice).

9. This Contract of Purchase, with its attachments, constitutes the entire agreement between the parties and may not be modified or changed except by written instrument executed by all parties hereto.

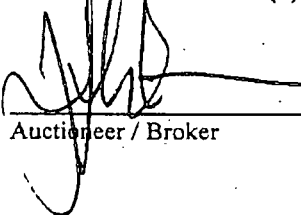
WITNESS the following duly authorized signatures and seals:


WITNESS TO PURCHASER(S)


PURCHASER

WITNESS TO SELLER(S)

Judy C. Livingston


Auctioneer / Broker

Auction Terms and Conditions
86.13 Acres
Langford Street
Prosperity, South Carolina
Thursday, May 31, 2007

Sellers: Judy C. Livingston

Agency Disclosure: J. Duncan & Associates, Inc. and Major & Company are agents for the Sellers and we represent the Sellers Only in these transactions. Registered Bidders acknowledge that they are Customers of this firm and that there is no Agency relationship created by participating in today's auction. Successful purchasers today will be asked to acknowledge this fact.

Restrictions: The property is being sold subject only to all Newberry County and State of South Carolina laws, ordinances and regulations. Also selling subject to any restrictions or covenants of record along with all recorded easements which include existing roads and planned roads, power line and other utility easements, ingress/egress and any other easements of record.

Order of Sale: The property is being offered today by an "Auction Plat" division. We will offer the property through the High Bidder's Choice method of sale. We will bid this "By the Acre" where the number of acres in each tract will be multiplied by the bid price to help formulate the final sales price. The successful high bidder in the first round of bidding may take whichever tract(s) they desire. This bid will be held as we offer the remaining tracts. Upon the conclusion of establishing the high bidder on the each tract, we reserve the right to offer the property back in combinations and as a whole. The combination which yields the most money for the Seller will be presented to the Seller for consideration.

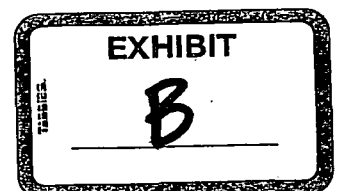
Buyer's Premium: A 10% Buyer's Premium will be added to the final high bid price to formulate the final sales price. For example: A \$50,000 bid plus \$5,000 buyer's premium equals the \$55,000 final Contract sales price.

Terms: A 10% down payment in GOOD funds in the form of cash, personal or business check is required from successful purchasers today, with the balance due between within thirty days of today.

Confirmation: The sale is subject to approval by the Seller. Closing will occur 30 days from the buyer's notification of approval.

Closing: Purchaser is responsible for deed preparation, deed stamps and all closing costs except as stated. Only the following sale closing costs will be paid by seller: (1) Commission or brokerage fees to auctioneer and/or cooperating Brokers as set forth in separate agreement with auctioneer, and as established in these Terms and conditions; (2) prorated property taxes and back taxes due, if any. All other closing costs, including but not limited to surveys, title examination, loan closing costs, and purchaser's closing attorney fees are at the expense of the Buyer.

Financing: Please note that financing is NOT a contingency of any auction. Because financing is NOT a contingency, the Auctioneer and Seller(s) strongly recommend that all potential bidders make certain in advance that they are capable of obtaining the necessary financing to close the transaction.



Property is being offered by an "Auction Plat" division. Should the property sell in divided tracts / lots, then a new plat will be drawn based on the "Auction Plat" division. If the property sells as a whole, no additional survey work will be performed and the property will convey based on the plat of record. If property sells divided, successful purchaser(s) will pay the following estimated survey expenses: (will be billed for actual expense of survey at closing)

R 30

Re-recording 000045295 Bk: 01302 Ps: 00083

STATE OF SOUTH CAROLINA)

Re-recording

) GENERAL WARRANTY DEED

COUNTY OF Newberry)

FILED, RECORDED, INDEXED
 09/25/2007 11:40:03AM
 Rec Fee: 10.00 St Fee: 0.00
 Co Fee: 0.00 Pages: 3
 Clerk of Court
 Jackie S. Bowers

Being re-recorded to show complete acreage on legal description.

KNOW ALL MEN BY THESE PRESENTS THAT Judy C Livingston, Grantor/s) in the State aforesaid, for and in consideration of the sum of One Hundred Eighteen Thousand One Hundred Sixty Two dollars and Zero cents (\$118,162.00) to the Grantor herein paid at and before the sealing of these presents by Forrest Byrd, (Grantee/s) the receipt and sufficiency whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Forrest Byrd, Heirs and Assigns, the following described real property:

53.70 acres
 All that certain piece, parcel or tract of land, lying being and situate in the County of Newberry, State of South Carolina being shown and delineated as Parcel A ~~6.70 Acres~~ on a plat prepared for Judy C. Livingston by Adtech Surveying, Inc., dated June 20, 2007 to be recorded herewith. Plat Recorded on July 13, 2007 in book C178 at page 1.

This being a portion of the property conveyed to Judy C. Livingston by Deed of Distribution from the Estate of Hilliard Furman Livingston (2005ES3600204) dated April 19, 2006 and recorded on May 1, 2006 in book 1151 at page 88.

This conveyance is made subject to right of way easement as shown on above mentioned plat.

TMS No. TMS: 460-10

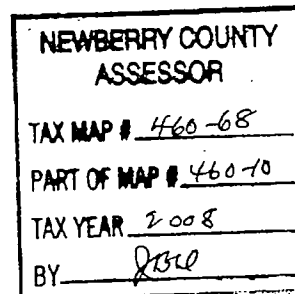
GRANTEE/S' ADDRESS: 225 Lancer Drive
 Columbia, South Carolina 29212

FILED, RECORDED, INDEXED
 07/13/2007 11:01:20AM
 Rec Fee: 10.00 St Fee: 308.10
 Co Fee: 130.35 Pages: 3
 Clerk of Court
 Jackie S. Bowers

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said Premises belonging, or in anywise incident or appertaining.

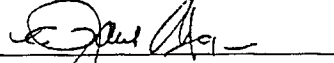
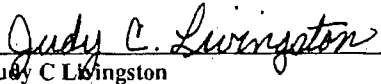
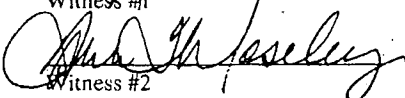
TO HAVE AND HOLD, all and singular, the said Premises before mentioned unto the said Forrest Byrd as hereinabove provided, Grantee/s' successors, heirs and assigns, forever.

Grantor/s hereby bind Grantors' successors, heirs, personal representatives and administrators, to warrant and forever defend, all and singular, the said Premises unto the said Forrest Byrd, as hereinabove provided, Grantee/s' successors, heirs and assigns against Grantor/s and Grantor/s' successors, heirs and assigns, and all other persons whomsoever lawfully claiming, or to claim the same or any part thereof.



WITNESS Grantor/s' hand and seal this 27th day of June, 2007.

**SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:**

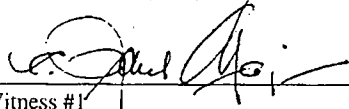
 _____ Witness #1	 _____ Judy C Livingston Grantor
 _____ Witness #2	_____ Grantor
	_____ Grantor

STATE OF SOUTH CAROLINA

COUNTY OF

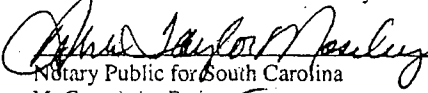
) PROBATE
)

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named Grantor/s sign, seal and as Grantor/s' act and deed, deliver the within-written Deed, and that s/he with the other witness subscribed above, witnessed the execution thereof.



Witness #1

SWORN to before me this 27th day of June, 2007



Notary Public for South Carolina [SEAL]
My Commission Expires SEPT 17, 2014

Re-recording

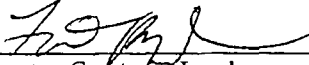
PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
The property is being transferred by Judy C. Livingston to Forrest Byrd on July 10, 2007
2. The Deed is

- (a) X Subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) _____ Subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
- (c) _____ EXEMPT from the deed recording fee because (Explanation, is required)

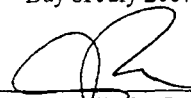
(If exempt, please skip items 4-6, and go to item 7 of this affidavit)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked:
 - (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$118,162.00
 - (b) _____ The fee is computed on the fair market value of the realty which is \$ _____
 - (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____
5. Check YES _____ or NO _____ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES" the amount of the outstanding balance of this lien or encumbrance is \$ _____
6. The DEED Recording Fee is computed as follows:
 - (a) \$ _____ the amount listed in item 4 above
 - (b) \$ _____ the amount listed in item 5 above (no amount place zero)
 - (c) \$ _____ Subtract Line 6(b) from Line 6(a) and place the result.
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as follows: _____
8. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

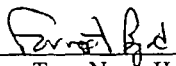


Grantor, Grantee or Legal
Representative connected with this
Transaction

SWORN to before me this
10th Day of July 2007



Notary Public for South Carolina
My Commission Expires: 4-9-2014



Print or Type Name Here

FILED, RECORDED, INDEXED
 07/13/2007 01:50:07PM
 Rec Fee: 10.00 St Fee: 0.00
 Co Fee: 0.00 Pages: 2
 Clerk of Court
 Jackie S. Bowers

STATE OF SOUTH CAROLINA)

) RIGHT-OF WAY EASEMENT

COUNTY OF NEWBERRY)

KNOW ALL MEN BY THESE PRESENTS, that I, JUDY C. LIVINGSTON, owner of Parcel "A" and Parcel "B" (Newberry County TMS# 460-10) as shown on a survey prepared for Judy C. Livingston by Adtech Surveying, Inc. dated June 20, 2007, revised June 30, 2007 and recorded in the office of the Clerk of Court for Newberry County in Plat Book C178 at page 2 on July 13, 2007, RESERVE unto myself, my heirs and assigns, and GRANT to the owners of Parcel A and Parcel B described on the above survey, and GRANT unto TIAA TIMBERLANDS, II, LLC, its successors and assigns, forever, a right-of-way easement of Sixty Six (66') feet, more or less, in width for the purpose of ingress, egress and the installation of utilities, to the Parcels "A" and "B" and the property now or formerly owned by TIAA Timberlands II, LLC, across Parcel "A" and Parcel "B".

Said Right of Way Easement crossing, leading to, and appurtenant to Grantees' property from a public road to property of Grantees. Grantees shall have the right and privilege to enter upon the same, from time to time, in order to maintain said right-of-way, and shall have the right to install and maintain utilities on said right-of-way.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said conveyed easement in any wise incident or appertaining thereto.

TO HAVE AND TO HOLD, all and singular the before conveyed easement to the said Grantees, their heirs and assigns forever.

Signed, sealed and delivered in the presence of:

[Signature]
[Signature]

Judy C. Livingston 8 2007
 Judy C. Livingston (Date)

EXHIBIT

D

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

PERSONALLY appeared before me the above signed witness and made oath that s/he saw the within named Judy C. Livingston sign, seal, and as her act and deed, deliver the within written Right-of-Way Easement and that s/he witnessed the execution thereof.

Shirley M. Park

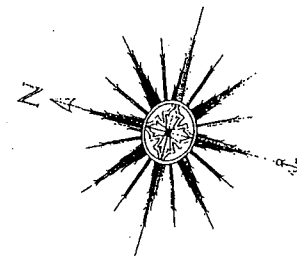
SWORN to before me this
8th day of July, 2007.

David Livingston

Notary Public of S. C.

My Commission Expires: 8-31-2015

Geodetic North



Parcel A
53.700 ACRES*

TAA Timbelonds N/F
S3A-135 Pg AV-13A
W517-12

N/;
Beatrice Benson
DB 462-33
TMS 460-22

Parcel B
*32.406 ACRES**



२३७



COUNTY OF NEWBERRY

OFFICE OF THE COUNTY COUNCIL
COURTHOUSE ANNEX, 1309 COLLEGE STREET
POST OFFICE BOX 156
NEWBERRY, SOUTH CAROLINA 29108

VOICE: (803) 321-2100
FAX: (803) 321-2102
WEB: www.newberrycounty.net

COUNCIL MEMBERS:

HENRY B. SUMMER, CHAIRMAN
WILLIAM D. WALDROP, VICE-CHAIRMAN
JOHN E. CALDWELL
JOHN DAVID DAWKINS
MIKE HAWKINS
EDGAR BAKER
BENEDICT LIVINGSTON, III

August 8, 2007

WAYNE ADAMS
COUNTY ADMINISTRATOR
GARY T. POPE
COUNTY ATTORNEY
SUSAN C. FELLERS
CLERK TO COUNCIL

Mr. Forrest Byrd
225 Lancer Drive
Columbia, SC 29212

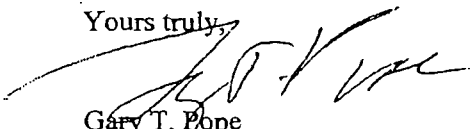
RE: Right of Way across your 53.7 acre parcel near Prosperity, SC

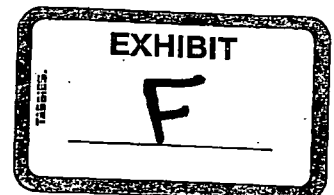
Dear Mr. Byrd:

Thank you for meeting with County Administrator Wayne Adams, Anne Peters, Jeff Duncan and me this afternoon. This letter will confirm that the 66 foot wide road right of way shown on the plat to your property, recorded in Plat Book C178 at page 2, is not a right of way for a public road, and has not been dedicated as such, and that Newberry County has no claim or interest therein. In addition you advised us that there is an old dedicated dirt road, approximately 10 to 15 feet wide which crosses your property in approximately the middle of that 66 foot right of way. According to County records, that old dirt road has not been maintained by the County and is a private road. Your closing attorney can describe to you which adjoining landowners, if any, have the right to use that old dirt road, and the extent of that right. He can also explain to you the access rights you have to your property by virtue of your deed and the Right of Way Easement signed by Judy Livingston and recorded in Record Book 1281 at page 187.

In the event that your 53.7 acre parcel of land is ever developed, having a sixty-six foot wide right of way would meet current County requirement for the width of a road right of way. If you ever wished to develop that property and make that right of way a public road, you would have to construct the road to County specifications, and make a formal offer of dedication, and the County would have to accept that offer, before it could come into the County system. Until that occurred, the County would have no legal interest whatsoever in that right of way.

Yours truly,


Gary T. Pope
Newberry County Attorney



STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CA No. 2008-CP-36-428

FORREST BYRD)

Plaintiff,)

vs.)

JUDY LIVINGSTON,)
TIAA TIMBERLANDS, II, LLC)

Defendant)

**ANSWER and COUNTERCLAIMS
of DEFENDANT TIAA
TIMBERLANDS, II, LLC**

Defendant TIAA Timberlands II, LLC ("TIAA"), answering the allegations of the
Complaint herein, would show:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter admitted, qualified or explained is denied.
2. The allegations of Paragraphs 1 are admitted.
3. Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 2 and therefore denies same.
4. The allegations of Paragraph 3 are admitted.
5. Paragraph 4, being descriptive of this action, requires no response from this Defendant. Otherwise it is denied.
6. Paragraph 5 is admitted.
7. Paragraph 6, being descriptive of this action, requires no response from this Defendant. Otherwise it is denied.

8. Responding to the allegations of Paragraph 7, Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations and denies same. Defendant TIAA would show, however, that the contract that is the subject of Paragraph 7 of the Complaint itself references a plat prepared for George H. Caldwell by Anderson & Associates, Jack O. Anderson, RLS# 13515, dated 2 February 1993, and recorded in the Office of Newberry County Clerk of Court in Plat Book S283 at page 7, Tax Map Number 460-00-00-010. ("Caldwell Plat" attached hereto as Exhibit A), and that the Caldwell Plat reflects the easement.
9. Responding to the allegations of Paragraph 8, Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations and denies same.
10. Responding to the allegations of Paragraph 9, Defendant TIAA craves references to the relevant documents for their terms. Further, with respect to Paragraphs 9, Defendant TIAA would further show that Plaintiff has not fully and accurately excerpted the complete provisions cited as shown in the attachments to the Complaint.
11. Responding to the allegations of Paragraph 10, Defendant TIAA craves references to the relevant documents for their terms. Further, with respect to Paragraphs 10, Defendant TIAA would further show that Plaintiff has not fully and accurately excerpted the complete provisions cited as shown in the attachments to the Complaint.
12. Responding to the allegations of Paragraph 11, Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations and

denies same.

13. Responding to the allegations of Paragraph 12, Defendant TIAA admits that in 2007 it was formally granted the easement described in the attachment shown as Exhibit D to the Complaint, and would further show that such legal right existed prior to that formal grant. Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 13 and therefore denies same.
14. Paragraph 13 is denied.
15. Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of Paragraphs 14, 15, 16, 17, and 18, and therefore denies same.
16. Responding to the allegations of Paragraph 19, Defendant TIAA re-alleges and incorporates Paragraphs 1 - 15 herein.
17. Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of Paragraph 20 and therefore denies same.
18. Responding to the allegations of Paragraph 21, TIAA admits that it claims an interest in the subject property, and would show that such interest arises not just from Exhibit D to the Complaint, but also from other sources described herein.
19. Paragraphs 22, 23, 24, and 25 are denied.
20. Defendant TIAA lacks knowledge or information sufficient to form a belief as to the truth or falsity of Paragraph 26 and therefore denies same.
21. Responding to the allegations of Paragraph 27, Defendant TIAA re-alleges and

FOR A SECOND DEFENSE AND BY WAY OF COUNTERCLAIM

(Declaratory Judgment/Pre-existing Easement)

30. All prior allegations are realleged.
31. If the 2007 formal grant of the express right-of-way/easement referenced in the Complaint is declared ineffective by the Court, Defendant TIAA seeks a declaratory judgment that it has an easement, express, implied by prior use, implied by necessity, and/or a prescriptive easement over Plaintiff's property.
32. The specifications of that easement are as described in the formal 2007 grant.
33. The express easement is shown in the plat prepared for George H. Caldwell by Anderson & Associates, Jack O. Anderson, RLS# 13515, dated 2 February 1993, and recorded in the Office of Newberry County Clerk of Court in Plat Book S283 at page 7, Tax Map Number 460-00-00-010.
34. The Caldwell Plat was referenced in the Real Estate Auction Contract of Purchase attached to the Complaint as Exhibit A, thereby giving Plaintiff record notice of the easement in addition to the actual notice arising from other sources.
35. Further, in the alternative, even without the pre-existing express easement shown on the Caldwell Plat, Defendant TIAA has an easement implied by prior use, an easement implied by necessity, and/or a prescriptive easement.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant TIAA prays that the Court dismiss the Complaint with prejudice, rule that the 2007 grant of the right-of-way easement is valid; or, in the alternative, rule that Defendant TIAA has a pre-existing express easement, easement implied by prior use, an easement implied by necessity, and/or a prescriptive easement, and enter judgment against Plaintiff on its Counterclaim.



Blaney A. Coskrey, III, Esquire
1201 Main Street, Suite 1980
Columbia, South Carolina 29201
(803) 748-1202

ATTORNEY FOR DEFENDANT
TIAA TIMBERLANDS II, LLC

Columbia, South Carolina
November 17, 2008

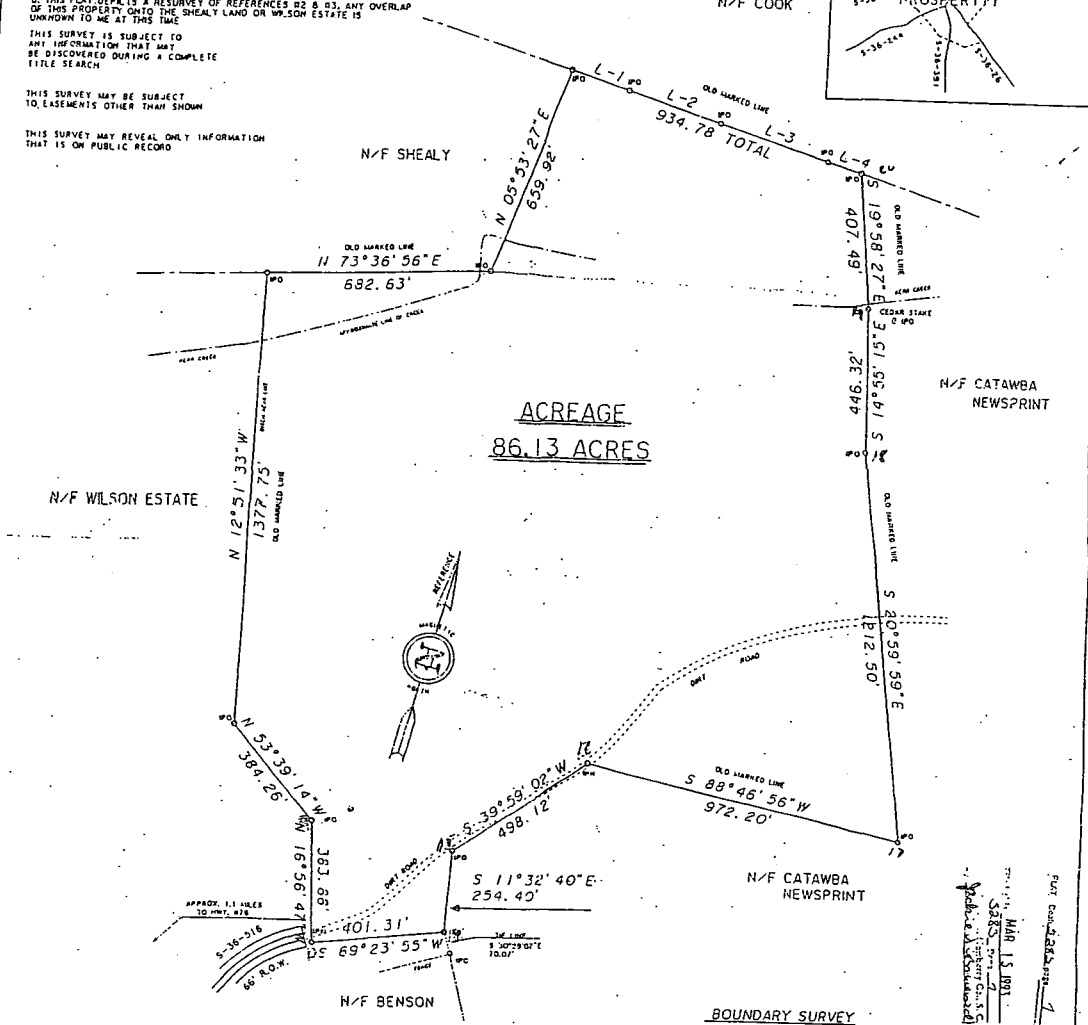
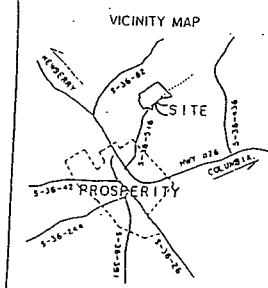
PLAINTIFF'S EXHIBIT
 6-Major
 9-3-04
 PENGAD 800-431-6893

NOTES AND REFERENCES

1. BEING SHOWN AS NEWBERRY COUNTY TAX MAP H460-00-01-10.
 2. PLAT OF PROPERTY OF GEORGE H. CALDWELL, BY CLAUDE E. JOHNSON RLS, DATED DECEMBER 1973.
 3. PLAT OF THE DILLAS CALDWELL ESTATE - PENDER RIDGE TRACT - BY JOHN C. HALLINGDALE, DATED JUNE 1963.
 4. PLAT OF SURVEY CONTAINING 78 ACRES DATED SEPTEMBER 1, 1973 AND RECORDED IN P88-P82.
 5. PLAT MADE AT THE REQUEST OF DAVID O. BROWN BY J.M. BETHENBAUGH DATED JANUARY 9, 1941 AND RECORDED IN P84-P8143.
 6. PLAT MADE AT THE REQUEST OF MRS. LOUISE C. COOK BY VIRGIN E. SHEALY RLS, DATED MARCH 16, 1973 AND RECORDED IN P84-P80.
 7. SOUTH CAROLINA HIGHWAY DEPARTMENT PLANS FOR THE CONSTRUCTION OF S-36-S13, DOKKET #36,535, PROJECT HC-535, COMPUTED RIGHTS-OF-WAY FOR THIS ROAD ARE SHOWN AS THEY APPEAR ON THESE DRAWINGS.
 8. THIS PLAT REFLECTS A RESURVEY OF REFERENCES #2 & #3. ANY OVERLAP OF THIS PROPERTY ONTO THE SHEALY LAND OR WILSON ESTATE IS UNKNOWN TO ME AT THIS TIME.
- THIS SURVEY IS SUBJECT TO ANY INFORMATION THAT MAY BE DISCOVERED DURING A COMPLETE TITLE SEARCH.
- THIS SURVEY MAY BE SUBJECT TO EASEMENTS OTHER THAN SHOWN.
- THIS SURVEY MAY REVEAL ONLY INFORMATION THAT IS ON PUBLIC RECORD.

LINE TABLE

COURSE	BEARING	DISTANCE
1	N 86°59'13"W	183.50'
2	N 87°04'08"W	299.29'
3	N 87°03'50"W	343.59'
4	N 87°04'00"W	108.42'



I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, THAT THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS C SURVEY AS SPECIFIED THEREIN.

JACK O. ANDERSON RLS #13515
 P.O. BOX 224 199 DOWD DR.
 GASTON, S.C. (803) 739-7168

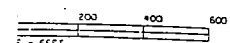
Anderson & Associates
 LAND SURVEYORS



GEORGE H. CALDWELL

LOCATED NEAR PROSPERITY
 IN NEWBERRY COUNTY, S.C.

FEBRUARY 2, 1993 SCALE 1" = 200'



R 43

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON and
TIAA TIMBERLANDS, II, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-36-428

ANSWER
OF THE DEFENDANT
JUDY LIVINGSTON

COMES NOW the Defendant, JUDY LIVINGSTON, by and through her undersigned counsel, and would respectfully show the Court the following:

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION

- (1) Defendant denies each and every allegation asserted in the Complaint not hereinafter expressly admitted and requires strict proof thereof. Furthermore, Defendant requires strict proof of any allegations asserted in the Complaint that are hereinafter denied;
- (2) Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint;
- (3) Defendant admits the allegations contained in Paragraph 2 of the Complaint;
- (4) Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint;
- (5) Defendant admits the allegations contained in Paragraphs 4, 5, 6, 7, and 8 of the Complaint;
- (6) Defendant admits the allegations contained in Paragraph 9 of the Complaint but would further state that the paragraph of the contract cited by the Plaintiff is incomplete. The paragraph provided that:

"Seller shall convey the property by marketable title to the Purchaser, their heirs, successors or assigns free from all liens and encumbrances, except such as are herein agreed to. The Purchaser agrees to accept the property subject to any zoning ordinances and regulations, building restrictions and conditions, restrictions and easements of record, including any shown on a recorded plat."

- (7) Defendant admits the allegations contained in Paragraph 10 of the Complaint but would further state that the paragraph of the auction terms and conditions cited by the Plaintiff is incomplete. The paragraph provided that:

"The property is being sold subject only to all Newberry County and State of South Carolina laws, ordinances and regulations. Also selling subject to any restrictions or covenants of record along with all recorded easements which include existing roads and planned roads, power line and other utility easements, ingress/egress and any other easements of record."

- (8) Defendant admits only so much of Paragraph 11 of the Complaint as states that upon payment of the full purchase price, Defendant Judy C. Livingston executed and delivered a general warranty deed conveying the subject property to the Plaintiff. Defendant would further state that the parties met to close the sale of the subject property on June 27, 2007. At that time, the parties discovered that the survey contained errors, including, but not limited to, an inadequate description of the right-of-way crossing over the subject property. The parties met back together on July 10, 2007 with the corrected survey and concluded the closing of the sale of the subject property;
- (9) Defendant admits only so much of Paragraph 12 of the Complaint as states that the Defendant Judy C. Livingston executed the Right of Way Easement on July 8, 2007 and that said Right of Way Easement was recorded on July 13, 2007;
- (10) Defendant denies the allegations contained in Paragraph 13 of the Complaint insofar as it states that she violated some duty to the Plaintiff. Defendant further states that she or her agents disclosed to the Plaintiff at the June 27, 2007 meeting that one of the errors on the

survey was that the right-of-way as shown on the subject property was shown as thirty (30) feet and not sixty-six (66) feet. The existence of the right-of-way and its width was clearly known and discussed by all parties at the closing, including the Plaintiff;

- (11) Defendant admits the allegations contained in Paragraph 14 of the Complaint;
- (12) Defendant admits only so much of Paragraph 15 of the Complaint as states that the Defendant and/or her agents told the Plaintiff that the width of the right-of-way as depicted on the corrected survey was required to gain approval of the survey by the Newberry County Planning and Zoning Department¹;
- (13) Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 16 and 17 of the Complaint;
- (14) Defendant denies the allegations contained in Paragraph 18 of the Complaint that state that she that she defaulted on her obligations under the contract. The Defendant further denies that she is responsible for the Plaintiff's fees and/or expenses;
- (15) Defendant realleges Paragraphs 1 through 16 above as fully as if repeated verbatim herein in response to Paragraph 19 of the Complaint;
- (16) Defendant admits the allegations contained in Paragraph 20 of the Complaint;
- (17) Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 21 of the Complaint;
- (18) Defendant realleges Paragraph 12 above as fully as if repeated verbatim herein in response to Paragraphs 22 and 23 of the Complaint;
- (19) Defendant denies the allegations contained in Paragraph 24 of the Complaint and would state that because the Plaintiff was on notice of the easement and the right-of-way, the

¹ Surveys approved for recording by the Newberry County Planning and Zoning Department bear a stamp reading "I

easement and the right-of-way are effective against him;

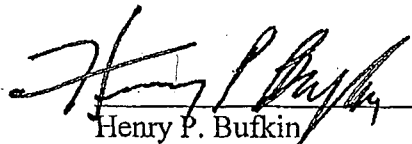
- (20) Defendant denies the allegations contained in Paragraphs 25 and 26 of the Complaint;
- (21) Defendant realleges Paragraphs 1 through 22 above as fully as if repeated verbatim herein in response to Paragraph 27 of the Complaint;
- (22) Defendant admits the allegations contained in Paragraph 28 of the Complaint;
- (23) Defendant realleges Paragraph 8 above as fully as if repeated verbatim herein in response to Paragraph 29 of the Complaint;
- (24) Defendant admits the allegations contained in Paragraph 30 of the Complaint;
- (25) Defendant realleges Paragraph 12 above as fully as if repeated verbatim herein in response to Paragraph 31 of the Complaint;
- (26) Defendant realleges Paragraph 14 above as fully as if repeated verbatim herein in response to Paragraph 32 of the Complaint;
- (27) Defendant denies the allegations contained in Paragraphs 33 and 34 of the Complaint;
- (28) Defendant realleges Paragraphs 1 through 29 above as fully as if repeated verbatim herein in response to Paragraph 35 of the Complaint;
- (29) Defendant realleges Paragraph 8 above as fully as if repeated verbatim herein in response to Paragraph 36 of the Complaint;
- (30) Defendant denies the allegations contained in Paragraphs 37, 38, and 39 of the Complaint;
- (31) Defendant realleges Paragraphs 1 through 32 above as fully as if repeated verbatim herein in response to Paragraph 40 of the Complaint;
- (32) Defendant realleges Paragraph 12 above as fully as if repeated verbatim herein in response to Paragraph 41 of the Complaint;

 hereby certify that these lots meet all zoning requirements. s/Planning Official. Date."

- (33) Defendant realleges Paragraph 14 above as fully as if repeated verbatim herein in response to Paragraph 42 of the Complaint;
- (34) Defendant denies the allegations contained in Paragraphs 43 and 44 of the Complaint;
- (35) Defendant realleges Paragraphs 1 through 36 above as fully as if repeated verbatim herein in response to Paragraph 45 of the Complaint; and
- (36) Defendant denies the allegations contained in Paragraphs 46, 47, 48, 49, 50, 51, 52, and 53 of the Complaint.

WHEREFORE, Defendants would respectfully request of this Honorable Court:

- (1) For a dismissal of this case with prejudice;
- (2) For attorneys fees and costs incurred in defending against this action; and
- (3) For such other and further relief as this Court may deem just and proper.



Henry P. Bufkin
The Bufkin Law Firm
P.O. Box 419
Prosperity, South Carolina 29127
Tel: (803) 364-2233
Attorneys for the Defendant Judy Livingston

November 6th, 2008
Prosperity, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS
THE EIGHTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2008-CP-36-428

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON, and
TIAA TIMBERLANDS, II, LLC,

Defendants.

REPLY

FILED
NEWBERRY COUNTY
2008 NOV 24 P 2:16
JACQUE S. TORRES
CLERK (P-00007)

**AS TO THE ANSWER AND COUNTERCLAIM OF
DEFENDANT TIAA TIMBERLANDS, II, LLC**

The Plaintiff, Forrest Bryd, responding to the allegations of Defendant TIAA Timberlands, II, LLC's Answer and Counterclaim, replies as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of Defendant TIAA Timberlands, II, LLC's Answer and Counterclaim, not specifically admitted herein, is hereby denied, and strict proof demanded thereof.

DECLARATORY JUDGMENTS/PRE-EXISTING EASEMENT

2. Paragraph 30 of the Answer and Counterclaim of Defendant TIAA Timberlands, II, LCC (hereinafter "TIAA") is denied in every respect, which is inconsistent with the allegations contained in the Complaint.

3. As Paragraph 31 of the Answer and Counterclaim of Defendant TIAA contains no factual allegations, no response is required; however, to the extent that a response is required, the same is denied and strict proof demanded thereof. The Plaintiff would further allege that no such prior expressed grant of an easement over the Plaintiff's property to Defendant TIAA is of record in the Office of the Clerk of Court for Newberry County, and the necessary circumstances under which any

implied easement may arise or present.

4. Paragraph 32 of the Answer and Counterclaim of Defendant TIAA is denied and strict proof demanded thereof.

5. Plaintiff admits so much of Paragraph 33 of the Answer and Counterclaim of Defendant TIAA as alleges that a plat prepared for George H. Caldwell by Anderson Associates, dated February 2, 1993 is recorded in the Office of the Clerk of Court for Newberry County, but otherwise denies all other allegations and inferences contained therein. Furthermore, the Plaintiff would allege that the fact that a dirt road is depicted on said plat does not constitute an expressed or implied grant of an easement to TIAA or any predecessor in title.

6. The Plaintiff admits so much of Paragraph 34 of the Answer and Counterclaim of Defendant TIAA as alleges that the Caldwell plat is referenced in the real estate auction contract of purchase attached to Complaint as Exhibit A, but otherwise denies the other allegations and inferences contained therein.

7. Paragraph 35 of the Answer and Counterclaim of Defendant TIAA is denied and strict proof demanded thereof.

WHEREFORE, the Plaintiff prays the Court inquire into the matter, and issue its Order dismissing the Counterclaim of Defendant TIAA Timberlands, II, LCC, with prejudice, and granting Plaintiff the relief requested in the Complaint.

Respectfully Submitted,

POPE & HUDGENS, P.A.


Kyle B. Parker

P.O. Box 190

1508 College Street

Newberry, South Carolina 29108

(803) 276-2532

Attorneys for Plaintiff

Newberry, South Carolina
November 21st, 2008

1 State of South Carolina)
2 County of Newberry) Court of Common Pleas
Non-Jury

3
4 2008-CP-36-428

5 Forrest Byrd)
vs.) Transcript of Record
6 Judy Livingston, TIAA)
Timberlands, II, LLC)
7 Defendant)

8
9 June 30, 2010
Newberry, South Carolina

10
11
12 B E F O R E:

13 Honorable Frank R. Abby, Jr., Judge.
14
15

16 A P P E A R A N C E S:

17 Michael Brackett, Esq.
Attorney for the Plaintiff
18

19 Blaney A. Coskrey, III, Esq.
20 Timothy D. Savidge, Esq.
Attorneys for the Defendant
21

22 Joy E. Holston
23 Court Reporter
24
25

1 THE COURT: All right, we are on the record in the
2 matter of Byrd v. Livingston, this is 08-CP-36-428. And
3 we have here with us both counsel for the plaintiff and
4 the defendant. It is my understanding that this is a
5 motion, gentlemen, to be, essentially to undo the
6 settlement agreement or to enforce the settlement
7 agreement is the kind of way I look at the pleadings. I
8 am happy to hear from y'all. I understand that testimony
9 is going to be necessary. I have spoken with the
10 Solicitor and I do not anticipate any general sessions
11 matters until this afternoon. So, we should have
12 sufficient time I would think. Who is first.

13 MR. COSKREY: I am, Your Honor, may it please the
14 Court.

15 THE COURT: Yes, sir.

16 MR. COSKREY: My name is Blaney Coskrey, I represent
17 TIAA Timberlands, one of the defendants. Here at counsel
18 table with me is Tim Savidge who represents the
19 codefendant, Ms. Livingston. I will be arguing a joint
20 motion primarily, although if I omit something relevant to
21 Mr. Savidge's client I believe they may pop up and assist
22 at the conclusion. Let me before I get to the motion,
23 Judge, just give the Court the benefit of a little bit of
24 background in this case. This case involves an easement
25 across property in Newberry County. And in order to

1 understand the easement and therefore the settlement
2 issues I need to explain a little bit of background. Judy
3 Livingston, a defendant in this case, owned a parcel of
4 property that was divided and sold at auction back in May
5 of 2007. For purposes of simplifying this we will say
6 this is divided into two pieces. Mr. Byrd was the
7 successful bidder on one of the parcels. And a third
8 party, nonparty to this case was the successful bidder on
9 the other parcel. The road that is at issue in this case
10 is a road that extends from a point of public access
11 across the first parcel bought by a nonparty and then
12 across Mr. Byrd's purchased property and into my client's
13 property. So you have basically three parcels in a road
14 that crosses my client, TIAA owns the farthest piece of
15 property. The easement, without really going into too
16 much of the merits of the case, the easement or the road
17 itself existed for a better part of a century, it has been
18 there, it has always been a point of access for the owner
19 of my client's parcel. Mr. Byrd successfully bid on his
20 parcel but before this closing he started raising
21 questions about this easement and whether it was necessary
22 and whether it should be there and those sorts of things.
23 The first attempt to close by Mr. Byrd was aborted in late
24 June, June 27th of 2007 in part because of this very
25 reason. The survey that was presented at that closing

1 didn't accurately reflect the easement, there was other
2 problems. But this whole question of whether the easement
3 existed and was there front and center in everybody's
4 consciousness from the very beginning. Mr. Byrd then
5 ended up closing a week or so later on that transaction.
6 Without having done anything else about easement his plat
7 and his deed reflect a 66 foot easement. So he ended up
8 closing and then subsequently after his closing attempted
9 again to sort of figure out how to get rid of the
10 easement. His method was to file this lawsuit. So this
11 lawsuit brings us to that point involved claims against
12 Ms. Livingston, seller of the property for breach of
13 warranties and other theories seeking damages against her,
14 seeking reformation of his own deed. And my client is
15 named as a defendant because he also seeks basically to
16 nullify the easement. My client counterclaimed in the
17 case asserting in the alternative implied easement
18 theories saying if this expressed easement, this 66 foot
19 wide easement referenced in your own deed is not valid.
20 Well, there are these implied theories. So with the
21 consent of the parties, Your Honor, Judge Hill bifurcated
22 the case and said we will first deal with whether there is
23 a 66 foot easement across this property. And then if that
24 is not resolved or if that is resolved in the plaintiff's
25 favor meaning that easement gets nullified by the Court on

1 anticipated cross motions of summary judgment then we will
2 have a hearing of discovery and further hearing and or
3 trial on the implied theories. So that is how all of that
4 was set up. In late November of 2009, last year, we all
5 gathered in Prosperity for a mediation. The Honorable
6 Clyde Davis is our mediator and we spent all day mediating
7 this case. Went to about 5:00 or 6:00 o'clock in the
8 evening and at the end arrived at the terms of a
9 settlement. If I could just hand up, Your Honor.

10 THE COURT: Please.

11 MR. COSKREY: This is the document that was typed up,
12 printed out and signed that day at the conclusion of the
13 mediation. And essentially if I can just run through
14 these bullet points, Judge. The first point is that the
15 easement, the big concession about my client was that this
16 easement would get narrowed from 66 feet to 25 feet.
17 There were concerns about Mr. Byrd about maintenance and
18 repairs of the road. The question of what would happen if
19 my clients lease their property to a hunt club is in there
20 and they would have to abide by certain rules. The lock
21 gate system to be used in production of the road is there.
22 It says this agreement will be supplemented by a more
23 formal and detailed written settlement agreement setting
24 forth. Says any cost associated with carrying out this
25 agreement including new surveys will be split among the

1 parties and of course the case dismissed and releases
2 signed included in the settlement agreement. So that is
3 what Mr. Byrd among others signed that day at the
4 conclusion of the mediation. A couple of weeks later I
5 had the, Mr. Savidge and I together had the relevant
6 subsequent documents drafted and sent to Mr. Parker, Kyle
7 Parker who was at the time Mr. Byrd's attorney, he
8 essentially has been relieved as counsel. And we sent
9 documents to Mr. Byrd and there was a lot of back and
10 forth between the attorneys, not about the terms of the
11 settlement, we never got any complaints about the
12 documents don't reflect the settlement or anything like
13 that, it was more simply I am trying on my end to get this
14 to the finish line. That was the gist of the emails from
15 Mr. Parker. Those emails, Your Honor, are relevant under
16 the analysis of enforcement of settlement. So, what we
17 have done, what I have done is attached my affidavit,
18 those emails and we will come back to that in a moment,
19 the emails. But essentially to take the story forward,
20 the narrative forward, what ended up happening was finally
21 for the first time in February of this year we got word of
22 Mr. Byrd's intent to essentially repudiate the agreement.
23 That was the first we had heard of that and it came almost
24 three months after the mediation and what we believed to
25 be a binding settlement. And so this motion then followed

1 to enforce the settlement. Your Honor, the enforced
2 settlement as we have set out in our memorandum that we
3 filed a few weeks ago and it is simply a contract, nothing
4 complicated about it. It is simply a question of whether
5 there is a mutual assent to be bound to the essential and
6 material terms of an agreement. Now, a lot of times
7 settlement enforcement motions turn on the second part of
8 that, have you covered the essential and material terms.
9 Here I don't think that is the issue because as Your Honor
10 as seen from the agreement that was signed in November we
11 covered it pretty darn well. I mean there are details
12 here that go pretty far beyond what you would normally see
13 in a document of that type. So I don't think the
14 essential and material terms issue is where they are
15 coming from in all of this. They make as I understand it
16 two primary arguments, Your Honor. One of them is that
17 this agreement anticipated that a more formal settlement
18 agreement would follow and it does. It is third from the
19 bottom, bullet point, anticipates that there will be
20 another document to follow. As Your Honor knows that is
21 common, it is more than common and I would assume almost
22 certainly mediated supplements but just about all
23 supplements there is going to be a formal document that
24 follows. That is not by any stretch of the imagination
25 fatal to the enforcement of the document that is entered

1 into initially. And I think that, I want to make sure
2 that everybody understands this, we are here to enforce
3 the November 23rd, 2007 document that I handed up. That
4 is the question, is that document enforceable. Your
5 Honor, I am handing up two copies of a case that Mr.
6 Brackett has seen before. That is a US District Court
7 case that is really right on point for many of the issues
8 that we are here discussing today. It is the United
9 States District Court, the District of South Carolina
10 applying South Carolina law on enforcement of settlements.
11 And specifically what the Court says on this issue of an
12 anticipated additional agreement to follow is, if I may
13 just read a couple of sentences, this is quoted at the
14 bottom of page 7 of our memorandum. Failure to complete
15 formal settlement papers does not indicate that a
16 settlement agreement was not in fact reached, indeed an
17 attempt to memorialize a contract in a subsequent writing
18 will not prevent a review in court from finding an
19 enforceable contract so long as the parties intend to be
20 bound by the earlier documents. The actual signing of the
21 formal settlement documents is a mere formality, a
22 memorialization of previously agreed upon terms as the
23 parties intended to be bound who are in agreement to
24 subsequently execute a formal settlement agreement. So
25 that is the Court applying the law, there is always the

1 need to execute additional documents. On the question of
2 whether the parties intended to be bound. What the
3 Sadighi court also says is when you look to the subsequent
4 actions of the parties to determine whether they intended
5 to be bound and that is why those emails that I ended up
6 attaching to my affidavit are relevant to all of this.
7 Essentially what you will see, Judge, without my going
8 through them one by one is that at no point in that
9 exchange over those several months did counsel say we are
10 not bound, we don't think this is a real settlement.
11 There is none of that, there is just this assertion of
12 difficulty getting a client in or what needs to change
13 here.. Mr. Parker says at one point, nothing gain changing
14 needs to change, simply dealing with the issue that I have
15 with my client. As the Sadighi court makes clear, those
16 emails, that subsequent action tells us a lot, it speaks
17 volumes about whether the parties intended to be bound.
18 Your Honor, additional evidence of whether the parties
19 intended to be bound is found in the fact that a
20 subsequent survey, very one anticipated by November 23rd
21 agreement actually occurred. A surveyor was hired and a
22 new survey produced and as the agreement says will happen
23 the cost of that split three ways among the three parties
24 to this lawsuit. So, that tells you not only does
25 everybody understand the settlement to be bound, we are

1 actually carrying out the agreement itself including Mr.
2 Byrd through his counsel is carrying out this agreement.
3 And that survey has actually been filed in Newberry
4 County. Your Honor, just briefly a couple of other points
5 on whether subsequent actions reflect the intention to
6 have been bound. The scheduling order that I mentioned
7 that Judge Hill ordered was completely disregarded by
8 everybody. Motions deadlines passed, everything passed as
9 we sat and waited for the documents to be completed and
10 executed. Your Honor, the issue of the survey being paid
11 for is also relevant to what I understand to be their
12 second big argument and that is that Mr. Byrd's son is
13 referenced in this agreement for November 23rd. It is a
14 mere three words in the first bullet point. Those three
15 words address the easement, the 25 foot easement is going
16 to replace the 66 foot easement. And at the end you will
17 see where his son's parcel including his cost in there.
18 And what they tried to argue, Your Honor, is the inclusion
19 of those three words means the son was a party to this
20 agreement. That is simply not the case. The son was not
21 a party to this agreement. There is no signature for the
22 son, there is no contemplation that the son was supposed
23 to have signed this November 23rd agreement. And in fact
24 the use of the word parties in the agreement tells us
25 exactly what that word has to mean in this context. For

1 example, the last point says the litigation, mutual
2 releases among all parties. The parties are not Mr.
3 Byrd's son. The parties are parties to the case. And,
4 Judge, I have left out one big fact and I apologize for
5 just going in and jump back. Here is why the son is
6 relevant to all of this. The first piece of property that
7 I mentioned was bought by a third party way back in May of
8 2007, one that is between Mr. Byrd's property and the
9 public access point. That piece of property was
10 subsequently purchased by Mr. Byrd's son ten months after
11 this lawsuit was filed. So, in August of 2008 as a result
12 of Mr. Byrd's son purchasing the intervening piece of
13 property you now have a public road, Mr. Byrd's son as an
14 owner of a parcel, Mr. Byrd as an owner of a parcel and
15 TIAA. And I apologize that I sort of left out that
16 theory. So, to move back to this agreement, that is why
17 there is a reference to this document to Mr. Byrd's son
18 because at the point of the settlement Mr. Byrd wanted the
19 benefit of his son. In other words, the maintenance and
20 all the narrowing of the easement would apply to his son
21 as well. So, what is why those words are in there.

22 MR. BRACKETT: For the record, Your Honor, that
23 matter is not in evidence. With respect to motivation to
24 inducement at the mediation conference, that is not in
25 evidence. The documents speak for themselves.

1 THE COURT: I understand, we are trying this without
2 a jury though and I will take this as his position as far
3 as what the, what his client's position is.

4 MR. COSKREY: And, Your Honor, Mr. Bufkin's affidavit
5 is in the record. So, in any event back to the agreement
6 from November of 2009 there are those three words and it
7 is on the basis of those three words, son's parcel
8 included that Mr. Byrd attempts to argue here that there
9 was some party to this agreement that he didn't sign,
10 can't be found. Judge, let's assume the Court agrees on
11 the basis of the son's affidavit which is in the record
12 where he says I didn't give anybody authority to act on my
13 behalf. I don't want to be bound by this. Let's assume
14 the Court has the benefit to that. If the son is not
15 bound by this agreement that has nothing to do with
16 whether the father is bound by the agreement. The father
17 is the party to the lawsuit and that is the fact that what
18 we are here that I was talking about. Now, the subsequent
19 documents that were drafted that I mentioned that followed
20 this agreement, because they followed this agreement
21 anticipated the son's participation. But if he doesn't
22 participate because he says I don't want to participate he
23 is going to still be bound by the 66 foot easement and the
24 rest of it. That is fine, all he needs is those documents
25 and the subsequent documents, not the November document

1 but the subsequent documents get tweaked to reflect the
2 agreement from November. In other words the son doesn't
3 sign a document, it doesn't apply to the son, et cetera,
4 et cetera. So, again it is easy to get distracted what we
5 are talking about but the agreement we are here to enforce
6 is this November 2009 agreement. And that is the one that
7 has three parties, three parties to this lawsuit and those
8 three parties are bound. Your Honor, a couple of more
9 really quick points and I appreciate the Court's patience
10 with me. On page 11 of our brief we included a quote from
11 Corbin on contracts that sort of nails this issue down.
12 It says a contracted party who agrees to render or produce
13 a result and success depends of the cooperation of the
14 nonparty. It is not usually excused when a nonparty fails
15 to cooperate. And that is what we are talking about, Mr.
16 Byrd, Sr., a party to this lawsuit cannot use his son's
17 unwillingness or lack of desire to be a part of all of
18 this to get himself off of this. It is Mr. Byrd, Sr. that
19 we are here about today, it is that November 2009
20 agreement that we are here on today and all of the cases
21 talking about the importance of enforcing settlement and
22 policies applies full on here. And for that reason we
23 would ask the Court to grant the motion to enforce the
24 settlement, to allow the parties to draft documents that
25 accurately reflect the Court's ruling and let us be done.

1 with this. Judge, that is my argument and before I turn
2 the stage over to Mr. Brackett I object that he is going
3 to try to put on live testimony here today. The rules
4 that a motion indicate that affidavits are asserted two
5 days before the hearing, anticipate the affidavits are not
6 live testimony is the appropriate way to respond to a
7 motion like this.

8 MR. BRACKETT: I don't intend to call a witness.

9 MR. COSKREY: Okay, I am sorry, Your Honor. I am
10 done, thank you.

11 THE COURT: I heard that earlier too, I just thought
12 it would take four hours to have this matter heard today
13 and I am wondering what I am going to do with the rest of
14 my morning since it is not going to take four hours, since
15 we are not going to take live testimony. All right, Mr.
16 Brackett, I will be happy to hear from you.

17 MR. BRACKETT: Thank you, Your Honor, may it please
18 the Court.

19 THE COURT: Yes, sir.

20 MR. BRACKETT: The first argument that we present is
21 that the agreement in principle and make no mistake about
22 it, it is the agreement in principle, that is the title,
23 the document that was placed on there by the three parties
24 to the lawsuit. It is not a settlement document, it is
25 referred to differently in the defendants brief in an

1 effort to do away with the term agreement and principle.
2 Now, we take the position that that is an agreement in
3 principle but it never rose to the level of an enforceable
4 final contract. Now, citing the case law that says, the
5 use of the term agreement in principle in and of itself is
6 indicative of the lack of the meeting of the minds at the
7 time that document is signed and that we are going, we are
8 not bound now, we may be bound at some point in the
9 future. So, the name the parties put on the document
10 itself is indicative--

11 THE COURT: That was the findings exactly what the
12 intentions of the parties at the time it was executed.

13 MR. BRACKETT: It basically says if we have an
14 agreement at all it will happen sometime later. This is
15 not necessarily it. Now, we take the position that there
16 was not a meeting of the minds on the part of all of the
17 parties to the agreement and without the meeting of the
18 minds the part of all of the parties there is no contract,
19 never rose to an enforceable contract. Now, Mr. Coskrey
20 argued, argument, his argument assumes that all he is
21 trying to do is to enforce a final completed contract set
22 out on the face of the November 2009 document. He tries
23 to discount entirely the role that the Byrd's, we call him
24 Byrd's son, plays in this series of events. Now, the
25 agreement in principle says a more formal document will

1 follow. That is not the issue in this case. It is simply
2 is not and for that reason the Sadighi case has no
3 application. In the Sadighi everyone who was suppose to
4 sign the final agreement, everyone who was a party to the
5 settlement signed it. There was no issue in that case
6 about someone having been left out and some necessary
7 party having signed onto the agreement. That is simply
8 not the issue in this case. What we have here is the
9 issue of whether or not the parties intended that this
10 settlement would be a four party settlement, not a three
11 party settlement. Now, the reason that the agreement in
12 principle is only signed by three parties is because the
13 Byrd's son was not a party to the lawsuit, he was not a
14 party to the mediation conference. All of this is
15 established by his affidavit which is exhibit 5 to the
16 plaintiff's memorandum. By the way, Your Honor, you
17 should have before you the plaintiff's memorandum that was
18 filed back in late May, early June and it has five
19 exhibits attached to it. Exhibit 5 is the Byrd's son
20 affidavit where he clearly says he had nothing to do with
21 this process, didn't know about it prior to the fact,
22 doesn't agree with it, isn't a party to, is not going to
23 sign anything. Now, how do we know, how do we know that
24 it was the intent of the agreement in principle that this
25 was going to be a four party settlement. If you look at

1 exhibit 1 to the memorandum the agreement in principle,
2 first provision, son's parcel included. Now, that is what
3 it says. So the son was contemplated, was intended to
4 bind himself to the terms of this agreement and to have
5 his land be subject to the same terms that are set out in
6 the agreement in principle. So that document contemplates
7 itself. If you look to exhibit 2 to the memorandum, this
8 is the more formal settlement document that is to follow
9 that is referred to in exhibit 1. If you go to the very
10 first paragraph on exhibit 2. By the way this document
11 was prepared by defendants counsel. Look at the
12 introductory paragraph. It identifies three parties,
13 Byrd, the father; Judy Livingston, TIAA referred to
14 collectively as litigation parties and then it says to the
15 extent described herein Forrest Byrd, II, Byrd's son, is a
16 party to this agreement. There is nothing ambiguous about
17 that. The litigation parties and Byrd's son shall be
18 referred to herein as the parties. Notice they are
19 referred to collectively as the parties. They are not
20 referred to as individual parties, joint and several
21 parties, they are referred to collectively as the parties.
22 And then if you go on to page 2, the third paragraph of
23 this more formal proposed agreement, therefore in
24 consideration of the actions, rights, obligations
25 described herein, et cetera, each of the parties, the

1 parties agree, stipulate and promise, that is a defined
2 term in there, that includes all four of them. It doesn't
3 include three, they could of said that if that is what
4 they intended but that is not what was said. If you want
5 to talk about what is most indicative of the intent of
6 these people it is what was proposed in this more formal
7 agreement drafted by the defendants lawyers. If you go to
8 page 7 of that exhibit there is the signature page. He
9 was suppose to be a signatory to this thing. There is no
10 condition attached to it, there is no maybe if he doesn't
11 want to sign he doesn't have to sign, they didn't put any
12 of that sort of wiggle room in here. This is pretty
13 definitive stuff. Then if you go to exhibit 3, this is
14 the new, I am sorry, this is the cancellation easement,
15 cancellation of easement that is actually in the heart of
16 the dispute of the lawsuit. And if you go to the forth
17 page of that you will see it was prepared for the
18 signature of the Byrd's son. And he is also identified in
19 the very first paragraph as a party to the cancelation of
20 the easement. Again, no qualification, no conditions.
21 Then if you go to exhibit 4 this is suppose to be the new
22 easement and a document drafted by defendants attorneys.
23 The son was intended to be a grantor. We know that
24 because it says so right on the first page of the easement
25 agreement. And if you go over to the signature page he

1 was intended to sign. Now, so what was contemplated by
2 the parties when the agreement in principle was signed and
3 when the more formal documents were prepared and
4 presented, what was contemplated was a four party deed. I
5 have cited for Your Honor the Dean opinion, South Carolina
6 Supreme Court opinion, it discusses the issue in this
7 case. What happens when a proposed contract that involves
8 multiple parties in the event of a proposed contract
9 involving multiple parties but one of those parties
10 refuses to sign. Some sign and some don't. Now, keep in
11 mind the formal agreement, the formal documents were never
12 signed by anybody to my knowledge. The only thing that
13 has a signature on it is the agreement in principle. And
14 the Dean opinion says in the absence of agreement of
15 execution by all parties it is not an enforceable contract
16 as to those who even did sign. So the fact that it was
17 contemplated and be a four party deal Dean's son says, no
18 thank you, I don't care to be involved in this then there
19 is no contract. The Sadighi case doesn't talk about this
20 issue. Notice that the agreement in principle nor any of
21 the proposed or formal settlement documents speak in terms
22 of if Byrd's son refuses to sign the other three parties
23 agree to be bound. It doesn't say that. It also doesn't
24 say that the obligations under this agreement are joint
25 and several, it doesn't say that they are individual

1 obligations, they are always treated as collective
2 obligations. The alternative argument we present, Your
3 Honor, is if it were to happen but the Court concluded
4 that there was indeed a contract for obtaining some terms
5 Our argument is that the parties intended or contemplated
6 that there would at least be a condition precedent to
7 performance of the contract and that would be that the son
8 would have to agree to sign on. Without that condition
9 precedent being satisfied no one else has any obligations
10 under the contract. That is the law of condition of
11 precedent. And so without the son agreeing, this is not
12 the situation Mr. Coskrey cited in contracts. If a party
13 is looking for the cooperation of somebody else, what this
14 entails is far more than just asking for cooperation from
15 a non-signatory third party. What we are talking about
16 here is having a nonparty to the lawsuit become a party to
17 the settlement agreement. We are not looking for
18 cooperation, we are looking for a meeting of the minds
19 agreement, a name on the dotted line. And we didn't get
20 any of that from the son. That might of been what
21 everybody wanted, what everybody hoped for at the time but
22 it just didn't happen. I don't represent the son, all I
23 can do is report what happened. So, under the two
24 theories, those two arguments, one there is not a contract
25 at all and number two, alternatively there was a failure

1 of the condition precedent then there really is no
2 enforceable settlement agreement in this case. Thank you.

3 THE COURT: All right.

4 MR. COSKREY: Thank you, Your Honor, I will be brief.
5 What counsel intends to do and it is a bit in this
6 direction, it is an attempt to define the parties to the
7 November of 2009 agreement by taking that term out of the
8 subsequent document. And saying here is the definition
9 that came up on the subsequent document. There are three
10 parties to this agreement, they all signed the agreement
11 in November of 2009. The first line of the agreement from
12 November says undersigned parties. The next to the last
13 bullet point says that the cost shall be split equally
14 among the parties. And, again, we have in the record
15 through the affidavit of Mr. Bufkin, the cost will split
16 three ways between the three parties. This did not need
17 another signature, it needed the three signatures that it
18 had, those are parties to the agreement. Mr. Byrd signed
19 the agreement himself after nine hours of mediation. He
20 is bound by it. This is not as counsel argued a four
21 party deed. Surely the subsequent documents include the
22 son, no doubt about it, no question about it. Again, that
23 was a benefit that was anticipated in this agreement. But
24 the question isn't whether the subsequent document is
25 enforceable. Counsel is right, that was never signed.

1 The question is whether this document from November of
2 2009 is enforceable. And it is clear that it is, it meets
3 all the contractual prerequisites for a binding agreement.
4 Very briefly, the agreement principle argument, Your
5 Honor, is completely shot down by the Sadighi case. That
6 case makes clear that the way is controlling are all the
7 circumstances that is allowed for to discern the intent of
8 parties. I won't go back through all of that. But, Your
9 Honor, not only from contents of the November document but
10 also from the subsequent actions of the parties. They
11 believe themselves to be bound and in fact carried out
12 this agreement at least as far as the survey is concerned.
13 This is not a condition of precedent analysis, I know it
14 has been a long time for any of us to be in first year
15 contracts. We are all struggling to find the right
16 contract document, doctrine to talk about. But it is not
17 a condition of precedent analysis at all. A precedent in
18 a contract is something that says once this trigger
19 happens, once the son rises in the East, once something
20 happens then your obligation as a party to this contract
21 arises, it emerges. That is what a condition of precedent
22 is and that is not at all, there is nothing like that in
23 this November of 2009 agreement. It is the wrong analysis
24 and there is, if we are looking for a first year contract
25 analysis it is severability, this is discussed in our

1 brief. The question whether those three words can be
2 severed properly from this agreement. So, in conclusion,
3 Your Honor, it is easy as I said earlier to get distracted
4 from which agreement we are trying to enforce. We are
5 here to enforce the one that Mr. Byrd signed. Thank you.

6 THE COURT: Before we go back to you, Mr. Brackett,
7 let me ask real quick. Where does that leave, let's
8 assume I agree with you and find the Byrd father and don't
9 find Byrd son which I am having a, I think that is as good
10 as you are going to be able to get, that I agree. You
11 still have got a 66 foot easement running across one piece
12 of property and then there is a 25 foot easement?

13 MR. COSKREY: Yes, sir.

14 THE COURT: And then you have to bring another
15 lawsuit or somebody has to sue for his son, correct?

16 MR. COSKREY: Well, no sir. We have as of record, a
17 66 foot easement across that property.

18 THE COURT: All right. Mr. Brackett.

19 MR. BRACKETT: Your Honor, what the agreement in
20 principle essentially says in every day street language
21 is, we will agree to this if Byrd's son agrees. It says
22 that the son's tract is to be included. No one at that
23 mediation table had the authority to bind Byrd's son's
24 property. It just couldn't happen. And what opposing
25 counsel now proposes is, well, if we can't get him on we

1 are just going to pretend this language isn't in there at
2 all. That it had no role to play in the fact that we
3 signed an agreement in principle. So we are just going to
4 ignore it. Can't do that.

5 THE COURT: I don't disagree with you, Mr. Brackett,
6 from a legal standpoint. And I realize that perhaps you
7 were not involved with the mediation that took place in
8 November. Isn't there a strong likelihood that everyone
9 there including your client had a reasonable belief that
10 the father had some influence over the son or at least had
11 consulted with the son regarding this adjoining piece of
12 property?

13 MR. BRACKETT: Absolutely not. If anybody thought
14 that that was just a mere assumption on their part, there
15 is no evidence in the record that that was the case. The
16 son's affidavit says that he didn't know anything about it
17 until after the fact. In other words, he said I wasn't
18 consulted about it, nobody asked me about my position on
19 this. And that is his affidavit. So, there is nothing in
20 the record about whether, that says or suggest that
21 Forrest Byrd had apparent authority to act as an agent for
22 the son. Nothing of record to suggest that. The way it
23 all played out was, everybody thought that, everybody knew
24 that Byrd's son's adjacent property was subject to the
25 same claims with respect to easements and that it would be

1 beneficial to everybody to enter into an agreement if it
2 also could bind Byrd's son. That is what the agreement of
3 principle says. That language is in there regardless of
4 how much opposing parties want to ignore it. It is in
5 there and that intent and contemplation is firmly shown by
6 the subsequent settlement documents that just expressly
7 included Byrd's son without, didn't give him any exit from
8 that. You are either a party or you are not, you are
9 either a signatory or you are not. And so what happened
10 was the intent of these parties just didn't work out.
11 They tried real hard but it just didn't work. Byrd's son
12 said no, I am not interested in that. And so in our view
13 there is no meeting of the minds or all of the essential
14 terms as described in the document.

15 THE COURT: I don't necessarily disagree with you.
16 But the problem is and I realize there is no apparent
17 authority, there is no evidence from A to Z or anything
18 like that. But the only way that the Byrd's, I don't see
19 any other way that the reference to the Byrd's son in the
20 November document would be entered in there unless your
21 client had interjected that in some way, shape or form.
22 That settlement hearing which of course neither you nor I
23 were present at that. I mean where did that come from.

24 MR. BRACKETT: I don't know, I wasn't there, there is
25 no transcript. That in and of itself is a separate, could

1 be a separate disputed factual issue about who said what
2 and who in turn did what you said to mean this. That
3 opens up an entire different can of worms. The point of
4 trying to put it in the form of a written agreement under
5 the merger and all of that stuff, if you have a written
6 agreement it is suppose to merge all of the prior
7 conversations and negotiations. If they wanted to qualify
8 the agreement in principle by saying that Forrest Byrd has
9 represented that he has authority to speak for his son and
10 the son's parcel is going to be included in this
11 agreement. That could of all been spelled out. It
12 wasn't. So, all we know from the document itself which is
13 the controlling document in this case, everybody
14 contemplated that Byrd's son would be a forth party.

15 THE COURT: How does it hurt your client if I were to
16 say your client is bound by the November agreement and
17 that the son is not.

18 MR. BRACKETT: Now, if that is the case then you are,
19 you say he is bound by the agreement--

20 THE COURT: If I say I can sever that portion of the
21 agreement under the first bullet point, the son's parcel
22 included. Let's assume I say I can sever that how he is
23 harmed.

24 MR. BRACKETT: He is harmed because that wasn't the
25 deal he entered into. That wasn't the agreement. The

1 agreement was that his property and the adjacent property
2 are going to be treated the same for purposes of however
3 this easement turns out, whether it is or is not an
4 enforceable easement, how that thing works out. That was
5 the deal. The motive behind it is, that is not the
6 question, Your Honor, with all due respect.

7 THE COURT: I understand. It just appears like your
8 client has a little bit of buyers remorse.

9 MR. BRACKETT: Pardon me?

10 THE COURT: It just seems to me it looks like your
11 client has some buyers remorse.

12 MR. BRACKETT: Well, talk about buyers remorse, we
13 can lay some of the factual background that Mr. Coskrey
14 didn't tell you about that this written easement agreement
15 that they rely on was signed in secret, nobody told my
16 client about it. It wasn't recorded, it wasn't recorded
17 until after his deed was recorded. It was absolutely done
18 in secret. My client could of left the closing, Your
19 Honor, on July the 20th, he could of left the closing,
20 gone to the Court House, he would not have found a written
21 easement of record on that day because they didn't record
22 it. They were hiding it from him. Now, that is the
23 background.

24 MR. COSKREY: Judge, very briefly.

25 THE COURT: Yes.

1 MR. COSKREY: Nothing was hidden, it was in his own
2 deed. Mr. Byrd's own deed and surveyed, referenced the 66
3 foot easement. It is just an--

4 MR. BRACKETT: And if he goes to the Court House you
5 stop there.

6 MR. COSKREY: Excuse me--

7 MR. BRACKETT: They are referring to a document--

8 THE COURT: No, Mr. Coskrey, go ahead.

9 MR. COSKREY: And I think that all of that is
10 extraneous to this motion but I just don't want that
11 record to go on the record. It is in his own deed. Very
12 briefly, back to the actual pertinent issue that we are
13 here about today, Judge. Mr. Bufkin's affidavit does
14 address Your Honor's question about what Mr. Byrd
15 expressed an interest in having his son included and how
16 that came about. It is paragraph 2 of Mr. Bufkin's
17 affidavit which is in the record. Also relevant to Your
18 Honor's question which is this obvious point which is
19 everything, I understand Your Honor is not going to bind
20 the son to this and I understand why. But one has to ask
21 what is going on here when every bit of this November
22 agreement is to the benefit of the son. Surely he comes
23 in and says I don't want to be bound, perhaps that is his
24 right. But relevant to Your Honor's question of what is
25 going on here in terms of Mr. Byrd and whether he wanted

1 this included or not is that fact, ever bit of this was to
2 benefit his son. And the last point, in fact the son does
3 not have the same arguments that his father has with
4 respect to the easement. The son in fact, when I say he
5 can sue I don't mean he can sue and he has meritorious
6 claims. He in fact does not have his father's same
7 argument because in fact the easement was clearly of
8 record by--

9 THE COURT: Was of record at the time, you did
10 mention that early in the factual recitation.

11 MR. BRACKETT: Your Honor, I would move to strike Mr.
12 Bufkin's affidavit, paragraph 2 on the grounds that
13 normally an affidavit from an attorney of record is
14 considered only on matters of laying foundations for more
15 or less ministerial things. A lawyer of record is not
16 committed to inject into the record matters or arguments.
17 He has attempted to be an evidentiary fact witness in this
18 case by having included this type of information. And
19 that is impermissible to do and for that reason, Your
20 Honor, I would move that that portion of his affidavit
21 would be stricken. I would say that the law argumentative
22 for attorney affidavits in striking of that sort of
23 material I would cite Forrest versus Hartford, (phonetic),
24 192 Fed, decision 592, 1999 decision.

25 THE COURT: Thank you, sir.

1 MR. COSKREY: Judge, if I may, we don't agree that
2 that should be stricken obviously. But even if the Court
3 did not have Mr. Bufkin's affidavit which is a silence
4 from Mr. Byrd there is nothing in the record for Mr. Byrd
5 on this point. And the obvious point that I made a minute
6 ago that all of these terms benefits his son so the Court
7 can draw whatever inference he chooses from that.

8 THE COURT: All right. Has everybody had their
9 peace?

10 MR. COSKREY: Yes, sir.

11 MR. BRACKETT: Thank you.

12 THE COURT: Thank you very much. If y'all have a few
13 moments if I can speak to y'all in chambers concerning
14 this case and some of the logistics. It is my
15 understanding that Judge Griffith has a conflict in
16 hearing this case, was he involved in some of this
17 litigation before he took the bench or how was he--

18 MR. COSKREY: My understanding, we argued this a
19 couple of weeks ago in front of Judge Griffith before he
20 recused himself and he indicated from the bench that day
21 that he had represented Mr. Byrd.

22 THE COURT: Let me discuss some of the logistics
23 involved with this with y'all in chambers if I may.

24 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
25

1 CERTIFICATE OF REPORTER

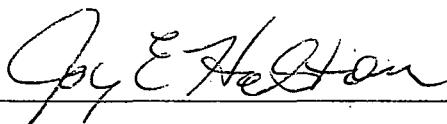
2 State of South Carolina)

3 County of Newberry)

4
5
6 I, Joy E. Holston, Official Court Reporter for the
7 Eighth Judicial Circuit of the State of South Carolina, do
8 hereby certify that the foregoing is a true, accurate and
9 complete transcript of record of the proceedings had and
10 evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of Common Pleas for
12 Newberry County on the 30th day of June, 2010.

13 I do further certify that I am neither of kin,
14 counsel nor interest to any party hereto.

15
16 February 16, 2011
17

18 
19

20 Joy E. Holston, Court Reporter

21 My Commission expires: March 13, 2016
22
23
24
25

STATE OF SOUTH CAROLINA

FILED
NEWBERRY COUNTY

IN THE COURT OF COMMON PLEAS

COUNTY OF NEWBERRY

2010 AUG 17 P 20089CP-36-428

JACKIE S. BOWERS
CLERK OF COURT

Forrest Byrd,

Plaintiff,

vs.

Plaintiff's Rule 59(e) Motion
For Reconsideration

Judy Livingston and
TIAA Timberlands, II, LLC,

Defendants.

To: Defendants and their attorneys.

Pursuant to Rule 59(e), SCRCP, Plaintiff moves the court to reconsider and to amend its Order dated July 30, 2010, filed August 3, 2010, served by mail on August 5, 2010 and received by the undersigned on August 6, 2010, on the general ground that the Court has wrongly decided the issue of the enforceability of the Agreement in Principle. The particular grounds are:

Partial and Misleading Factual Recitation

1. In the Facts section of the Order the key document at issue is identified as the "Settlement Agreement," when it was clearly titled by the signatories as an "Agreement in Principle." In this case, the terminology used by the parties themselves on the key document is of utmost importance. The Plaintiff signed an "Agreement in Principle," not a "Settlement Agreement." The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

2. In the Facts section of the Order, when describing the more formal documents contemplated by the parties in the mis-named Settlement Agreement, no mention is made of the undisputed fact that the subsequent more formal documents were prepared by the Defendants' attorneys and that the documents show, on their face, that Byrd Son was considered to be a party to the agreement and was to be a signatory. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.
3. In the Facts section of the Order, when describing the more formal documents contemplated by the parties in the mis-named Settlement Agreement, no mention is made of the fact that the formal settlement documents prepared by the Defendants' attorneys did not identify Byrd' Son as a discretionary signatory or a conditional signatory, or any similar description. He was identified in the proposed Settlement Agreement and Release as a party to the agreement. ("These three persons [Byrd, Livingston and TIAA] shall be collectively referred to as 'the Litigation Parties.' **In addition**, to the extent described herein, Forrest Byrd II (**"Byrd Son"**) **is a party to this Agreement.**") (emphasis added). It could not be stated more clearly. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

Errors of Law

4. Whereas the central issue presented is whether the "Agreement in Principle" was a joint contract requiring signatures of all intended parties to be effective, as determined by the title of the document; the content of the document, all subsequent conduct of the parties and not just selected cherry-picked portions of the subsequent conduct, the Order skirts the central issue by addressing individual considerations in a vacuum. The various subjects addressed

in the Order: effect of formal agreement to follow, subsequent behavior of the parties, use of the term “agreement in principle,” are not individual grounds for finding the agreement unenforceable, rather they comprise the body of evidence that collectively demonstrate that Byrd Son was intended by the above-captioned parties as a party to a joint agreement whose personal agreement and signature was required. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

5. In section A of the Order, the Court reviews general contract principles applicable to settlement agreements and concludes that “This Court’s task, therefore, is to look at all the circumstances, both at the time of the settlement and following, to determine if **the parties** intended to be bound and if they stated the material and essential terms of **their settlement** in the November 23, 2009 Settlement Agreement.” (Emphasis added). This ignores, and assumes as established, the issue of just who the “parties” were and what was “their” settlement. Consequently, the Order erroneously describes the central issue to be determined to decide the motion. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.
6. In section B of the Order, the Court holds that the provision in the November 23, 2009 Agreement in Principle that a formal written agreement is to follow is not, by itself, determinative of the question whether the November 23, 2009 Agreement in Principle is binding on those who signed it. The Court relies on Sadighi v. Daghighfekr, 66 F.Supp.2d 752 (D.S.C. 1999) to hold that “the mere fact that a formal agreement would follow is not fatal to the enforceability of the settlement.” This is error because the issue and facts in Sadighi are easily distinguishable from the case now before the court- it did not involve a

disputed missing party, such as Byrd Son. In Sadighi all parties participated in the negotiation and it was one or more of those parties who refused to go forward with the settlement, arguing that the initial writing called for a subsequent more comprehensive settlement agreement. There was no missing signatory in Sadighi. If the Agreement in Principle herein did not refer to Byrd Son's property as being included in the settlement, and if the subsequent documents were prepared only for the signatures of Byrd, Livingston and TIAA, and if one of those three parties tried to subsequently disavow the settlement, Sadighi would be supporting precedent. But, that is not the situation presented. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

7. In section C of the Order, the Court relies on subsequent action of the three parties to the agreement in principle to discern the intent of its signatories. More accurately, the Court relies on only on certain aspects of the subsequent actions and totally ignores, and fails to even acknowledge, other very telling and relevant behavior.

The Order reviews subsequent informal emails that are used to support the conclusion that Byrd' attorney believed the terms of the agreement in principle to be binding in and of themselves without regard to Byrd Son's participation. But, on this score the Order cherry-picks emails, and it is internally inconsistent because

(a) the Order only partially quotes the emails (introduced as attachments to attorney Coskrey's affidavit) without disclosing other portions of the emails, such as:

Parker (Byrd's attorney) writing on December 15, 2009 "I'll send some **revised language**, hopefully this afternoon;" (if an agreement had been reached, what would be the need for revisions);

Also on December 15, 2009, Parker wrote to Coskrey "It may be tomorrow before I can get back to you on the settlement agreement. I am waiting to hear back from Mr. Byrd **on my suggested changes;**"

On January 4, 2010 in his email to attorneys Savidge and Coskrey, Parker described the agreement as "the **prospective settlement**" and that he "will inform the court that **we are working on settling the matter. . .**" (Prospective is defined as looking forward into the future; not a term suggesting the existence of an agreement already in place);

In a second email on January 4, 2010 Parker wrote "I'll let you know what we've got **as soon as I have approval from these guys.**" (Emphasis added).

These emails show that, contrary to the message deduced by the Court, attorney Parker did not then believe that the Agreement in Principle was final and already binding, and he believed that Byrd Son was a necessary party, and notwithstanding the obvious relevance of these emails, they are mysteriously absent from the Order and apparently from the Court's consideration.

(b) Additionally, when the Order identifies the subsequent behavior of the parties and their attorneys, that purportedly demonstrates that they intended to be bound by the terms of the Agreement in Principle irrespective of Byrd Son, the Order does not even acknowledge or disclose the fact that the subsequent formal settlement documents were prepared and presented by Defendants' attorneys and that the documents clearly and obviously contemplated and intended that Byrd Son was a party who was called on to execute the settlement documents. If anything, the content of the proposed more formal legal instruments

speaks more formally, directly and definitively to intent than do the abbreviated, informal emails relied upon by the Court in discerning intent. The Court apparently overlooked the best evidence of subsequent conduct. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

8. In section D of the Order, the Court completely discounts what the title "Agreement in Principle" says about intent. Standing alone, the heading offers little, but contrary to the Court's stated conclusion, this title or heading, in conjunction with the other facts of the case, particularly that a fourth person not present for negotiation and not a signatory to the Agreement in Principle, speaks volumes to the question of intent. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement..
9. In section E of the Order, the Court dodges the question of whether Byrd Son was an intended party to a settlement agreement that would be binding on Byrd, Livingston and TIAA. The Court focuses on the Agreement in Principle and concludes that it, standing alone, is binding as to its signatories without regard to its internal reference to Byrd Son and to the subsequent actions of the parties in the form of proposed formal legal instruments. The Court expressly held that enforceability of the Agreement in Principle was not to be guided by the subsequent documents. This is absolutely inconsistent with the portion of the Order where the Court wrote that "Where there is doubt about the parties' intend to be bound, Courts rely heavily on the subsequent actions of the parties in determining whether they intended to be bound at the time of the initial agreement." (Section C of the Order, citing Wright v. Trask, 495 S.E.2d 222 (S.C. App. 1997). This is a significant internal inconsistency demonstrating that outcome and not evidence and law is most influencing the Court's decision. If subsequent behavior reflects

the parties' intent, it is wrong for this Court to look to subsequent conduct in the form of informal and loosely worded emails in one portion of the Order and to expressly conclude elsewhere in the Order that formal and carefully chosen terminology within legal instruments is not relevant. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

10. The Order also remarks about Byrd Son's motivation for signing or not signing onto the agreement. The only evidence from Byrd Son in the record is his affidavit. Any conclusion coming from outside the affidavit is wholly conjecture, and it is error for the Court to engage in conjecture and double error to use said conjecture to decide the motion. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.
11. That Byrd may have insisted that Byrd Son and his property be included in the Agreement in Principle is no different than requiring other negotiated terms in the agreement that may prove later to be unattainable. The Court implies that Byrd had a dishonorable ulterior motive for including Byrd Son or that is unfair for him to now argue that the agreement is unenforceable because of the inclusion of the term he promoted. Inclusion of the term was agreed to by the three parties to the Agreement in Principle. It was not a term unilaterally slipped into the agreement by Plaintiff. If Livingston and/or TIAA objected to including Byrd Son, they could have said so and refused to sign the Agreement in Principle. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.
12. The Order finds that the term of the Agreement in Principle providing that Byrd Son's property is included in the agreement is severable from the remainder of the Agreement in

Principle. The Court rightly states that whether a term is severable is a matter of intent of the parties. The arguments addressed hereinabove on issues of intent are incorporated herein by reference. This includes the effect of the provision that a formal agreement is to follow, **all** subsequent behavior of the parties and use of term “agreement in principle.”

Further, in the portion of the Order discussing the inclusion of Byrd Son in the agreement and in particular the severance of the Byrd Son term from the agreement, the Court states that Plaintiff relied heavily on the case of Engineered Data Products v. Art Style Printing, 71 F.Supp2d 1073 (D. Colo. 1999). That is incorrect. In his memorandum of law, Plaintiff cited the Engineered Data opinion solely in support of the principle of law that as a rule, agreements in principle that refer to subsequent formal agreements are not binding. No other argument or position was taken for which Engineered Data was cited. Plaintiff relied on Dean v. Dean, 93 S.E.2d 206 (S.C. 1956) for its treatment of joint contracts that are signed by less than all intended parties. This is the central issue presented in this proceeding, but neither the issue nor the Dean opinion is discussed in the Order. The Order should be reconsidered, amended accordingly and should deny the motion to enforce settlement.

Rule 59 (e) Law

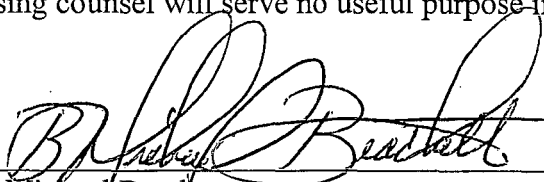
... it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as a “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. ... [the] purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits.

Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772 (S.C. 2004).

A Rule 59(e) motion for reconsideration may be made and granted for one of three reasons: (1) an intervening change in the controlling law has occurred since issuance of the original Order; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993). **Plaintiff seeks amendment of the July 30, 2010 Order herein to correct a clear error of law and to prevent a manifest injustice to the Plaintiff.**

In particular, the Court should reconsider the matters set forth herein and conclude that the parties to the Agreement in Principle intended, as reflected by the title they chose for the document, by the requirement that a formal written agreement would follow, by the formal subsequent documents prepared by Defendants' attorneys that expressly named Byrd Son as a party and provided for him to execute same, and by the law of Dean v. Dean, 93 S.E.2d 206 (S.C. 1956), that the Agreement in Principle is unenforceable as against its three signatories for the failure to receive the assent of Byrd Son, an intended party.

This motion will be supported by all matters of record herein and by the authorities cited herein and by authorities subsequently discovered that may be presented to the court. The undersigned certifies that prior consultation with opposing counsel will serve no useful purpose in this instance.


B. Michael Brackett
Moses Koon & Brackett, PC
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803.461.2312
Attorney for Plaintiff

August 16, 2010

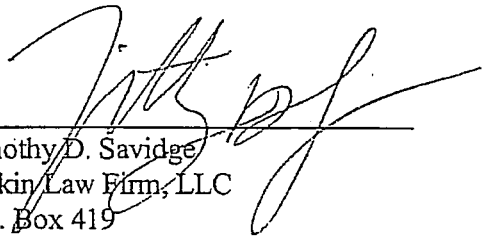
2. In reliance upon the Agreement, the Defendants' respective counsel prepared the necessary settlement documents and communicated said documents to Plaintiff's counsel on or about December 11, 2009. In further reliance upon the Agreement, Defendant Livingston incurred expenses to obtain a new plat reflecting the terms of the Agreement. Copies of the relevant formal settlement documents (unexecuted) are attached hereto collectively as "Exhibit B."

3. Despite repeated requests by Defendants' respective counsel, Plaintiff and Plaintiff's counsel have been unwilling to comply with the terms of the Agreement, execute the settlement documents, and dismiss this litigation.

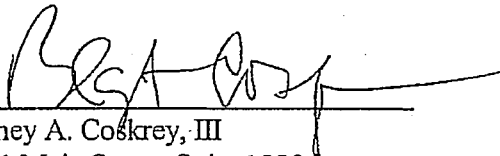
4. Defendants respectfully request that this Court (1) order the Plaintiff to abide by the Agreement that he himself executed, (2) order the Plaintiff to execute the settlement documents that have been prepared reflecting the terms of the Agreement, (3) and assess Plaintiff and Plaintiff's counsel for the attorneys fees and costs associated with this motion incurred by the Defendants.

5. This motion will be further based upon the pleadings that have been filed in this case, upon any memoranda filed with the Court, and upon applicable law.

6. The undersigned hereby certify that they have consulted with Plaintiff's counsel in attempts to resolve the issues raised herein, but that such consultations have been unsuccessful.



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Attorney for the Defendant TIAA
Timberlands II, LLC

February 19, 2010
Prosperity, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON and TIAA TIMBERLANDS,
II, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2008-CP-36-428

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO ENFORCE
SETTLEMENT AGREEMENT AND MOTION
FOR SANCTIONS/PETITION FOR RULE TO
SHOW CAUSE

COME NOW the Defendants, Judy Livingston ("Livingston") and TIAA Timberlands, II, LLC ("TIAA"), by and through their undersigned counsel, and submit this memorandum of law in support of their Motion to Enforce Settlement Agreement and Motion for Sanctions/Petition for Rule to Show Cause filed on February 19, 2010.

FACTS

The Plaintiff ("Byrd") entered into a contract with Livingston on May 31, 2007 to purchase approximately 53 acres (the "Parcel") from her. This contract resulted from Byrd being the high bidder on the Parcel at an auction conducted by J. Duncan & Associates, Inc. The Parcel contains a dirt road that crosses it leading to TIAA's property. This road has been used for many decades (the better part of a century), and is shown on at least one plat of record in Newberry County.¹ This road was discussed at the auction, and it was clearly shown on the auction materials (e.g. aerial photographs, advertising documents). At the auction, Livingston was represented by her real estate agent, C. Paul Major, of Major & Company, Inc. The parties proceeded to meet on June 27, 2007 to close on the sale of the Parcel, whereupon Major

¹ Plat prepared for George H. Caldwell dated February 2, 1993 and recorded on March 16, 1993 in the Office of the Clerk of Court for Newberry County in Plat Book S285 at Page 7.

discovered that the depiction of the road on the new survey was not shown as being 66' in width, as he believed Newberry County required.² Byrd also raised an issue with the amount of acreage that was shown on the new survey. The parties therefore agreed to recess and have a new survey prepared changing both the acreage to be deeded to Byrd and the width of the right-of-way.

Over the next several days, Byrd and Major sent e-mail communications back and forth regarding the width of the road: Byrd questioning whether a 66' width was necessary and Major expressing his understanding that a 66' width was required by the County. The new survey was subsequently obtained (showing the 66' wide right-of-way), and the parties met on July 10, 2007 to close on the sale. Byrd's deed was recorded on the morning of July 13, 2007. Byrd's own deed prepared by Byrd's own attorney stated: "This conveyance is made subject to right of way easement as shown on above mentioned plat." Complaint Exhibit C. The "above mentioned plat" clearly showed the 66' easement. Two days prior to the closing, Livingston executed a formal "Right-Of-Way Easement" document ("Easement Document") on July 8, 2007 which granted a 66' wide right-of-way to TIAA across the existing dirt road. The Easement Document was recorded on the afternoon of July 13, 2007, a few hours after Byrd's deed was recorded.

Byrd filed his Summons and Complaint on September 10, 2008 alleging that he had no idea of the Easement Document, that the execution and recording thereof by Livingston constituted a breach of contract, and that he should receive damages therefrom. He seeks (1) to quiet the title to his property by extinguishing the Easement Document, (2) to reform the deed to his property, and (3) to recover breach of contract damages from Livingston. Both Livingston and TIAA defend on the grounds that Byrd had actual notice of both the easement itself as well

²Major has testified that while the dirt road was physically between 15' to 20' in width, officials at the Newberry County Planning and Zoning Office told him that a 66' wide right-of-way would be required before the new survey could be recorded in the County land records, ostensibly because the survey represented a subdivision of

as the 66' width of the easement. TIAA also asserted several theories of implied easements – easement by prescription, easement by necessity, and easement by prior use. These theories would be necessary to resolve only if Byrd were to succeed in convincing the Court to extinguish the 66' easement referenced in his own deed. As a result, the Honorable D. Garrison Hill, with the consent of all parties, bifurcated the case, providing a schedule for first dealing with the 66' easement, and then depending on how that issue were resolved, a discovery period and trial on the implied theories. *See* Scheduling Order filed November 2, 2009.

During the discovery phase, the Defendants learned that Byrd's son, Forrest S. Byrd, II, had purchased a tract of land adjacent to Byrd's Parcel on July 31, 2009, some ten months after his father had filed this lawsuit. The dirt road that is the subject of this litigation crosses the son's property before it crosses Byrd's Parcel leading to TIAA's property. The written Easement Document burdens the son's property as well. Byrd did not name the prior owners of that parcel, Paul M. Saucier and Robert L. Rachals, nor did he add his son as a party when the purchase took place.

Following discovery and depositions, all parties voluntarily entered into a mediation³ of this case on November 23, 2009 at which the Hon. Clyde N. Davis, Jr., former Master-In-Equity for Lexington County served as mediator. All parties were present and represented by counsel. Mediation began at approximately 9:30 AM and lasted until late in the afternoon. The parties eventually reached a compromise on all issues and entered into a settlement agreement document embodying the terms of their agreement. Notably, the parties agreed to withdraw and cancel the existing easement, replace it with a new easement, establish a maintenance plan for the easement,

property, and the County has an interest in ensuring that roads to and across subdivided property are wide enough to permit future subdivision of property.

³ Pursuant to court rules in effect at the time this case was filed, Alternative Dispute Resolution was not

and obtain and record new documents reflecting these changes (including a new plat). The two (2) page settlement agreement was signed by the Plaintiff, Forrest Byrd, by the agent for TIAA, Anthony Wood, and by the attorney for Judy Livingston, Henry P. Bufkin.⁴

At the mediation, all the parties, including Byrd, agreed that it would be a good idea if Byrd's son's property could be brought under the terms of the new easement as well to maintain uniform width, maintenance terms, etc. Therefore, based on Byrd's representations that both he and his son desired the son's property's inclusion, a phrase was inserted at the end of the first paragraph of the settlement agreement document showing the parties' wish and intent that the son's property could be made a part of the settlement:

"25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock – express grant superceding and canceling the 66' grant, son's parcel included."

The settlement agreement contemplated that several other documents would be required, including a new plat, a document canceling the existing easement, a document creating the new easement, and a hunt club code of ethics. The parties did not have the ability to create these documents while they were sitting at the mediation table.

Immediately following the mediation, the parties undertook to begin preparing these documents as well as another more formal settlement document that clarified in more detailed language the terms of the settlement agreement. Once all these documents were prepared, all were sent to the Plaintiff's attorney, Kyle B. Parker, for his client's signature and also for him to obtain Byrd's son's signature. Over two months went by as counsel for all parties communicated back and forth about the various settlement agreement documents. Only in February, 2010 did

mandatory for cases filed in the Newberry County Circuit Court. South Carolina Supreme Court Order 2007-11-15-02.

⁴ Livingston had to leave the mediation conference before the settlement agreement was ready to be signed

the Defendants first learn that the Plaintiff intended not to honor the settlement agreement. Shortly thereafter Parker filed a Motion to be Relieved as Counsel, followed by a Notice of Appearance filed by Byrd's new counsel. This Motion to Enforce the Settlement was filed on February 19, 2010.

ARGUMENT

A. Law Applicable to Settlement Agreements Generally

The South Carolina appellate courts have made clear that issues relating to settlement agreements, including their enforceability, are to be analyzed under general contract principles. *Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC*, ___ S.E.2d ___ (Opinion 4446, Jan. 9, 2009); *Patricia Grand Hotel, LLC v. MacGuire Enterprises, LLC*, 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007). "South Carolina common law requires that, in order to have a valid 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). *See also Vessell v. DPS Assocs. Of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998) (applying South Carolina law). Where the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intention of the parties. *Id.*; *see also Mattox v. Cassidy*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986).

The critical question of whether there was mutual assent to be bound to the essential and material terms "is based upon the intent and purposes as shown by all the circumstances." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996); *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999) (applying South Carolina law). Those circumstances may include the actions of the parties themselves, as well as their attorneys. *Id.*,

so she could pick up her grandchildren from school. She gave Mr. Bufkin the authority to enter into the settlement

66 F.Supp.2d at 761. This Court's task, therefore, is to look at all the circumstances, both at the time of the settlement and following, to determine if the parties intended to be bound and if they stated the material and essential terms of their settlement in the November 2009 agreement.

B. Material and Essential Terms

After a full day of mediating the case, the parties reached an agreement as to the terms of a settlement the evening of November 23, 2009. They then typed those terms into a document, printed the document, had all parties and attorneys review the document, and then executed the document. The level of specificity of those terms included in the November 23, 2009 document leaves little doubt that the materiality issue is satisfied here. Those terms were:

- 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and cancelling the 66' grant, son's parcel included.
- maintenance/repair - SC voluntary forestry best management practices shall be followed - Each of the parties, after use, will put the road and/or property back in good or better condition than prior to use.
- TIAA/Hancock lessees, including hunt clubs, will be required to abide by the code of ethics in the lease currently used by TIAA/Hancock.
- double lock gate system will be employed.
- this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.
- any costs associated with carrying out the agreement, such as surveys (not

agreement on her behalf, and all parties consented to her departure.

including attorneys' fees) shall be split equally among the parties.

- Litigation dismissed, mutual releases among all parties.

Clearly, if this level of specificity is not sufficient, no case can ever be successfully and finally mediated. The parties carefully considered the essential issues between them, and resolved those issues. Forrest Byrd and the other parties signed the Agreement. That Agreement is enforceable.

C. Effect of a Formal Agreement to Follow

Byrd argues that the settlement was not final and binding because the parties indicated in the Agreement signed on November 23, 2009 that "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties." Formal settlement documents always follow mediations. The anticipation that another formal document will follow does not render the settlements reached at those mediations somehow unenforceable. This very argument was rejected by the U.S. District Court in *Sadighi*. In that case, the settling document stated that it "was not intended as a final expression of the terms of the settlement. The exact terms will be expressed in a more comprehensive Settlement Agreement." Based on that language, the party opposing enforcement had argued, as apparently does Byrd here, that the letter was not an expression of intent to be bound, but simply a preliminary, unenforceable statement.

Despite the inclusion of this language, the Court in *Sadighi* nevertheless enforced the settlement. Applying South Carolina law, the Court explained:

Failure to complete formal settlement papers does not indicate that a settlement agreement was not in fact reached. . . . Indeed, an intent to memorialize a contract in a subsequent writing will not prevent a reviewing court from finding an enforceable contract so long as the parties intended to be bound by the earlier documents. . . . [T]he actual signing of the formal settlement documents was a

“mere formality,” a memorialization of previously agreed upon terms, as the parties intended to be bound, regardless of an agreement to subsequently execute a formal Settlement Agreement.

Sadighi, 66 F.Supp2d at 763-64 (D.S.C. 1999) (citations omitted).

The Court’s reasoning in that case controls here as well. The fact that the parties intended to carefully embody the terms of the settlement in a subsequent formal document has no bearing on the enforceability of what was agreed to on November 23, 2009. The question remains one of intent: Did the parties intend to be bound by the document that they signed on November 23, 2009? The contents of the document, as well as the circumstances of its execution, indicate that they did intend to be so bound. Byrd’s argument regarding the alleged preliminary nature of the agreement is without merit.

D. Subsequent Actions of the Parties

Where there is doubt about the parties’ intent, Courts rely heavily on the subsequent actions of the parties in determining whether they intended to be bound at the time of the initial agreement. *See, e.g., Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222, 226 (Ct. App. 1997) (“[S]ubsequent acts are relevant to show whether a contract was intended.”) The *Sadighi* court noted that the attorneys acted in ways to indicate that they thought they had achieved a binding settlement. After the settlement was reached, discovery deadlines passed, no more depositions were taken, and deadlines for amendments to the pleadings passed. The Court noted: “This conduct speaks volumes.” *Sadighi*, 66 F.Supp.2d at 761.

In this case, Byrd’s attorney inquired by email as to where the formal agreement was, noting on December 7, 2009: “The quicker we can get this done, the better for everyone.” Coskrey Affidavit, Exhibit 1. After receiving the formal document, Parker later indicated on December 15, 2009 that he was going to send some revised language, then added: “Nothing

game changing or anything.” *Id.* On January 4, 2010, Parker wrote: “I have heard only a little from Byrd Son w/ respect to any changes he may have to the agreement” On January 19, 2010, Parker, having received another frustrated email from defense counsel about the delays, wrote: “I’m still trying over here. I’ll let you know the moment I have something for you. Believe me, I empathize with your position. Indulge me a little longer, however.” *Id.* On January 25, 2010, more than two months after the settlement, Parker wrote: “. . . I hope to get something to you this week. I am supposed to meet with Mr. Byrd again in the coming days, and will get back with you and Blaney then.” *Id.* A few days later⁵ Parker wrote that his client had been busy and he was going to meet with him the following Monday. *Id.*

These emails demonstrate that Byrd’s attorney believed the settlement to be binding, and had apparently run into problems with his own client. Parker served a Motion to Be Relieved as Byrd’s counsel on February 16, 2010. “It will never do, in the absence of fraud, to allow the undoubted attorneys of record for a party to a suit to enter into a solemn agreement to settle and adjust the issues and subject-matter of a suit and then later, if it is done, because for any reason the party is dissatisfied, to allow him to repudiate this agreement and employ different counsel to upset and set aside what his first counsel has done.” *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244, 246-47 (Ct. App. 2007).

In addition to the emails, counsel’s lack of compliance with the Scheduling Order in the case also indicates that everyone believed the case to be settled. Moreover, significantly portions of the Settlement Agreement were actually carried out. For example, the parties obtained the new survey contemplated by the Agreement signed on November 23, 2009. That survey was

⁵ The date stamp on this email is incorrect. As indicated in the forwarding email from Timothy Savidge, the email was actually written on January 29, 2010.

actually filed in Newberry County, a filing that would now have to be “undone” by Court order if the settlement is not enforced. See Motion to Enforce Settlement Exhibit B. The Agreement had provided that “any costs associated with carrying out the agreement, such as surveys (not including attorneys’ fees) shall be split equally among the parties.” Significantly for purposes of the intent question, Byrd’s attorney paid his one-third share of that survey. See Affidavit of Henry Bufkin. Moreover, Byrd’s attorney withdrew a pending Motion for Protective Order and to Quash Subpoena by letter to the Clerk dated January 5, 2010. As in the *Sadighi* case, “this conduct speaks volumes.”⁶

E. Inclusion of Byrd Son in the Agreement

Byrd Son purchased an adjacent parcel of property more than ten months after Byrd filed this lawsuit. Once the settlement was reached on November 23, 2009, because the easement affected Byrd Son’s land as well as his own, Byrd sought to include three words related to his son in the first term of the Agreement. That paragraph reads in its entirety:

25' easement (measured equally from center of the existing road)
for purposes of ingress and egress, runs with land, subject to
verification of feasibility by TIAA/Hancock - express grant
superceding and canceling the 66' grant, son’s parcel included.

Exhibit A to Motion to Enforce. The formal agreement, as well as the accompanying documents when they were drafted, included Byrd Son because that is what Byrd had indicated he wanted.

Now, having advocated including those three words, Byrd is trying to use their inclusion to

⁶ Byrd makes the argument that not all “parties” to the Agreement signed it, meaning that Byrd Son did not sign. See Memorandum in Opposition to Motion to Enforce Settlement, pp. 3-5. Byrd Son did not sign that Agreement because his father indicated he had authority. If Byrd did not have authority, actual, apparent, or other, then Byrd Son is not a “party” to the Agreement. This view is borne out by the fact that the use of the terms “parties” elsewhere clearly means only TIAA, Byrd, and Livingston. For example, Byrd’s attorney paid one-third (not one-fourth) of the cost of the survey. See Affidavit of Bufkin. The cost was to be “split equally among the parties.” Byrd’s argument confuses the issue by discussing in this context the draft of the later formal written agreement. That document is the wrong point of reference for the question.

nullify a binding settlement agreement, not just as to his son, but also as to himself.

Byrd Son now claims in an Affidavit that he “did not authorize anyone to speak for me or to act on my behalf,” which clearly arises solely for the purpose of trying to nullify his father’s own binding obligation. *See* Affidavit of Byrd Son ¶ 3. Even if the Court were to find that the Agreement of November 25, 2009 is not binding on Byrd Son, it is still binding on Byrd. This is the major error in the broad argument made by Byrd here. If he is right that his son cannot be bound, Byrd still bound *himself* with his signature on November 23, 2009. Entirely apart from the son’s obligations, Byrd personally agreed on behalf of himself to the terms of the document, and those terms are still binding on *him*. Providing signature lines for Byrd Son on the subsequent settlement documents was meant merely as a convenience for the Son to achieve uniformity with respect to the easement that crossed his land before crossing Byrd’s land. If the Court concludes Byrd Son is not bound, the formal agreement, the cancellation document, the survey, and the new easement would simply be drafted to reflect that their effects extend only to the parcel owned by Byrd, not by his son. The status quo, including the existing 66 foot easement, would remain in effect as to Byrd Son. Contrary to Byrd’s argument, the inclusion of the three words referring to his son’s parcel in the first paragraph of the settlement agreement has absolutely no effect on the enforceability of the settlement as to Byrd himself. *See* 14 J. Perillo, *Corbin on Contracts* § 75.8 (Rev. ed. 2001) (“A contracting party who agrees to render a performance or produce a result when success depends upon the cooperation of a nonparty is not usually excused when the nonparty fails to cooperate.”).

If Byrd’s representations at the mediation regarding his son’s wishes were found to be binding, the effect of that inclusion would be that Byrd Son would be burdened not by a 66 foot easement, but by a 25 foot easement. The fact that Byrd Son prefers a 66 foot easement to apply

to his property suggests that something very strange is occurring in these arguments. Byrd Son's claim in an Affidavit that he "did not authorize anyone to speak for me or to act on my behalf" clearly arises solely for the purpose of trying to nullify his father's own binding obligation. See Affidavit of Byrd Son ¶ 3. The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

Instead, the three words related to the son are easily severable without affecting the obligations of the parties to the agreement. A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent.

Columbia Architectural Group, Inc. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980).

Whether a provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867

(Ct. App. 2002). Here it is clear that the parties fully intended to settle this dispute entirely apart from the three words mentioning the son's parcel. If, as Byrd now claims, he had no authority to act on his son's behalf, then he could only have been acting on his own behalf. He was clearly agreeing to the terms of a settlement that addressed the rights and obligations of the three parties to that agreement: Byrd, Livingston, and TIAA.

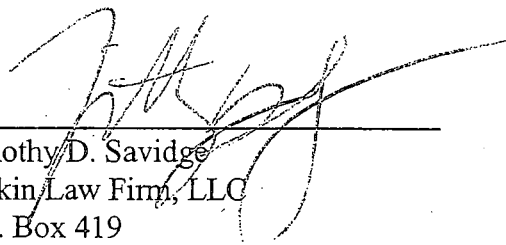
In short, whether the inclusion of three words referencing Byrd Son is analyzed under the doctrine of partial impossibility, severability, divisibility, or other basic contract principles, Byrd is bound to the settlement by his signature on November 23, 2009.

CONCLUSION

All parties to this litigation freely and voluntarily mediated this case in November, 2009 with the presence and advice of their respective counsel. The parties entered into a binding contract on that day that set forth all the material terms of a settlement of the case. Byrd is now

attempting to nullify the agreement by resorting to the argument that his son was a party to the settlement agreement but never signed it. On the contrary, his son was neither a party to the mediation, the agreement, nor the case as a whole. The inclusion of his son's property was intended by Byrd to benefit his son (narrowing the easement, maintenance guarantees, etc.). Using his son as a scapegoat to avoid his own responsibility should not be tolerated by this Court. Regardless of whether the Court finds the agreement enforceable against the Son's property, the agreement is enforceable against Byrd.

The Defendant respectfully request the Court to enforce the November 23, 2009 agreement, to Order the parties to draft and execute the formal documents embodying and carrying out the settlement, and to award Defendants costs and fees associated with the filing of this Motion. See *Cheap-O's Truck Stop, Inc. v. Cloyd*, 567 S.E.2d 514, 350 S.C. 596 (S.C. Ct. App. 2002) (willful disregard of settlement agreement gives rise to the full range of sanctions).



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Timberlands, II, LLC

June 10, 2010
Prosperity, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF NEWBERRY

2008-CP-36-428

Forrest Byrd,

Plaintiff,

vs.

Plaintiff's Memorandum of Law
In Opposition to Defendants'
Motion to Enforce Settlement

Judy Livingston and
TIAA Timberlands, II, LLC,

Defendants.

The above-named parties attended a mediation conference on November 23, 2009 resulting in the parties signing an "Agreement in Principal."¹ (**Exhibit 1**). The Agreement in Principal included Plaintiff's son as a party to the agreement notwithstanding that he is not a party to the action and was not present at the mediation conference. Subsequently, the Defendants prepared and delivered a more formal and detailed Settlement Agreement and Release (**Exhibit 2**), including a proposed Cancellation of Easement instrument (**Exhibit 3**) and a proposed new Easement Agreement (**Exhibit 4**) all purportedly required by the Agreement in Principal. Because Plaintiff's son does not agree with the terms of the Agreement in Principal and will not execute the proposed Settlement Agreement and Release and will not execute the new proposed easement instruments (**Exhibit 5**), the Plaintiff is no longer bound by the Agreement in Principal and is unwilling to execute the more formal and detailed Settlement Agreement and Release and Easement instruments. Defendants filed a motion to enforce the alleged settlement agreement.

¹ The Agreement in Principal was signed by the parties themselves and not by the attorneys or the mediator.

Plaintiff's position is that the Agreement in Principal never advanced beyond the negotiation phase (or the "agreement to agree in the future" phase) to become an actual contract that the Court can order the parties to carry out. Alternatively, Plaintiff argues that the Agreement in Principal, if it is a contract at all, is a contract with a condition precedent that, if not satisfied, excuses Plaintiff from having to perform any obligations under the Agreement in Principal.

1. Not a Contract. That the Agreement in Principal does not rise to the level of a "contract" is evidenced by the following:
 - a. It is well settled in South Carolina that settlement agreements are viewed as contracts. Harris-Jenkins v. Nissan Car Mart, Inc., 557 S.E.2d 708, 711 (S.C. App.2001); see also Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n., 540 S.E.2d 843, 845 (S. C. 2001) (enforcement of the terms of a settlement agreement is a matter of contract law); Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC, 649 S.E.2d 494, 501 (S.C. App.2007) Parties to a contract must manifest a mutual intent to be bound, and without the actual agreement of the parties, there is no contract. Timmons v. McCutcheon, 324 S.E.2d 319 (S.C. App.1984).
 - b. "As a rule, 'agreements in principle' that refer to subsequent 'formal agreements' are not binding." Engineered Data Prods., Inc. v. Art Style Printing, Inc., 71 F. Supp.2d 1073, 1078 (D.Colo.1999) (*quoting* Skycom Corp. v. Telstar Corp., 813 F.2d 810, 815 (7th Cir.1987). Agreement in principle is the sort of depiction that regularly is taken as an expression of a desire not to be bound. Id.
 - c. The Agreement in Principal in the case at bar was intended as a four-party agreement: the three parties to the pending action and the Plaintiff's son who owns the parcel adjacent to the

Plaintiff's parcel.² The road at issue traverses the son's parcel, and access to Defendant TIAA's land and access to Plaintiff's land from the public road must be across the son's land. Consequently, the width of the easement, the use and maintenance of the road/easement, the placement of the locked gate and access via the gate (all contained in the agreement in principal) would all affect the son's parcel. That the son was intended and expected to be a necessary party to the Settlement Agreement is also demonstrated by the content of the subsequent proposed Settlement Agreement and Release and the related Easement instruments, prepared and circulated by the Defendants' attorneys, clearly identifying Plaintiff's son as a party to and a required signatory to the agreement and the new easement.

- d. The Plaintiff's son was not a party to the action, did not attend the mediation either in person or by an agent, did not sign the Agreement in Principal, and has made clear that he will not sign the proposed Settlement Agreement and Release.³
- e C.J.S. has described the general rule as follows: "It has been held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it." Smith v. Worsham, 552 S.W.2d 367 (Mo. App. 1977), citing 17 C.J.S. Contracts §62. But, a close examination of the cases reveals that most courts look to the intention of the parties as the controlling factor. As was said in the Smith case:

² The second paragraph of the Agreement in Principal provides that the easement agreement includes the son's parcel (**Exhibit 1**), and the proposed instruments prepared by the Defendants to carry out the alleged settlement agreement all provide for the agreement and signature of Plaintiff's son. (**Exhibits 2, 3 and 4**).

³ See Forrest Steven Byrd, II's affidavit. (**Exhibit 5**).

Generally the authorities support the proposition stated in the encyclopedias and texts: One cannot correctly say, abstractly, that a contract signed by less than all the parties between whom it purports to be made is binding on those who did sign it, or that it is not so binding; the question is one of the parties' intention **as disclosed by the particular instruments and the conduct of the parties after the instrument was executed.**

Smith v. Worsham, *supra*. (emphasis added).

- f. The agreement, if any, envisioned and created by the agreement in principal was a joint contract or undertaking, requiring signatures of all intended parties to be effective.

This appears to be the law of South Carolina. In Dean v. Dean, 93 S.E.2d 206 (S.C. 1956), the Court considered the question of the effectiveness and enforceability of an agreement signed by less than all the intended parties. The Court quoted with approval 17 C. J. S. Contracts §62:

... The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed.

The Court then proceeded to determine the intent of the parties from the language appearing in the agreement. In the case at bar, nothing can better demonstrate the intent of the parties than the conduct of the Defendants after the Agreement in Principal was signed as reflected in the legal instruments prepared by the Defendants for the purpose of carrying forward the Agreement in Principal. In the proposed Settlement Agreement and Release (**Exhibit 2**) Plaintiff's son is identified as a party to the agreement; is identified as the owner of Tract B; that the right-of-way at issue crosses Tract B; and, most importantly, that the consideration for the agreement is "the actions, rights, and obligations described herein, including certainty as to the rights of **each of the Parties**,

the **Parties agree**, stipulate, and promise to the following terms of settlement.” (Emphasis added).

The parties and the obligations are referred to collectively and not individually.

The proposed Easement Agreement was prepared as one integrated agreement for the signatures of both the Plaintiff and his son. The proposed easement was not considered to be in the form of individual obligations and grants of easements (a separate easement instrument for each grantor). Plaintiff has certainly done nothing that can be described as having accepted and/or acted on the Agreement in Principal in the absence of his son’s ratification of the agreement.

Likewise, the Dean case addresses the requirements of joint contracts with respect to enforceability when everyone has not signed.

The general rule is that an obligation entered into by more than one person is presumed to be joint and that a several responsibility will not arise except by words of severance. In other words an obligation undertaken by two is presumably joint in the absence of express words to render it several or joint and several or of a statute declaring every contract, though joint in its terms, to be several as well as joint.

Where a contract is a joint contract, “. . . in the absence of signatures by all intended parties, it cannot be enforced against those who in fact executed it.” Id.

The Agreement in Principal is a joint contract containing no express words of severance.

Consequently, the indicia of intent discussed in the authorities above demonstrate that the Agreement in Principal at issue herein was not to become effective as to any party or parties unless and until agreed to by the person who was absent from the mediation and who did not sign the Agreement in Principal but nevertheless whose interests were expressly affected by the terms of the Agreement in Principal.

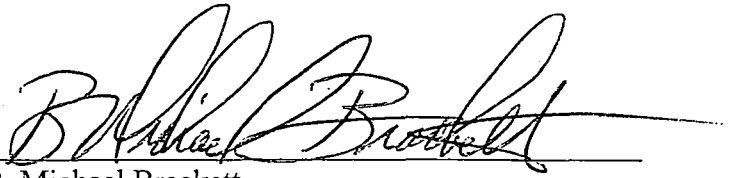
2. Condition Precedent is an alternate, but equally effective, principle of law that yields the same result. A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. Worley

v. Yarborough Ford, Inc., 452 S.E.2d 622 (S. C. App. 1994), citing 4 S.C. Juris. Actions, § 25 (1991). In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. Worley, supra., citing Ballenger Corp. v. City of Columbia, 331 S.E.2d 365 (S. C. App. 1985). 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.

The language of the Agreement in Principal as a whole, and the language of its separate provisions, the vast majority of those provisions affecting the interests of Plaintiff's son, show that without the agreement of the Plaintiff's son the benefits to be derived from the agreement by the other parties are rendered partial and incomplete. The language used in the Agreement in Principal created a condition precedent requiring that Plaintiff's son ratify the Agreement in Principal and sign the more formal and detailed Settlement Agreement to follow. Without satisfying the condition precedent, Plaintiff's performance under the Agreement in Principal is excused. Worley, supra.

Conclusion

For the reasons set out above: the absence of a valid and effective contract, and alternatively, the failure to satisfy a condition precedent, Plaintiff is not bound by, or is not required to perform pursuant to, the provisions of the Agreement in Principal and the proposed Settlement Agreement and Release, Cancellation of Easement, and Easement Agreement. The Defendants' Motion to Enforce Settlement should be denied.



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May 28, 2010

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CA No. 2008-CP-36-428

FORREST BYRD)

Plaintiff.)

vs.)

JUDY LIVINGSTON.
TIAA TIMBERLANDS. II, LLC)

Defendant)

Agreement In Principle

FILED
NEWBERRY COUNTY
2010 FEB 19 P 1:14
JAMES S. ROBERTS
CLERK OF COURT

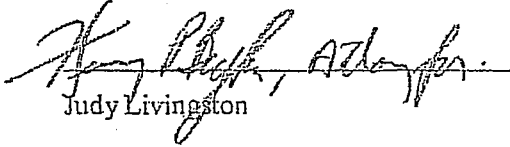
The undersigned parties, having mediated this matter on November 23, 2009, have reached an agreement in principle including the following terms.

- X 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and canceling the 66' grant, son's parcel included.
- X maintenance/repair - SC voluntary forestry best management practices shall be followed - Each of the parties, after use, will put the road and/or property back in good or better condition than prior to use.
- X TIAA/Hancock lessees, including hunt clubs, will be required to abide by the code of ethics in the lease currently used by TIAA/Hancock.
- X double lock gate system will be employed.
- X this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.
- X any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the parties.
- X Litigation dismissed, mutual releases among all parties.

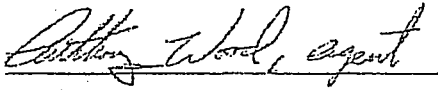




Forrest Byrd



Judy Livingston



TIAA Timberlands II, LLC by its
agent, Hancock Forest Management

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into by Forrest Byrd ("Byrd"), Judy Livingston ("Livingston"), and TIAA Timberlands, II, LLC ("TIAA"). These three persons shall be collectively referred to as "the Litigation Parties." In addition, to the extent described herein, Forrest Byrd II ("Byrd Son") is a party to this Agreement. The Litigation Parties and Byrd Son shall be referred to herein as "the Parties." Moreover, references to each of the mentioned referenced herein, unless otherwise noted, are intended to include successors and assigns.

WITNESSETH

WHEREAS, Byrd purchased land of approximately 53 acres from Livingston at auction on May 31, 2007, which purchase was finalized and closed on July 10, 2007, and which tract is shown on Exhibit A as Tract A ("Tract A"); and

WHEREAS, TIAA owns land adjacent to Tract A ("TIAA Tract"); and

WHEREAS Byrd Son owns land adjacent to Tract A, which tract is shown on Exhibit A as Tract B ("Tract B"); and

WHEREAS TIAA, its predecessors, agents, subcontractors, and lessees have for many years used a right-of-way crossing adjacent properties, including Tract A and Tract B; and

WHEREAS an express easement was drafted and filed to memorialize the rights of the parties with respect to the right-of-way, and recorded on July 13, 2007 in Newberry County at Book 01281, Page 00187 ("First Express Easement"); and

WHEREAS Byrd challenged TIAA's uses of the road contained in the First Express Easement; and



WHEREAS Byrd filed a lawsuit against Livingston and TIAA arising out of the purchase and easement rights, in the Newberry County Court of Common Pleas, such action bearing Civil Action No. 2008-CP-36-0428 ("the Litigation"); and

WHEREAS, the Litigation Parties mediated the case on November 23, 2009, reaching agreement as to the terms of a settlement;

NOW, THEREFORE, in consideration of the actions, rights, and obligations described herein, including certainty as to the rights of each of the Parties, the Parties agree, stipulate, and promise to the following terms of settlement:

1. **Warranties**

a. That the Parties have fully investigated all facts surrounding the various claims, controversies, and disputes, and the Parties are fully satisfied with the terms of this Agreement.

b. That the Parties have been fully informed and have full knowledge of the terms, conditions, and effects of this Agreement.

c. That no promise, representation, or inducement has been offered or made except as herein set forth, and that this Agreement is executed without reliance upon any statement or representation by or on behalf of the Parties.

2. **Dismissal of Claims**

The Litigation Parties agree to dismiss the Litigation, including all claims, counterclaims, and cross-claims.

3. **Release of All Claims**

Byrd, and Byrd Son, on behalf of themselves, their principals, agents, masters, servants, employers, employees, attorneys, insurers, successors, subrogees, assigns,

properties, general and limited partners, joint venturers, and parent, sister, subsidiary, and affiliated entities, releases and forever discharges TIAA and Livingston, and their principals, agents, masters, servants, employers, employees, attorneys, insurers, successors, subrogees, assigns, properties, general and limited partners, joint venturers, and parent, sister, subsidiary, and affiliated entities, of and from any and all claims, demands, damages, actions, causes of action, suits at law, or suits in equity, of whatsoever kind or nature that now exist or that hereafter may accrue, for or because of any matter or thing done, omitted, or suffered to be done by the parties hereby released, from the beginning of the world to the day of the date of these presents, and particularly, but without in any manner limiting the foregoing general language, on account of, arising out of, or in any manner associated with, first, the lawsuit filed against TIAA and/or Livingston.

4. Additional Terms

- a. **Cancellation of Existing Express Easement** - The First Express Easement dated July 8, 2007, signed by Judy Livingston, and recorded on July 13, 2007 in Newberry County at Book 01281, Page 00187 shall be cancelled. A copy of the document signed by the Parties and filed in the public record effecting this cancellation is attached here as Exhibit B.
- b. **Second Express Easement** - In its place, there shall be filed an express easement in favor of TIAA and its successors and assigns, twenty-five feet wide (measured equally from the center of the existing road) for purposes of ingress and egress, which shall run with the land. That easement ("Second Express Easement") shall grant rights across both Tract A and Tract B. A copy of the Second Express

Easement effecting this term is attached here as Exhibit C.

- c. **Maintenance and Repair** – Byrd, Byrd Son, and TIAA agree that each of them shall, after use, put the road and/or property back in good or better condition than its condition prior to that person's use. This promise by TIAA running to Byrd Son serves as part of the consideration supporting this Agreement. Maintenance of the road under this subsection shall be conducted in accordance with South Carolina Best Management Practices existing at the time as they apply to the maintenance of forest roads.
- d. **Lessees** - TIAA lessees and others using the road with TIAA's permission, including hunt clubs, will be required to abide by the code of ethics attached hereto as Exhibit D, or their substantial equivalent.
- e. **Cooperation** - TIAA, Byrd, and Byrd Son agree to cooperate and act in good faith to allow access and use of the road and easement rights as described herein by each of them and those acting with their permission, but restricting access by persons without permission to use the road. They agree to work together to use a gate and lock system effecting these goals.
- f. **Costs** - Any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the Litigation Parties.

5. **Waiver and Compromise of Claims**

The Parties assume the risk of any and all claims for damages that exist as of the date of this Agreement but of which they do not know or suspect to exist, whether through oversight, error, mistake, ignorance, negligence, or otherwise, and that, if known, would materially affect the decision to enter this Agreement. The Parties further agree

that the terms contained herein, with the attachments and referenced documents, contain a complete compromise of matters involving disputed issues of law and fact.

6. No Liability Admitted

This Agreement is a compromise and settlement of disputed claims and is intended merely to terminate the controversy between the Parties and to avoid further litigation between them, and it is not to be construed as an admission of liability on the part of the parties hereby released.

7. Miscellaneous Provisions

a. Additional Instruments

That the Parties will execute and deliver such other and further instruments as may be necessary to implement fully the terms of this Agreement.

b. Binding Effect

That this Agreement shall inure to the benefit of and be binding upon the Parties and their heirs, beneficiaries, grantees, devisees, estates, administrators, executors, personal representatives, successors, subrogees and assigns.

c. Assignability

The rights described herein shall be assignable and/or shall run with the land.

d. Governing Law

This Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina.

e. Invalid Provisions

That if, after the date hereof, any provision of this Agreement is held to be invalid or unenforceable under present or future laws, such provision shall be fully severable.

f. **Entire Agreement**

This Agreement constitutes the entire agreement among the parties pertaining to the subject matter contained herein.

g. **Amendment**

This Agreement shall not be modified or amended except by an instrument in writing signed by the Parties. Terms affecting less than all Parties to the agreement may be modified by an instrument in writing signed by the affected persons and/or their successors and assigns.

Entered this _____ day of _____, 2009.

WITNESSES:

TIAA Timberlands II, LLC

[2 signature pages to follow]

WITNESSES:

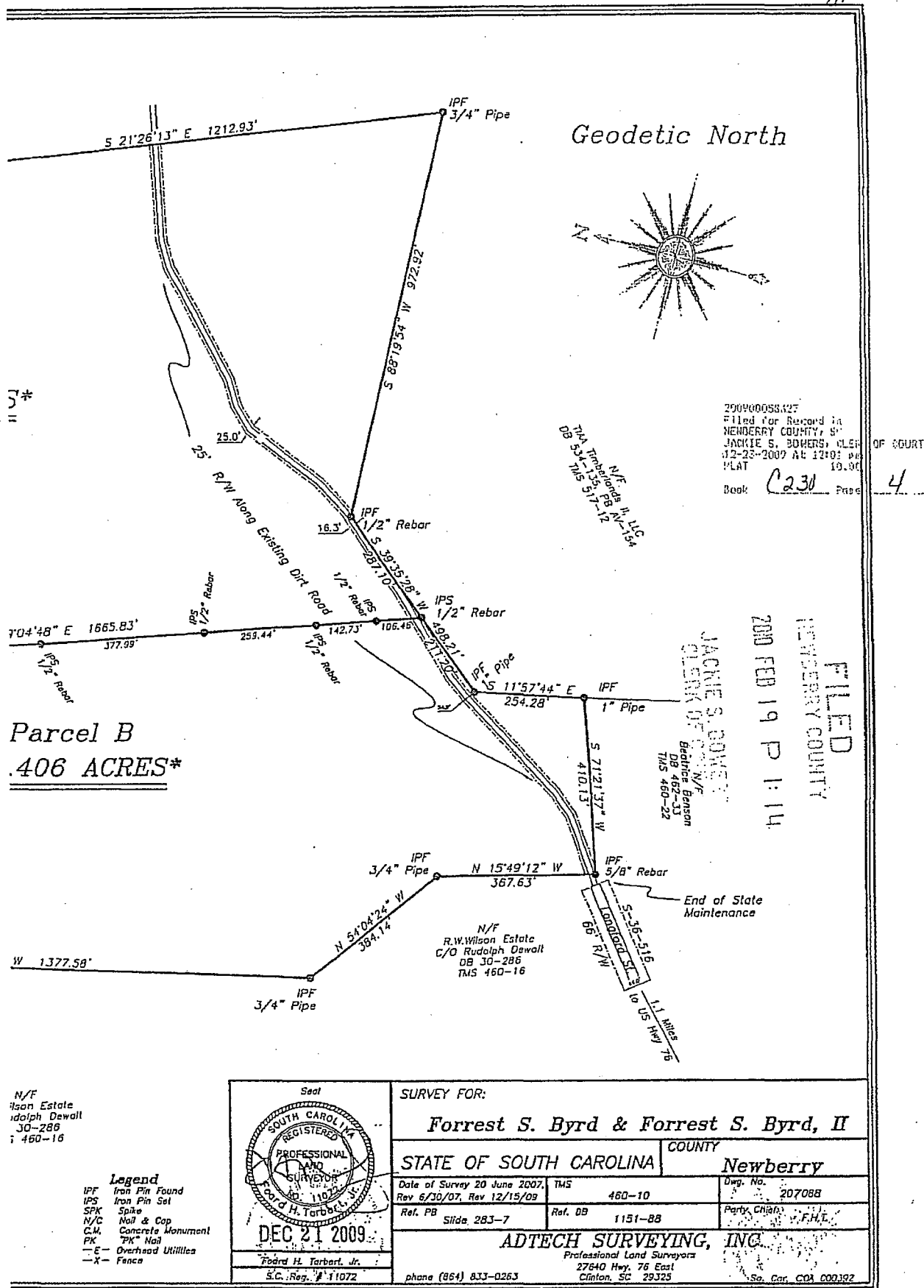
Forrest Byrd

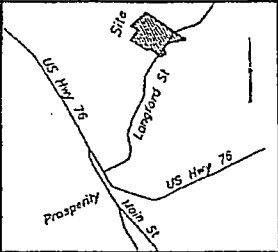
WITNESSES:

Forrest Byrd, II

WITNESSES:

Judy Livingston





Location Map

N/F
TIAA Timberlands II, LLC
DB 534-135, PB AV-154
TMS 517-12

N/F
Dorothy, Agatha B. Coak
DB 354-321
TMS 458-15

N/F
Tobie R. Shealy &
Steve R. Shealy
DB 431-157, PB 4-456
TMS 460-14

I hereby certify that this lot meets all zoning requirements.

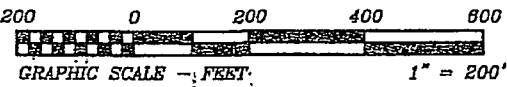
Atticus
Planning Official

Date 12-23-09

See agreement between
Forest S. Byrd, Forest S. Byrd II,
and TIAA Timberlands II, LLC

* Acreage calculated to the center of road and includes any & all right-of-way of the same.

I hereby state that to the best of my knowledge, information and belief, the survey shown hereon was made in accordance with the requirements of the Minimum Standards Manual for the Practice of Land Surveying in South Carolina and meets or exceeds the requirements for a Class B survey as specified therein.



Parcel A
53.700 ACRES*

Par
32.400

N/F
R.W. Wilson Est
C/O Rudolph D.
DB 30-286
TMS 460-11

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

CANCELLATION OF EASEMENT

For consideration received, the sufficiency of which is hereby acknowledged, FORREST BYRD, TIMBERLANDS II, LLC, FORREST S. BYRD, II, and JUDY C. LIVINGSTON hereby fully cancel and release that certain "Right-Of-Way Easement" recorded on July 13, 2007 in the Office of the Clerk of Court for Newberry County at Record Book 1281 at Page 187 and state that said "Right-Of-Way Easement" shall have no further force or effect and that any rights granted or received thereunder are terminated.

(signature page to follow)

FILED
NEWBERRY COUNTY
2007 FEB 19 P 1:15
JACKIE S. POWER
CLERK OF COURT



Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest Byrd

FORREST BYRD

2nd Witness as to Forrest Byrd
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Forrest Byrd this ____ Day of _____, 20____.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

TIAA TIMBERLANDS II, LLC

1st Witness as to TIAA Timberlands II, LLC

By: _____

Print Name: _____

Title: _____

2nd Witness as to TIAA Timberlands II, LLC
(2nd Witness may also be Notary)

STATE OF _____)

COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by TIAA Timberlands II, LLC, by _____
_____, its _____, this ____ Day of _____,
20____.

(seal)
Notary Public for _____
My Commission expires: _____
(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest S. Byrd, II

FORREST S. BYRD, II

2nd Witness as to Forrest S. Byrd, II
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA

)

)

ACKNOWLEDGMENT

COUNTY OF _____

)

The foregoing instrument was acknowledged before me by Forrest S. Byrd, II this ____ Day
of _____, 20__.

(seal)

Notary Public for South Carolina

My Commission expires: _____

(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Judy C. Livingston

JUDY C. LIVINGSTON

2nd Witness as to Judy C. Livingston
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Judy C. Livingston this ____ Day
of _____, 20__.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

EASEMENT AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that we, FORREST BYRD and FORREST S. BYRD, II (collectively the "Grantor"), for valuable consideration and also in consideration of the settlement of that certain litigation known as *Forrest Byrd v. Judy Livingston and TIAA Timberlands II, LLC* (C.A. No.: 2008-CP-36-428) to me in hand paid by TIAA TIMBERLANDS II, LLC ("Grantee"), the receipt of which is hereby acknowledged, do grant, bargain, sell and release unto the Grantee, its successors and assigns forever, an easement for ingress, egress, and other purposes as further described herein, as follows:

I. Easement area; dominant parcel

The easement shall be a twenty-five foot (25') wide easement, more particularly shown as "25' R/W Along Existing Dirt Road" on a plat prepared for Forrest Byrd and Forrest S. Byrd, II by Adtech Surveying, Inc. and Foard H. Tarbert, Jr., S.C.R.L.S. No. 11072, dated June 20, 2007, last revised December 15, 2009, and recorded in the Office of the Clerk of Court for Newberry County in Plat Book C230 at Page 4 on December 23, 2009.

Easement crosses TMS # 460-10 and TMS # 460-68

This easement shall benefit that certain piece, parcel or tract of land situate, lying and being in the County of Newberry, State of South Carolina, containing approximately 103 acres, more or less, and being shown on a plat prepared for Catawba Newsprint Co. by Forest and Land Enterprises, Inc., dated March 31, 1980 and recorded in the Office of the Clerk of Court for Newberry County in Plat Book AV at Page 154 on May 26, 1980. This parcel shall be the dominant parcel.

Dominant parcel TMS # 517-12

II. Easement rights

Grantee shall have the right of ingress and egress upon the easement area. Grantee shall have the right and privilege to enter upon the easement area from time to time in order to maintain the easement. Grantee shall have the right to perform any tasks necessary to preserve and maintain the easement.



III. Duration

This easement shall inure to the benefit of the dominant parcel described above and currently owned by the Grantee, TIAA Timberlands II, LLC, and shall benefit and run with the land forever and shall pass to any subsequent owners of said Parcel.

IV. Liability and hold harmless agreement

Grantee shall hold Grantor harmless for any costs, liabilities, or damages resulting from its use or maintenance of the easement.

V. Grantor's pledge

Grantor pledges not to do anything in or upon the easement area that would limit the Grantee's use and access thereof for the purposes described herein.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said conveyed easement in any wise incident or appertaining thereto.

ALL REFERENCES made herein to the Grantor or Grantee herein are deemed to be references to them, their heirs, successors, or assigns. All references made herein to the singular shall include the plural, and all references to the masculine shall include the feminine and the neuter.

TO HAVE AND TO HOLD, all and singular the before conveyed easement to the said Grantee, TIAA Timberland II, LLC, its successors and assigns forever.

(signature page to follow)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest Byrd

FORREST BYRD

2nd Witness as to Forrest Byrd
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA

)

)

ACKNOWLEDGMENT

COUNTY OF _____

)

The foregoing instrument was acknowledged before me by Forrest Byrd this ____ Day of _____, 20__.

(seal)

Notary Public for South Carolina

My Commission expires: _____

(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest S. Byrd, II

FORREST S. BYRD, II

2nd Witness as to Forrest S. Byrd, II
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Forrest S. Byrd, II this ____ Day
of _____, 20__.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

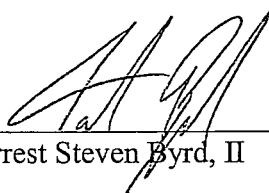
STATE OF SOUTH CAROLINA

COUNTY OF Richland

AFFIDAVIT

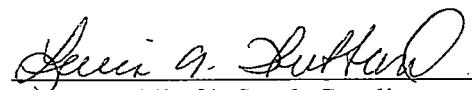
Personally appeared before me the undersigned Forrest Steven Byrd, II, who being first duly sworn, deposes and says that:

1. Forrest Byrd, who is presently in litigation in Newberry County with Judy Livingston and TIAA Timberlands, is my father. I own the 32.4 acre parcel of land adjacent to the 53 acre parcel owned by my father which is the subject of the legal action mentioned above, bearing case no. 2008-CP-36-428.
2. I am not, and never have been, a party to the legal action identified in paragraph 1.
3. I did not attend, and was not represented at, the mediation conference in 2008-CP-36-428 held on or about November 23, 2009. My father spoke to me about the mediation after the fact and explained to me the Agreement in Principal that was the product of the mediation. I was not involved in the negotiation of the terms of the Agreement in Principal; I did not authorize anyone to speak for me or to act on my behalf with respect to the Agreement in Principal; and I did not sign the Agreement in Principal.
4. I do not agree with the terms of the Agreement in Principal, and I will not sign either the Agreement in Principal or a more formal and detailed written settlement agreement based on the terms of the Agreement in Principal.



Forrest Steven Byrd, II

SWORN to before me this 4th
day of March, 2010.



Notary Public for South Carolina
My Commission Expires: 8-5-2012



STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CA No. 2008-CP-36-428

FORREST BYRD)

Plaintiff,)

vs.)

JUDY LIVINGSTON,
TIAA TIMBERLANDS, II, LLC)

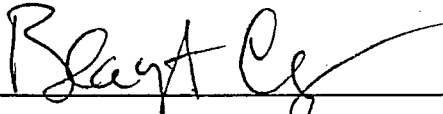
Defendant)

**AFFIDAVIT OF
BLANEY A. COSKREY, III**

Personally appeared before me Blaney A. Coskrey, III, who, being duly sworn, deposes and states as follows:

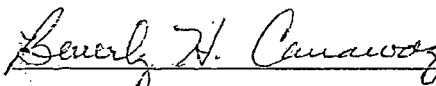
1. My name is Blaney A. Coskrey, III. I represent the Defendant TIAA Timberlands, II, LLC in this case.
2. Attached hereto as Exhibit 1 are genuine copies of authentic emails I received on the dates and at the times shown. The only incorrect date shown in the headers of the emails is the email forwarded to me on January 29, 2010. The forwarded email incorrectly shows a date of March 1, 2010.

FURTHER AFFIANT SAYETH NOT.



Blaney A. Coskrey, III

Sworn to and subscribed before
me this 9th day of June 2010



Notary Public for South Carolina

My commission expires: April 23, 2012

FILED
JUL 10 P 1:56
JUL 10 2010
JUL 10 2010
JUL 10 2010

From: Kyle Parker

To: Blaney Coskrey ; Timothy D. Savidge

Sent: Monday, December 07, 2009 10:09 AM

Subject: Byrd v. Livingston, et al

Blaney, please give me an update on the status of our agreement. Let me know if I can help in anyway. The quicker we can get this done, the better for everyone. Thanks.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Kyle Parker

To: Timothy D. Savidge ; Blaney Coskrey

Sent: Tuesday, December 15, 2009 10:09 AM

Subject: Re: Byrd v Livingston Settlement Agreement

I'll send some revised language, hopefully this afternoon. Nothing game changing or anything.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Kyle Parker

To: Blaney Coskrey

Sent: Tuesday, December 15, 2009 4:06 PM

Subject: Re: Byrd v Livingston Settlement Agreement

It may be tomorrow before I can get back to you on the settlement agreement. I am waiting to hear back from Mr. Byrd on my suggested changes.

I'm not sure that I have much of a problem with the draft of the cancellation and easement agreement,

though I'll address any such concerns with those of the settlement agreement. Thanks, again.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Kyle Parker

To: Timothy D. Savidge ; Blaney Coskrey

Sent: Monday, January 04, 2010 6:32 PM

Subject: Byrd v. Livingston Motion Hearing

So long as you don't have any objection, in light of the prospective settlement, I will withdraw my motion w/o prejudice. Unless I hear different from either of you, I will inform the court that we are working on settling the matter in addition to withdrawing the motion.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Kyle Parker

To: Timothy D. Savidge ; Blaney Coskrey

Sent: Monday, January 04, 2010 6:41 PM

Subject: Byrd v. Livingston Settlement

I have heard only a little from Byrd Son w/ respect to any changes he may have to the agreement, though I have yet to go over it with him. With the holidays, it has been difficult to get him in. I'm not exactly excited about taking him on in this case, but if it will make it easier for it to be resolved, I'm willing to do it. I'll let you know what we've got as soon as I have approval from these guys.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Blaney Coskrey

To: Kyle Parker

Cc: Timothy D. Savidge

Sent: Monday, January 18, 2010 2:26 PM

Subject: Byrd v. Livingston

Kyle, it is way past time for all this to be put to bed. Where are we?

Blaney

From: Kyle Parker

To: Blaney Coskrey

Sent: Tuesday, January 19, 2010 1:34 PM

Subject: Re: Byrd v. Livingston

I'm still trying over here. I'll let you the moment I have something for you. Believe me, I empathize with your position. Indulge me a little longer, however.

Do you now have authority from your client's headquarters?

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Kyle Parker

To: Timothy D. Savidge

Sent: Monday, January 25, 2010 10:48 AM

Subject: Byrd

Tim, got your message, and I hope to get something to you this week. I am supposed to meet with Mr. Byrd again in the coming days, and will get back with you and Blaney then.

Kyle B. Parker
Pope & Hudgens, P.A.

1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

From: Timothy D. Savidge

To: Coskrey, III, Blaney A.

Sent: Friday, January 29, 2010 10:47 AM

Subject: Fw: Byrd v. Livingston

Blaney,

I just received the below e-mail from Kyle. I'm not sure if you got this by separate e-mail or not.

Tim

Timothy D. Savidge
Bufkin Law Firm, LLC
208 N. Main Street
P.O. Box 419
Prosperity, SC 29127
p 803.364.2233
f 803.364.4445
tim@bufkinlawfirm.com

This electronic communication may contain confidential information which also may be legally privileged and which is intended only for the use of the Addressee(s) named above. If you are not the intended recipient of this communication, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination or copying of this communication may be strictly prohibited. You must not, directly or indirectly, use, disclose, distribute, print, or copy any part of this message if you are not the intended recipient. If you have received this communication in error, please notify us immediately by replying to this communication and deleting it from your computer.

----- Original Message -----

From: Kyle Parker

To: Timothy D. Savidge

Sent: Monday, March 01, 2010 9:29 AM

Subject: Byrd v. Livingston

So as to keep you all in the loop, apparently there was some huge trial in Charleston tis week w/ US/DOJ attorneys flown in from Washington where they had no email or other communication capabilities that required Mr. Byrd's IT expertise. He's apparently the IT big-wig w/ the US Attorney's office in SC. In fairness, it sounded like a nightmare.

In any case, I am to meet with him Mon. afternoon.

Kyle B. Parker
Pope & Hudgens, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
803-276-2532-Phone
803-276-8684-Fax

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON and TIAA
TIMBERLANDS, II, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2008-CP-36-428

AFFIDAVIT OF
HENRY P. BUFKIN

FILED
NEWBERRY COUNTY
2009 JUN 10 P 2:09
JACOB S. LIVINGSTON
CLERK

COMES NOW the undersigned Affiant, HENRY P. BUFKIN, who solemnly states that:

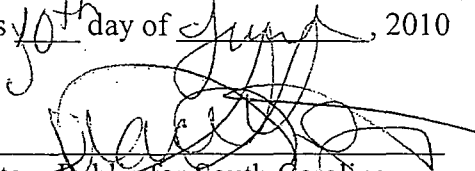
1. I am the attorney for the Defendant, Judy Livingston. I represented her at the mediation conference conducted on November 23, 2009. I signed the settlement agreement on her behalf at the mediation conference because Ms. Livingston had to leave earlier in the afternoon to pick up her grandchildren from school.
2. At the mediation conference, the Plaintiff, Forrest Byrd, expressed an interest in having the terms related to the width of the easement benefit his son's property as well.
3. Following the mediation conference, I undertook to obtain a new survey to comport with the terms of the settlement agreement. The cost of obtaining this new survey was \$100.00. Pursuant to the terms of the settlement agreement, the parties to the agreement were to split this cost equally, to wit: Judy Livingston – 1/3, TIAA Timberlands, II, LLC – 1/3, and Forrest Byrd – 1/3. I paid the surveyor's invoice on December 18, 2009 and then sought reimbursement of this cost from the other parties' respective counsel. On December 23, 2009, I received reimbursement of 1/3 of this cost from the Law Office of Blaney A. Coskrey, III, attorney for TIAA Timberlands, II, LLC. On December 23, 2009, I received

reimbursement of 1/3 of this cost from Pope and Hudgens, P.A., attorneys for Forrest Byrd.

Further, the Affiant sayeth not.


HENRY P. BUFKIN

SWORN to and subscribed before me
this 10th day of June, 2010


Notary Public for South Carolina

My Commission Expires: 8/31-2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

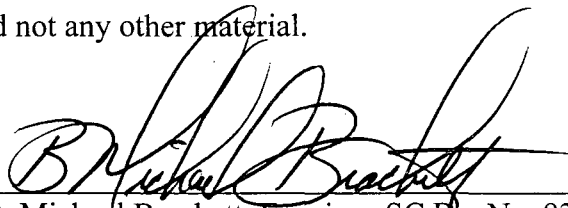
Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



B. Michael Brackett, Esquire - SC Bar No. 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellant

July 7, 2011

19155

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

SUPPLEMENTAL
RECORD ON APPEAL

B. Michael Brackett
Moses Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Appellant

Blaney A. Coskrey, III
1201 Main St., Suite 1980
Columbia, SC 29201
803.748.1202
Attorney for Respondent
TIAA Timberlands, II, LLC

Timothy D. Savidge
Bufkin Law Firm, LLC
P.O. Box 419
Prosperity, SC 29127
803.364.2233
Attorney for Respondent
Judy Livingston

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STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

FORREST BYRD,

Plaintiff,

vs.

JUDY LIVINGSTON and
TIAA TIMBERLANDS, II, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-36-428

NOTICE OF MOTION AND MOTION
TO ENFORCE SETTLEMENT
AGREEMENT AND FOR SANCTIONS/
PETITION FOR RULE TO SHOW-CAUSE

TO: THE PLAINTIFF, FORREST BYRD, AND TO KYLE B. PARKER, ATTORNEY FOR
THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendants Judy Livingston and TIAA
Timberlands, II, LLC, by and through their undersigned counsel, will move the Court on the
tenth (10th) day after service hereof or at such other date and time as the Court shall determine,
for an Order enforcing the "Agreement In Principle" dated November 23, 2009. The grounds for
this motion are as follows:

1. All parties voluntarily entered into a mediation of this action on November 23,
2009, at which the Hon. Clyde N. Davis, Jr., retired Master-In-Equity for Lexington
County, served as mediator. All parties were represented by counsel at the mediation. At
the conclusion of several hours of mediation, all parties voluntarily entered into an
"Agreement In Principle" (hereinafter the "Agreement"). The written Agreement signed
by the Parties contained the pertinent terms of a settlement, and additional documents
were to be subsequently prepared to memorialize the Agreement (e.g. new plat, new
easement document, formal settlement agreement, etc.). A copy of the Agreement is
attached hereto as "Exhibit A."

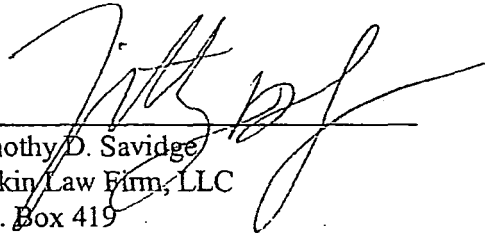
2. In reliance upon the Agreement, the Defendants' respective counsel prepared the necessary settlement documents and communicated said documents to Plaintiff's counsel on or about December 11, 2009. In further reliance upon the Agreement, Defendant Livingston incurred expenses to obtain a new plat reflecting the terms of the Agreement. Copies of the relevant formal settlement documents (unexecuted) are attached hereto collectively as "Exhibit B."

3. Despite repeated requests by Defendants' respective counsel, Plaintiff and Plaintiff's counsel have been unwilling to comply with the terms of the Agreement, execute the settlement documents, and dismiss this litigation.

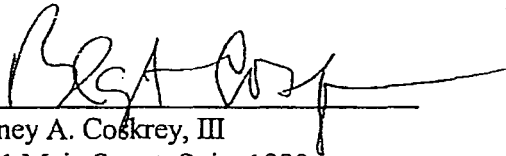
4. Defendants respectfully request that this Court (1) order the Plaintiff to abide by the Agreement that he himself executed, (2) order the Plaintiff to execute the settlement documents that have been prepared reflecting the terms of the Agreement, (3) and assess Plaintiff and Plaintiff's counsel for the attorneys fees and costs associated with this motion incurred by the Defendants.

5. This motion will be further based upon the pleadings that have been filed in this case, upon any memoranda filed with the Court, and upon applicable law.

6. The undersigned hereby certify that they have consulted with Plaintiff's counsel in attempts to resolve the issues raised herein, but that such consultations have been unsuccessful.



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Bufkin Law Firm, LLC
P.O. Box 419
Prosperity, South Carolina 29127
Attorneys for the Defendant Judy Livingston



Blaney A. Cofkrey, III
1201 Main Street, Suite 1980
Columbia, South Carolina 29201
Attorney for the Defendant TIAA
Timberlands II, LLC

February 19, 2010.
Prosperity, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CA No. 2008-CP-36-428

FORREST BYRD)

Plaintiff.)

vs.)

JUDY LIVINGSTON.
TIAA TIMBERLANDS, II, LLC)

Defendant)

Agreement In Principle

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NEWBERRY COUNTY
200 FEB 19 P 1:14
JAMES S. HANCOCK

The undersigned parties, having mediated this matter on November 23, 2009, have reached an agreement in principle including the following terms.

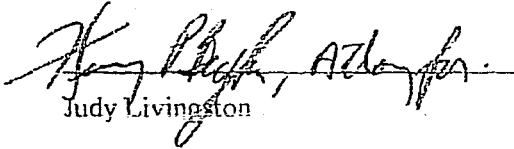
- X 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and canceling the 66' grant, son's parcel included.
- X maintenance/repair - SC voluntary forestry best management practices shall be followed - Each of the parties, after use, will put the road and/or property back in good or better condition than prior to use.
- X TIAA/Hancock lessees, including hunt clubs, will be required to abide by the code of ethics in the lease currently used by TIAA/Hancock.
- X double lock gate system will be employed.
- X this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.
- X any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the parties.
- X Litigation dismissed, mutual releases among all parties.

Handwritten signatures and initials:
Fb, HJD, [unclear]

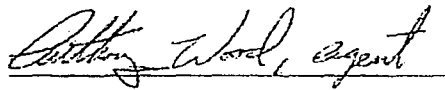
EXHIBIT A



Forrest Byrd



Judy Livingston



TIAA Timberlands II, LLC by its
agent, Hancock Forest Management

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into by Forrest Byrd ("Byrd"), Judy Livingston ("Livingston"), and TIAA Timberlands, II, LLC ("TIAA"). These three persons shall be collectively referred to as "the Litigation Parties." In addition, to the extent described herein, Forrest Byrd II ("Byrd Son") is a party to this Agreement. The Litigation Parties and Byrd Son shall be referred to herein as "the Parties." Moreover, references to each of the mentioned referenced herein, unless otherwise noted, are intended to include successors and assigns.

WITNESSETH

WHEREAS, Byrd purchased land of approximately 53 acres from Livingston at auction on May 31, 2007, which purchase was finalized and closed on July 10, 2007, and which tract is shown on Exhibit A as Tract A ("Tract A"); and

WHEREAS, TIAA owns land adjacent to Tract A ("TIAA Tract"); and

WHEREAS Byrd Son owns land adjacent to Tract A, which tract is shown on Exhibit A as Tract B ("Tract B"); and

WHEREAS TIAA, its predecessors, agents, subcontractors, and lessees have for many years used a right-of-way crossing adjacent properties, including Tract A and Tract B; and

WHEREAS an express easement was drafted and filed to memorialize the rights of the parties with respect to the right-of-way, and recorded on July 13, 2007 in Newberry County at Book 01281, Page 00187 ("First Express Easement"); and

WHEREAS Byrd challenged TIAA's uses of the road contained in the First Express Easement; and

EXHIBIT B

WHEREAS Byrd filed a lawsuit against Livingston and TIAA arising out of the purchase and easement rights, in the Newberry County Court of Common Pleas, such action bearing Civil Action No. 2008-CP-36-0428 ("the Litigation"); and

WHEREAS, the Litigation Parties mediated the case on November 23, 2009, reaching agreement as to the terms of a settlement;

NOW, THEREFORE, in consideration of the actions, rights, and obligations described herein, including certainty as to the rights of each of the Parties, the Parties agree, stipulate, and promise to the following terms of settlement:

1. Warranties

a. That the Parties have fully investigated all facts surrounding the various claims, controversies, and disputes, and the Parties are fully satisfied with the terms of this Agreement.

b. That the Parties have been fully informed and have full knowledge of the terms, conditions, and effects of this Agreement.

c. That no promise, representation, or inducement has been offered or made except as herein set forth, and that this Agreement is executed without reliance upon any statement or representation by or on behalf of the Parties.

2. Dismissal of Claims

The Litigation Parties agree to dismiss the Litigation, including all claims, counterclaims, and cross-claims.

3. Release of All Claims

Byrd, and Byrd Son, on behalf of themselves, their principals, agents, masters, servants, employers, employees, attorneys, insurers, successors, subrogees, assigns,

properties, general and limited partners, joint venturers, and parent, sister, subsidiary, and affiliated entities, releases and forever discharges TIAA and Livingston, and their principals, agents, masters, servants, employers, employees, attorneys, insurers, successors, subrogees, assigns, properties, general and limited partners, joint venturers, and parent, sister, subsidiary, and affiliated entities, of and from any and all claims, demands, damages, actions, causes of action, suits at law, or suits in equity, of whatsoever kind or nature that now exist or that hereafter may accrue, for or because of any matter or thing done, omitted, or suffered to be done by the parties hereby released, from the beginning of the world to the day of the date of these presents, and particularly, but without in any manner limiting the foregoing general language, on account of, arising out of, or in any manner associated with, first, the lawsuit filed against TIAA and/or Livingston.

4. Additional Terms

- a. **Cancellation of Existing Express Easement** - The First Express Easement dated July 8, 2007, signed by Judy Livingston, and recorded on July 13, 2007 in Newberry County at Book 01281, Page 00187 shall be cancelled. A copy of the document signed by the Parties and filed in the public record effecting this cancellation is attached here as Exhibit B.
- b. **Second Express Easement** - In its place, there shall be filed an express easement in favor of TIAA and its successors and assigns, twenty-five feet wide (measured equally from the center of the existing road) for purposes of ingress and egress, which shall run with the land. That easement ("Second Express Easement") shall grant rights across both Tract A and Tract B. A copy of the Second Express

Easement effecting this term is attached here as Exhibit C.

- c. **Maintenance and Repair** – Byrd, Byrd Son, and TIAA agree that each of them shall, after use, put the road and/or property back in good or better condition than its condition prior to that person's use. This promise by TIAA running to Byrd Son serves as part of the consideration supporting this Agreement. Maintenance of the road under this subsection shall be conducted in accordance with South Carolina Best Management Practices existing at the time as they apply to the maintenance of forest roads.
- d. **Lessees** - TIAA lessees and others using the road with TIAA's permission, including hunt clubs, will be required to abide by the code of ethics attached hereto as Exhibit D, or their substantial equivalent.
- e. **Cooperation** - TIAA, Byrd, and Byrd Son agree to cooperate and act in good faith to allow access and use of the road and easement rights as described herein by each of them and those acting with their permission, but restricting access by persons without permission to use the road. They agree to work together to use a gate and lock system effecting these goals.
- f. **Costs** - Any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the Litigation Parties.

5. **Waiver and Compromise of Claims**

The Parties assume the risk of any and all claims for damages that exist as of the date of this Agreement but of which they do not know or suspect to exist, whether through oversight, error, mistake, ignorance, negligence, or otherwise, and that, if known, would materially affect the decision to enter this Agreement. The Parties further agree

that the terms contained herein, with the attachments and referenced documents, contain a complete compromise of matters involving disputed issues of law and fact.

6. No Liability Admitted

This Agreement is a compromise and settlement of disputed claims and is intended merely to terminate the controversy between the Parties and to avoid further litigation between them, and it is not to be construed as an admission of liability on the part of the parties hereby released.

7. Miscellaneous Provisions

a. Additional Instruments

That the Parties will execute and deliver such other and further instruments as may be necessary to implement fully the terms of this Agreement.

b. Binding Effect

That this Agreement shall inure to the benefit of and be binding upon the Parties and their heirs, beneficiaries, grantees, devisees, estates, administrators, executors, personal representatives, successors, subrogees and assigns.

c. Assignability

The rights described herein shall be assignable and/or shall run with the land.

d. Governing Law

This Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina.

e. Invalid Provisions

That if, after the date hereof, any provision of this Agreement is held to be invalid or unenforceable under present or future laws, such provision shall be fully severable.

f. **Entire Agreement**

This Agreement constitutes the entire agreement among the parties pertaining to the subject matter contained herein.

g. **Amendment**

This Agreement shall not be modified or amended except by an instrument in writing signed by the Parties. Terms affecting less than all Parties to the agreement may be modified by an instrument in writing signed by the affected persons and/or their successors and assigns.

Entered this _____ day of _____, 2009.

WITNESSES:

TIAA Timberlands II, LLC

[2 signature pages to follow]

WITNESSES:

Forrest Byrd

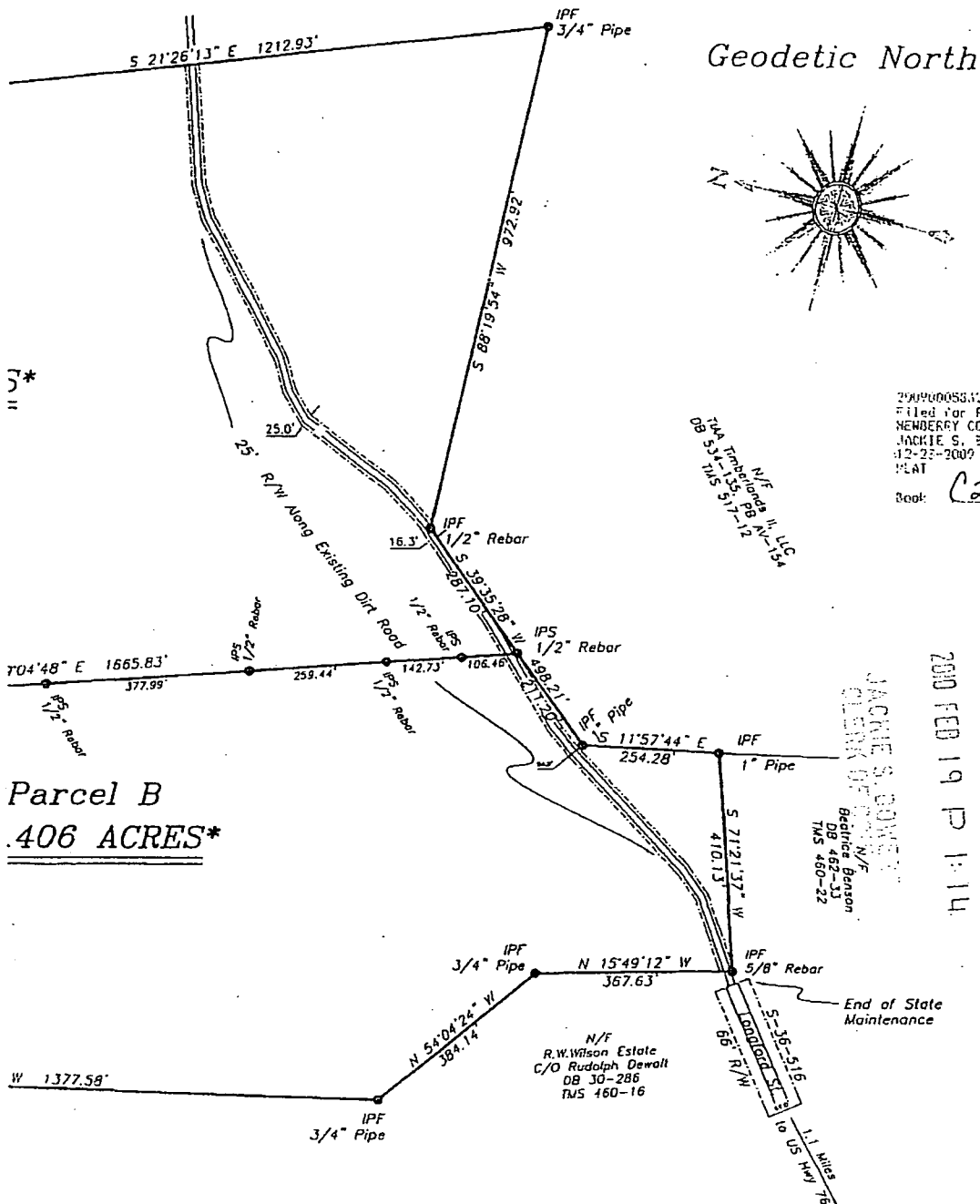
WITNESSES:

Forrest Byrd, II

WITNESSES:

Judy Livingston

HB



200000058425
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 NEWBERRY COUNTY, SC
 JACKIE S. BOWERS, CLERK
 12-27-2009 At 12:03 PM
 PLAT 19.00
 Book: C230 Page: 4

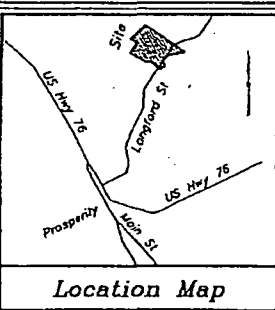
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 NEWBERRY COUNTY
 2010 FEB 19 P 1:14

Parcel B
 406 ACRES*

N/F
 Wilson Estate
 C/O Rudolph Dewalt
 DB 30-286
 TMS 460-16

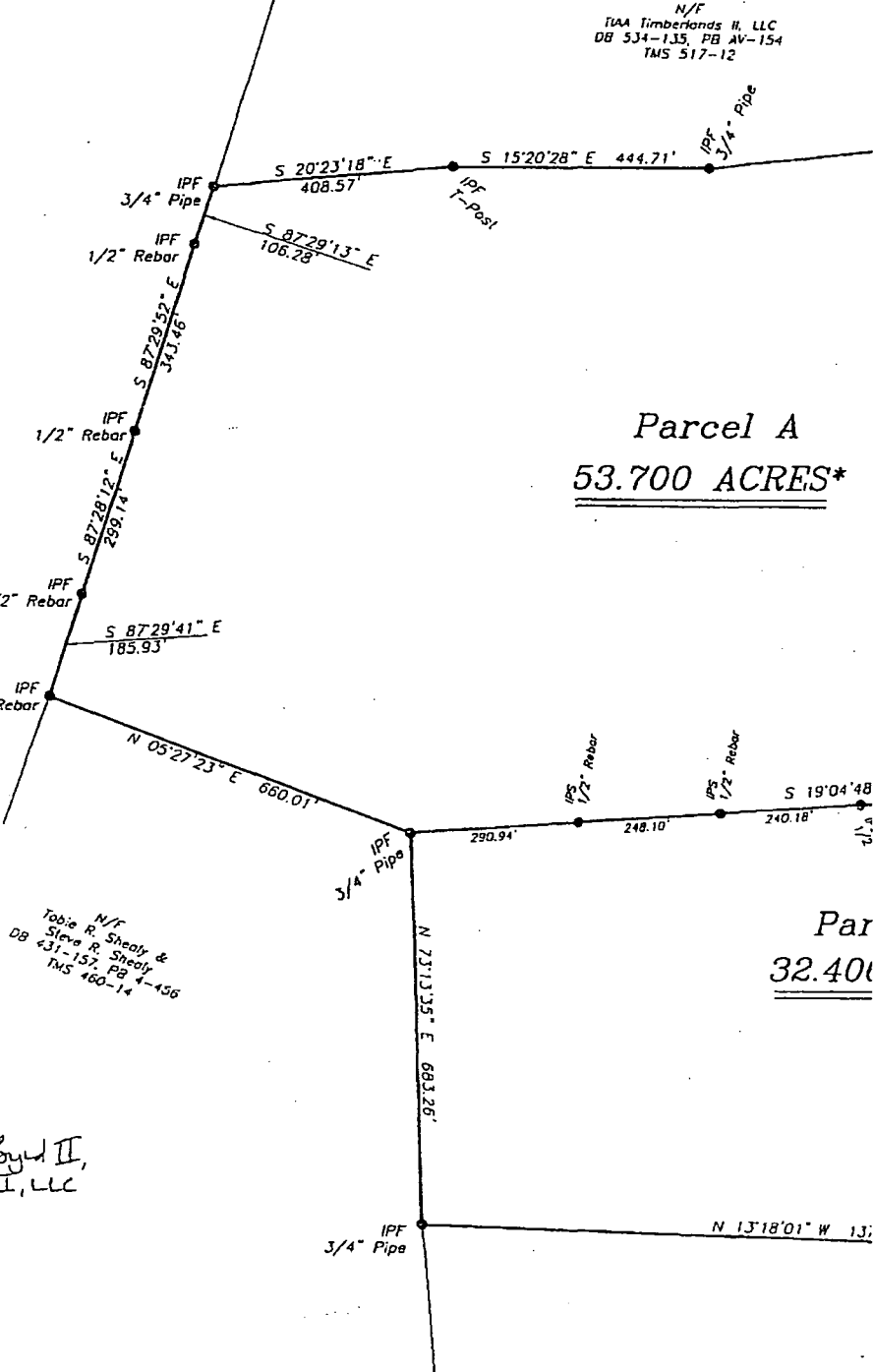
- Legend**
- IPF Iron Pin Found
 - IPS Iron Pin Set
 - SPK Spike
 - N/C Nail & Cap
 - C.M. Concrete Monument
 - PK "Pin"
 - E- Overhead Utilities
 - X- Fence

DEC 21 2009 Forre H. Torbert, Jr. S.C. Reg. # 11072	SURVEY FOR:		
	Forrest S. Byrd & Forrest S. Byrd, II		
	STATE OF SOUTH CAROLINA		COUNTY Newberry
	Date of Survey 20 June 2007, Rev 6/30/07, Rev 12/15/09	TMS 460-10	Orig. No. 207088
	Ref. PB Slide 283-7	Ref. DB 1151-88	Party, Chain F.H.I.
ADTECH SURVEYING, INC. Professional Land Surveyors 27640 Hwy. 76 East Clinton, SC 29325 phone (854) 833-0263 So. Car. COA 000392			



N/F
TAA Timberlands II, LLC
DB 534-135, PB AV-154
TMS 517-12

N/F
Dorothy A. Gailor B. Cook
DB 434-137
TMS 438-15



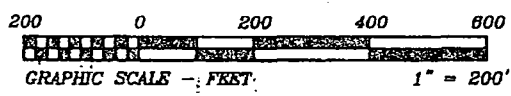
N/F
Tobie R. Shealy &
Steve R. Shealy
DB 431-157, PB 4-456
TMS 460-14

I hereby certify that this lot meets all
zoning requirements.
Alister
Planning Official
Date 12-23-09

See easement between
Forest S. Byrd, Forest S. Byrd II,
and TAA Timberlands II, LLC

* Acres calculated to the center of road
and includes any & all right-of-way of the same.

I hereby state that to the best of my knowledge, information and
belief, the survey herein was made in accordance with the
requirements of the Minimum Standards Manual for the Practice of
Land Surveying in South Carolina and meets or exceeds the re-
quirements for a Class B survey as specified therein.



N/F
R.W. Wilson Esq.
C/O Rudolph D.
DB 30-286
TMS 460-11

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

CANCELLATION OF EASEMENT

For consideration received, the sufficiency of which is hereby acknowledged, FORREST BYRD, TIMBERLANDS II, LLC, FORREST S. BYRD, II, and JUDY C. LIVINGSTON hereby fully cancel and release that certain "Right-Of-Way Easement" recorded on July 13, 2007 in the Office of the Clerk of Court for Newberry County at Record Book 1281 at Page 187 and state that said "Right-Of-Way Easement" shall have no further force or effect and that any rights granted or received thereunder are terminated.

(signature page to follow)

FILED
NEWBERRY COUNTY
2009 FEB 19 P 1:15
JACKIE S. POWERS
CLERK OF COURT

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest Byrd

FORREST BYRD

2nd Witness as to Forrest Byrd
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA

)

)

ACKNOWLEDGMENT

COUNTY OF _____

)

The foregoing instrument was acknowledged before me by Forrest Byrd this ____ Day of _____, 20____.

(seal)

Notary Public for South Carolina

My Commission expires: _____

(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

TIAA TIMBERLANDS II, LLC

1st Witness as to TIAA Timberlands II, LLC

By: _____

Print Name: _____

Title: _____

2nd Witness as to TIAA Timberlands II, LLC
(2nd Witness may also be Notary)

STATE OF _____)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by TIAA Timberlands II, LLC, by _____, its _____, this ____ Day of _____, 20____.

(seal)
Notary Public for _____
My Commission expires: _____
(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest S. Byrd, II

FORREST S. BYRD, II

2nd Witness as to Forrest S. Byrd, II
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)

COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Forrest S. Byrd, II this ____ Day
of _____, 20__.

(seal)

Notary Public for South Carolina

My Commission expires: _____

(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Judy C. Livingston

JUDY C. LIVINGSTON

2nd Witness as to Judy C. Livingston
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Judy C. Livingston this ____ Day
of _____, 20____.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

EASEMENT AGREEMENT

I. Easement area; dominant parcel

The easement shall be a twenty-five foot (25') wide easement, more particularly shown as "25' R/W Along Existing Dirt Road" on a plat prepared for Forrest Byrd and Forrest S. Byrd, II by Adtech Surveying, Inc. and Foard H. Tarbert, Jr., S.C.R.L.S. No. 11072, dated June 20, 2007, last revised December 15, 2009, and recorded in the Office of the Clerk of Court for Newberry County in Plat Book C230 at Page 4 on December 23, 2009.

Easement crosses TMS # 460-10 and TMS # 460-68

This easement shall benefit that certain piece, parcel or tract of land situate, lying and being in the County of Newberry, State of South Carolina, containing approximately 103 acres, more or less, and being shown on a plat prepared for Catawba Newsprint Co. by Forest and Land Enterprises, Inc., dated March 31, 1980 and recorded in the Office of the Clerk of Court for Newberry County in Plat Book AV at Page 154 on May 26, 1980. This parcel shall be the dominant parcel.

Dominant parcel TMS # 517-12

II. Easement rights

Grantee shall have the right of ingress and egress upon the easement area. Grantee shall have the right and privilege to enter upon the easement area from time to time in order to maintain the easement. Grantee shall have the right to perform any tasks necessary to preserve and maintain the easement.

III. Duration

This easement shall inure to the benefit of the dominant parcel described above and currently owned by the Grantee, TIAA Timberlands II, LLC, and shall benefit and run with the land forever and shall pass to any subsequent owners of said Parcel.

IV. Liability and hold harmless agreement

Grantee shall hold Grantor harmless for any costs, liabilities, or damages resulting from its use or maintenance of the easement.

V. Grantor's pledge

Grantor pledges not to do anything in or upon the easement area that would limit the Grantee's use and access thereof for the purposes described herein.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said conveyed easement in any wise incident or appertaining thereto.

ALL REFERENCES made herein to the Grantor or Grantee herein are deemed to be references to them, their heirs, successors, or assigns. All references made herein to the singular shall include the plural, and all references to the masculine shall include the feminine and the neuter.

TO HAVE AND TO HOLD, all and singular the before conveyed easement to the said Grantee, TIAA Timberland II, LLC, its successors and assigns forever.

(signature page to follow)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest Byrd

FORREST BYRD

2nd Witness as to Forrest Byrd
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Forrest Byrd this ____ Day of _____, 20 ____.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

Signed, Sealed and Delivered in the Presence of:

1st Witness as to Forrest S. Byrd, II

FORREST S. BYRD, II

2nd Witness as to Forrest S. Byrd, II
(2nd Witness may also be Notary)

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me by Forrest S. Byrd, II this ____ Day
of _____, 20 ____.

(seal)
Notary Public for South Carolina
My Commission expires: _____
(2nd Witness may also be Notary)

Hunting Club Code of Ethics

I. Wildlife Conservation

Hunting is an integral part of wildlife conservation. I pledge to hunt in accordance with conservation laws and rules. I will insist that my guests and my club obey all hunting laws. There will be no tolerance for violators in my club.

II. Safety

Hunting is a great experience when done safely. I pledge to hunt with safety first in mind at all times. I will instruct my guests to hunt safely and insist that my club have safety rules that all members follow. Close calls, injuries, and tragedies ruin the hunting experience. I will not hunt near any active forestry operations which I acknowledge have priority over hunting activities.

III. Respect for Hunting Property

It is at the landowner's pleasure that I am allowed to hunt and enjoy the use of the property. My hunting club pays a very modest fee for the privilege to hunt when considering the total value of the property. Timber management activities (including timber cutting, helicopter operations, tree planting and other operations) have priority over all other activities including hunting. I pledge to respect the owner's property and not litter, shoot signs, damage trees, set fires, or damage roads. I will help keep the appearance of the property at high standards. I will pay my membership fees on schedule, so my club can make its payment in a timely, businesslike manner.

IV. Respect and Courtesy towards Neighbors:

It is the policy of the landowner to be good neighbors with neighboring property owners. I pledge to help the landowner be a good neighbor by being courteous and respectful to neighboring landowners and their interests. I will not go onto a neighbor's property without their permission. I will not competitively hunt along property lines or near neighbor's food plots or hunting stands causing conflict and ill feelings with neighbors. My club and I will be proactive in working with neighbors to resolve any hunting conflicts that arise. If the landowner allows our club to dog hunt, I understand that it will be allowed only as long as the neighbors don't have issue with dogs crossing onto their property. It is the club's responsibility to work with neighbors on dog hunting issues. I will be courteous and professional when approaching strangers on property and asking if they have permission to be there since many other people have rights to enter the property.

V. Assist Landowner With Forest Protection:

One value a hunting club can add is being the eyes and ears for the property owner. My club agrees to report any fires, dumping, beetle damage, encroachments on property lines, gate problems or other issues to their local HFM forester.

I have read, understand & agree to abide by
The "Hunting Club Code of Ethics"

By: _____
President

FILED
JACKIE S. BOWERS
CLERK OF COURT
2010 FEB 9 P 1:15
HARRIS COUNTY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



B. Michael Brackett, Esquire - SC Bar No. 838
Moses Koon & Brackett, PC
1333 Main Street, Suite 650
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Appellant

July 20, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

APPELLANT'S BRIEF

B. Michael Brackett
Moses Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Appellant

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<u>S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC</u> , 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct.App. 2008)	3
<u>Sadighi v. Daghighfekr</u> , 66 F.Supp.2d 752 (D.S.C. 1999)	7,8
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Statutes

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Other Authorities

<u>Black's Law Dictionary</u> (Rev. 4 th ed. 1968), 1386	9
17 C.J.S. Contracts §62.	12
Ralph King Anderson, Jr., <u>South Carolina Requests to Charge - Civil</u> , 2002, §19-7.	7
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STATEMENT OF ISSUES ON APPEAL

As to the Missing Party

1. Did the trial court err in holding that the parties to this appeal had a meeting of the minds and entered into a binding contract during the mediation even though Byrd Son was not present and never became a signatory to the Agreement in Principle or to any subsequent agreement?
2. Did the trial court err in holding that the totality of circumstances sufficiently established that the parties to this appeal intended to be bound by the terms of the Agreement in Principle notwithstanding that Byrd Son was not present at the mediation and never became a signatory to the Agreement in Principle or to any subsequent agreement?
3. Did the trial court err in holding that the Agreement in Principle was enforceable as to the actual signatories without the signature or consent of Byrd Son?

As to Subsequent Conduct

4. Did the trial court err when, in reviewing the subsequent conduct and communications of the parties to this appeal, it cherry-picked the communications, identifying only portions of communications while inexplicably ignoring other portions of the communications?

5. Did the trial court err, when reviewing the subsequent conduct of the parties, by failing to acknowledge or take into account the fact that the subsequent more formal settlement documents were prepared and presented by the Respondents' attorneys?
6. Did the trial court err, when reviewing the subsequent conduct of the parties, in giving undue prominence to the content of informal emails while ignoring the formal and carefully chosen terminology of proposed legal instruments drafted and presented by Respondents' attorneys?

As to the Nature of the Question Presented

7. Did the trial court err in failing and refusing to decide the case according to the law governing joint contracts that are signed by less than all intended parties?

Other

8. Did the trial court err in failing to rule that inclusion of Byrd Son in the final settlement agreement was a condition precedent to Appellant's being bound to a final settlement agreement?
9. Did the trial court err in ruling that the language of the AIP that includes and incorporates the interests of Byrd Son into the AIP can be severed from the AIP while the AIP remains enforceable against the other parties?

STANDARD AND SCOPE OF REVIEW

Enforcement of the terms of a settlement agreement is a matter of contract law. Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n., 343 S.C. 335, 540 S.E.2d 843, 845 (S. C. 2001). An action for specific performance is one in equity. Campbell v. Carr, 361 S.C.

258, 262-63, 603 S.E.2d 625, 627 (Ct.App. 2004). In reviewing a proceeding in equity, the appellate court may find facts based on its own view of the preponderance of the evidence. Greer v. Spartanburg Technical College, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct.App. 1999). An action to construe a contract is an action at law. McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). A legal question in an equity case receives review as in law. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App. 2003). Questions of law may be decided with no particular deference to the trial court. S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct.App. 2008). This court may correct errors of law in both legal and equity actions. Id.

STATEMENT OF THE CASE

On September 10, 2008 Appellant brought this action alleging that his purchase of approximately 53 acres of unimproved rural land from Respondent Livingston was encouraged, induced and obtained through fraud, negligent misrepresentation and breach of contract. (R19). In general, Appellant alleged that Respondent Livingston, as seller, and Respondent TIAA, as the adjacent landowner and purported grantee of a secret grant of easement from Livingston, wrongly claimed that Appellant's land was burdened by easement rights granted by Livingston to TIAA.

Respondent Livingston served a general denial. (R44).

Respondent TIAA generally denied Appellant's allegations and counterclaimed for a finding that, in the event the challenged written grant of easement was found to be ineffective, TIAA nevertheless had an implied easement. (R38). Appellant served his Reply generally denying the existence of an implied easement running in favor of TIAA. (R49).

Following pretrial discovery, the parties attended a mediation conference on November 23, 2009 resulting in the parties signing an "Agreement in Principle." (hereinafter "AIP") (R114).

After subsequent efforts to execute the "more formal and detailed written Settlement Agreement" called for in the AIP were unsuccessful,¹ Respondents filed their Motion To Enforce Settlement Agreement and For Sanctions/Petition for Rule to Show Cause" dated February 19, 2010. (R145-168). Appellant opposed the Respondents' Motion.

A hearing was held on June 30, 2010, followed by an Order dated July 30, 2010 finding and concluding that the AIP is enforceable and that Appellant must carry out the terms of the AIP. (R1).

Appellant served his Rule 59(e) Motion for Reconsideration on August 16, 2010. (R82).

By Order dated November 5, 2010, the trial court denied Appellant's Motion for Reconsideration. (R16).

Appellant's Notice of Appeal of the July 30, 2010 and November 5, 2010 Orders was served on December 16, 2010.

STATEMENT OF FACTS

From the pleadings and the July 30, 2010 Order, the underlying dispute is generally described as involving a real estate transaction in which Appellant purchased at auction a parcel of unimproved rural land, approximately 53 acres, from Respondent Livingston. The facts in the underlying action were disputed, especially the allegations with respect to whether the Appellant had been put on inquiry notice of the existence of an easement at or prior to the closing of the transaction. Appellant alleged that the seller's written grant of easement dated July 8, 2007, two days prior to the closing, was not effectively disclosed to him and was not placed on the public

¹ The details of the post "agreement in principle" activity will be described hereinbelow.

record until after the closing. Respondents claim that Appellant was aware of enough information at closing to constitute inquiry notice. These facts do not control this appeal but are provided to give context to the mediation and to the AIP and to the subsequent conduct of the parties that are central to the appeal.

The above-named parties attended a mediation conference on November 23, 2009 resulting in the parties signing an "Agreement in Principle."² (hereinafter "AIP"). (R114). The AIP included Appellant's son, Forrest Steven Byrd, II (herein "Byrd Son"), as a party to the agreement notwithstanding that he was not a party to the underlying action and was not present at the mediation conference. (R114, l. 13-15). The AIP provided that the AIP would be supplanted by a more formal and detailed Settlement Agreement. (R114, l.22-23). Subsequently, email communications passed between the attorneys on the subject of how to achieve the more formal settlement agreement called for by the AIP. (R136-141).

The Respondents' attorneys prepared and delivered to Appellant a more formal and detailed Settlement Agreement and Release (R116), including a proposed Cancellation of Easement instrument (R126), and a proposed new Easement Agreement (R131), all purportedly required by the AIP. Byrd Son refused to agree to the terms of the AIP. (R135). Because Byrd Son would not agree with the terms of the AIP and would not execute the proposed Settlement Agreement and Release and would not execute the new proposed easement instruments, the Appellant took the position that a final, enforceable settlement agreement had not been reached and that he was not bound by the AIP and was unwilling to execute the more formal and detailed Settlement Agreement and Release and Easement instruments. Appellant was ready to go to trial.

² The AIP was signed by the parties themselves and not by the attorneys or the mediator.

Respondents filed their Motion to Enforce Settlement (R145), and the trial court granted the motion. (R1).

ARGUMENTS

- I. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT BYRD SON WAS A DISCRETIONARY PARTY TO THE ULTIMATE SETTLEMENT AGREEMENT AND WAS NOT INTENDED BY THE PARTIES TO BE A NECESSARY AND JOINT PARTY TO AN ULTIMATE SETTLEMENT AGREEMENT. (Issues on Appeal nos. 1, 2 and 3.)

In its Order Granting the Motion to Enforce Settlement, the trial court held that Byrd Son was not intended by the other parties to be a necessary party to a final agreement and that the parties to the AIP intended to be bound by the AIP and to go forward with the settlement even without Byrd Son's participation. (R10, l. 2 to R14, l.2). In this, the trial court committed reversible error.

To reach its conclusion, the trial court discounted that the mediation document was described by the parties themselves as an "Agreement in Principle" and not as a "settlement agreement." (R114). Also discounted was the provision of the AIP providing that "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties." (R114, l. 22-23). The trial court concluded that the use of the name "Agreement in Principle" was merely duplicative of the phrase "a more formal agreement will follow," and that neither of these names or phrases was controlling because of the "conduct of the parties subsequent to the Agreement [AIP]." (R9, l. 12-25).

The error in the trial court's reasoning is exhibited by the following:

- A. In choosing to use the term "Agreement in Principle" rather than "Settlement Agreement"

the parties set forth their intentions. The intention of the parties to a contract is to be determined from the language used. Where an agreement, or in this case an AIP, evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §19-7. Words [“settlement agreement”] cannot be read into an agreement which import an intent wholly unexpressed when the agreement was executed. Id. at 19-8. It is more than mere coincidence that the AIP was designated by the parties themselves as an agreement in principle while the envisioned subsequent, more formal and detailed document was designated by the parties as a “Settlement Agreement.” (R114 and R116).

“As a rule, ‘agreements in principle’ that refer to subsequent ‘formal agreements’ are not binding.” Engineered Data Prods., Inc. v. Art Style Printing, Inc., 71 F. Supp.2d 1073, 1078 (D.Colo.1999), quoting Skycom Corp. v. Telstar Corp., 813 F.2d 810, 815 (7th Cir.1987). Agreement in principle is the sort of depiction that regularly is taken as an expression of a desire not to be bound. Id.

B. The trial court relied on Sadighi v. Daghighfekr, 66 F.Supp.2d 752 (D.S.C. 1999) to hold that “the mere fact that a formal agreement would follow is not fatal to the enforceability of the settlement.” This was error because the issue and facts in Sadighi are easily distinguishable from the case now before the court- Sadighi did not involve a disputed missing party, such as Byrd Son. In Sadighi all parties participated in the negotiation and it was one or more of those parties who refused to go forward with the settlement, arguing that the initial writing called for a subsequent more comprehensive settlement agreement. There was no missing signatory in Sadighi. If the AIP herein did not refer to Byrd Son’s property as being included in the settlement, and if the subsequent

documents were prepared only for the signatures of Byrd, Livingston and TIAA, and if one of those three parties tried to subsequently disavow the settlement, Sadighi would be supporting precedent. But, that is not the situation presented.

C. The AIP did not describe Byrd Son as a discretionary party without whom the agreement would remain binding on the others. Here, contrary to the conclusion of the trial court, the subsequent conduct of the parties to the AIP demonstrated very well the intended and the understood involvement of Byrd Son. The Order (R7, l. 18 to R9, l. 11) mentions that the attorneys allowed amendment and discovery deadlines to pass, depositions were not taken, and the content of email communications between the attorneys demonstrated that the parties intended and believed the terms of the AIP to binding in and of themselves.

But the trial court cherry-picked the subsequent conduct it identified and relied upon, and the Order included internal inconsistencies. For example:

(i) the Order only partially quotes the attorney emails (R136-141) without disclosing other portions of the emails, such as:

- Parker (Appellant's attorney) writing on December 15, 2009 "I'll send some **revised language**, hopefully this afternoon;" (if an agreement had been reached, what would be the need for revisions); (R137, 2d email message)
- Also on December 15, 2009, Parker wrote to Coskrey "It may be tomorrow before I can get back to you on the settlement agreement. I am waiting to hear back from Mr. Byrd **on my suggested changes**;" (R137, 3d email message)
- On January 4, 2010 in his email to attorneys Savidge and Coskrey, Parker described the agreement as "the **prospective settlement**" and that he "will inform the court

that **we are working on settling the matter. . .**” (R138, 1st full email message).

Prospective is defined as looking forward into the future; not a term suggesting the existence of an agreement already in place. Black’s Law Dictionary (Rev. 4th ed. 1968), 1386;

- In a second email on January 4, 2010 Parker wrote “I’ll let you know what we’ve got **as soon as I have approval from these guys.**” (Emphasis added). (R138, 2d full email message).

These emails show that, contrary to the message deduced by the trial court, attorney Parker did not then believe that the AIP was final and already binding, and he believed that Byrd Son was a necessary party, and notwithstanding the obvious relevance of these emails, they are mysteriously absent from the Order and apparently from the Court’s consideration.

(ii) Additionally, when the Order identifies the subsequent behavior of the parties and their attorneys that purportedly demonstrates that they intended to be bound by the terms of the AIP irrespective of Byrd Son, the Order does not even acknowledge or disclose the fact that the subsequent formal settlement documents were prepared and presented by Respondents’ attorneys and that the documents clearly and obviously contemplated and intended that Byrd Son was a party who was called on to execute the final settlement documents. If anything, the content of the proposed more formal legal instruments speaks more formally, directly and definitively to intent than do the abbreviated, informal emails relied upon by the Court in discerning intent. The Court apparently overlooked the best evidence of subsequent conduct.

Byrd Son was identified in the proposed Settlement Agreement and Release as a party to the agreement. (“These three persons [Byrd, Livingston and TIAA] shall be collectively referred to as

‘the Litigation Parties.’ **In addition**, to the extent described herein, Forrest Byrd II (**“Byrd Son”**) **is a party to this Agreement.”**) (emphasis added) . (R116, l. 2-8). It could not be stated more clearly. Byrd Son was also expressly identified as a party and signatory to the proposed Easement instruments. (R126-130 and R131-134).

II. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT THE SUBSEQUENT CONDUCT OF THE PARTIES AND ATTORNEYS CONCLUSIVELY ESTABLISHED THAT THE PARTIES HAD A MEETING OF THE MINDS ON ALL ESSENTIAL AND MATERIAL TERMS OF AN AGREEMENT. (Issues on Appeal nos. 4, 5 and 6.)

It is absolutely telling that subsequent to the AIP, Respondents’ attorneys prepared and circulated a proposed “more formal and detailed written settlement agreement” as called for in the AIP. The more formal and detailed settlement agreement consisted of three separate proposed documents: Settlement Agreement and Release, Cancellation of Easement and a new Easement Agreement. (R116, R126, R131).

Byrd Son was identified in the proposed Settlement Agreement and Release as a party to the agreement. (“These three persons [Byrd, Livingston and TIAA] shall be collectively referred to as ‘the Litigation Parties.’ **In addition**, to the extent described herein, Forrest Byrd II (**“Byrd Son”**) **is a party to this Agreement.”**) (emphasis added). (R116, l. 2-8). Byrd Son was expressly made a party and signatory to the Cancellation of Easement. (R126, l. 5 and R129). Byrd son was expressly made a party-grantor to the proposed new Easement Agreement. (R131, l. 4-5 and R134).

Notwithstanding the intent reflected in the new documents, the trial court ruled that “The proper focus of the enforceability question, however, is not the subsequent documents, but the November 23, 2009 Settlement Agreement” [should be AIP]. (R10, l. 25 to R11, l. 1). This is absolutely inconsistent with the portion of the Order where the trial court wrote that “Where there is doubt about the parties’ intend to be bound, Courts rely heavily on the subsequent actions of the parties in determining whether they intended to be bound at the time of the initial agreement,” citing Wright v. Trask, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997). (R7, l. 19-22). This is a significant internal inconsistency. What the trial court did was to emphasize its view of Appellant’s attorney’s intent by partially quoting informal emails while turning a blind eye to the Respondents’ attorneys’ intent as reflected in proposed detailed legal instruments that would be filed in the public record.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE LAW OF JOINT CONTRACTS TO THE MOTION TO ENFORCE SETTLEMENT. (Issue on Appeal no. 7).

In the portion of the Order discussing the inclusion of Byrd Son in the agreement and in particular the severance of the Byrd Son term from the agreement, the Court states that Plaintiff relied heavily on the case of Engineered Data Products v. Art Style Printing, 71 F.Supp2d 1073 (D. Colo. 1999). That is incorrect. In his memorandum of law, Plaintiff cited the Engineered Data opinion solely in support of the principle of law that as a rule, agreements in principle that refer to subsequent formal agreements are not binding. No other argument or position was taken for which Engineered Data was cited. Plaintiff relied on Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956) for its treatment of joint contracts that are signed by less than all intended parties. This is the central

issue presented in this proceeding, but neither the issue nor the Dean opinion is discussed in the Order.

C.J.S. has described the general rule as follows: “It has been held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it.” Smith v. Worsham, 552 S.W.2d 367 (Mo. App. 1977), citing 17 C.J.S. Contracts §62. But, a close examination of the cases reveals that most courts look to the intention of the parties as the controlling factor. As was said in the Smith case:

Generally the authorities support the proposition stated in the encyclopedias and texts: One cannot correctly say, abstractly, that a contract signed by less than all the parties between whom it purports to be made is binding on those who did sign it, or that it is not so binding; the question is one of the parties’ intention **as disclosed by the particular instruments and the conduct of the parties after the instrument was executed.**

Smith v. Worsham, *supra*. (emphasis added).

In Dean v. Dean, *supra*., the Court considered the question of the effectiveness and enforceability of an agreement signed by less than all the intended parties. The Court quoted with approval 17 C. J. S. Contracts §62:

... The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed.

In the case at bar, nothing can better demonstrate the intent of the parties than the conduct of the Respondents after the AIP was signed as reflected in the legal instruments prepared by the Respondents for the purpose of carrying forward the AIP.

IV. THE TRIAL COURT ERRED IN FAILING TO APPLY THE LEGAL PRINCIPLE OF CONDITION PRECEDENT TO THE APPELLANT'S ALLEGED OBLIGATION WITH RESPECT TO A FINAL SETTLEMENT AGREEMENT. (Issue on appeal no. 8).

A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. Worley v. Yarborough Ford, Inc., 452 S.E.2d 622 (S. C. App. 1994), citing 4 S.C. Juris. Actions, § 25 (1991). In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. Worley, supra., citing Ballenger Corp. v. City of Columbia, 331 S.E.2d 365 (S. C. App. 1985). 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.

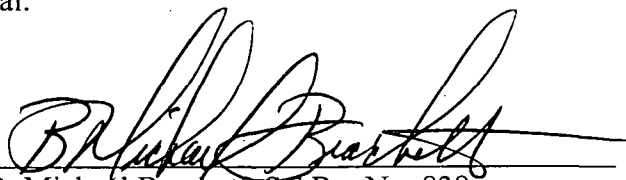
The language of the AIP as a whole, and the language of its separate provisions, the vast majority of those provisions affecting the interests of Byrd Son, show that without the agreement of Byrd Son the benefits to be derived from the agreement by the other parties are rendered partial and incomplete. The language used in the AIP created a condition precedent requiring that Byrd Son ratify the AIP and sign the more formal and detailed Settlement Agreement to follow. Without satisfying the condition precedent, Appellant's performance under the AIP is excused. Worley, supra

V. THE TRIAL COURT ERRED IN RULING THE BYRD SON INCLUSION PROVISION SEVERABLE FROM THE REMAINDER OF THE AIP. (Issue on Appeal no. 9).

Appellant incorporates herein by reference the other portions of this brief addressing the trial court's errors with respect to discernment of the parties intent. Nothing in the language of the AIP, or in the proposed new documents intended to comprise the new and improved Settlement Agreement or in other conduct subsequent to the AIP evidences an intent that the AIP would be enforceable on its own without regard to Byrd Son's agreement to participate.

CONCLUSION

The trial court's Orders dated July 30, 2010 and November 5, 2010 should be reversed and the matter remanded to the circuit court for trial.

A handwritten signature in black ink, appearing to read "B. Michael Brackett", is written over a horizontal line.

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July 22, 2011

Brief of Respondent

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STATEMENT OF THE ISSUES ON APPEAL

Was the lower court correct in enforcing a Settlement Agreement signed by all parties to the Litigation and to the Agreement despite the fact that subsequent documents were prepared to carry out the settlement, and despite the fact that one of the benefits of the Settlement was to be offered later to a nonparty?

STATEMENT OF THE CASE

Appellant Forrest Byrd filed this action on September 10, 2008 following his purchase at public auction of several Newberry County parcels of property from Respondent Judy Livingston. Byrd's claims all arise out of the existence of a right-of-way across the land that he purchased from Livingston, and the action was filed to extinguish that right-of-way. Byrd alleged several causes of action that he entitled Quiet Title, Reformation, Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Negligent Misrepresentation/Fraud. (R. pp. 19 - 26) All five causes of action were alleged against Livingston. Byrd asserted only the first cause of action against Respondent TIAA Timberlands II, LLC ("TIAA"), which is an adjacent landowner. TIAA played no role in the Byrd Parcel transaction, but its property is also affected by the right-of-way.

Livingston and TIAA filed Answers denying the allegations. (R. pp. 38 -48). TIAA also included a Counterclaim for Declaratory Judgment seeking the declaration of an implied easement for ingress and egress across Byrd's property in the event that the Court held the written easement to be invalid. (R. p. 41).

With the consent of the parties, the lower court bifurcated the case, ordering that the parties first conduct discovery, file cross-motions for summary judgment, and if those motions were denied, present evidence at trial regarding the written, express easement. (R. pp. 17 - 18) The Scheduling Order reflected that the express easement issues would resolve the entire case except for the TIAA Counterclaim. (R. p. 17). That Order bifurcated the issues and provided specific deadlines for discovery and motions on the express easement ("Phase 1"). If the Court were to rule that the express easement were valid, the Counterclaim

would be mooted and the case would be concluded. (R. p. 17). In the event that the Court were to rule that no express easement existed, the Scheduling Order provided that the parties would then proceed to conduct discovery and present for resolution by the Court the issues raised in the TIAA Counterclaim related to the implied easement ("Phase 2"). (R. p. 17).

Eight days prior to the deadline for Phase 1 discovery, the parties attended a mediation conference. At that conference on November 23, 2009, the Honorable Clyde Davis acted as mediator, and the parties reached an agreement. At the conclusion, prior to leaving the mediation, the parties all signed a document reflecting the terms of the settlement ("Settlement Agreement") (R. pp. 148 - 149).

Byrd subsequently refused to carry out the terms of the settlement, resulting in TIAA and Livingston filing a Motion to Enforce Settlement Agreement and for Sanctions/Petition for Rule to Show Cause ("Motion to Enforce Settlement") on February 19, 2011. (R. pp. 145 - 168). Byrd subsequently filed a Memorandum in Opposition to Defendants' Motion to Enforce Settlement. (R. pp. 107 - 113) The Motion was heard by the Lower Court on June 30, 2010, and granted by Order dated July 30, 2010. In the Court's Order, The Honorable Frank R. Addy, Jr. concluded that the Settlement Agreement was enforceable and binding upon Byrd. (R. pp. 1 - 15).

Byrd filed a Motion for Reconsideration on August 16, 2010, which was denied by the Lower Court on November 5, 2010. (R. pp. 82 - 90; R. p. 16). This appeal followed.

STATEMENT OF FACTS

A. The Property Purchase

Byrd was the successful bidder on two of four contiguous parcels of unimproved property in Newberry County offered for sale by Livingston at public auction. Immediately following the successful bid on May 31, 2007, Byrd entered into a written contract with Livingston to purchase approximately 53 acres. (R. pp. 27 - 28). The Parcel contains a dirt road that crosses it leading to TIAA's property. (R. p. 36).

Prior to closing on the property, Byrd received a survey showing a sixty-six foot wide right-of-way across the property. (R. pp. 24 - 25, 36). Referencing that document, Byrd's deed stated that "[t]his conveyance is made subject to right of way easement as shown on above mentioned plat." (R. p. 31). On July 8, 2007 Livingston executed a "Right-Of-Way Easement" document ("Easement Document") that formally granted a 66' wide right-of-way to TIAA across the existing dirt road. (R. p. 34). Byrd's main contention is that Livingston did not tell him about the "Right-Of-Way Easement" document.

The parties met on July 10, 2007 for the closing. On July 13, 2007 at 11:01 a.m., Byrd's deed was filed (including the language "made subject to the right of way easement as shown on above mentioned plat"). (R. pp. 31 - 33). Later that same day at 1:50 p.m., the Easement Document was recorded. (R. p. 34). Although his own plat and deed referenced the sixty-six foot right-of-way, Byrd claims he did not know about the written Easement Document itself.¹

¹ Although the issue was never presented to a Court because the case settled, Byrd faced the formidable task of arguing that he was entitled to relief even though he had actual knowledge of the sixty-six foot easement, which was referenced in his own plat and deed.

B. The Settlement

Following completion of discovery on the Phase I issues, all parties voluntarily entered into a mediation of this case on November 23, 2009, with the Hon. Clyde N. Davis, Jr. serving as mediator. The parties and their counsel were present. The parties reached a settlement of all issues. Prior to leaving the mediation conference, they typed those terms into a Settlement Agreement, printed the document, had all parties and attorneys review it, and then executed the Settlement Agreement. Appellant Byrd signed the Settlement Agreement. The agreed-upon terms of the settlement contained in the written Settlement Agreement were:

- * 25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and canceling the 66' grant, son's parcel included.
- * maintenance/repair - SC voluntary forestry best management practices shall be followed - Each of the parties, after use, will put the road and/or property back in good or better condition than prior to use.
- * TIAA/Hancock lessees, including hunt clubs, will be required to abide by the code of ethics in the lease currently used by TIAA/Hancock.
- * double lock gate system will be employed.
- * this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.

- * any costs associated with carrying out the agreement, such as surveys (not including attorneys' fees) shall be split equally among the parties.
- * Litigation dismissed, mutual releases among all parties.

(R. pp. 148 - 149).

Byrd's son, mentioned only once, in three words at the end of the first bullet item, was neither a party to the case nor to the Settlement Agreement. (R. pp. 19, 148 - 149). He was, at the time of the mediation, the owner of an adjacent parcel. The easement in question began at the termination of a public road (Langford Street), crossed Byrd's son's property, crossed Byrd's property, and then continued onto TIAA's property. His property was referenced in the first bullet item of the Settlement Agreement after Byrd expressed an interest in having the favorable terms related to the narrowed easement (from sixty-six feet wide to twenty-five feet wide) apply to the son's property as well. (R. pp. 142 - 143).

Immediately following the mediation, the parties undertook to prepare the additional documents contemplated by the Settlement Agreement, including a new written easement, and a cancellation of the prior easement. (R. pp. 150 - 167). As described by the Settlement Agreement, a new survey was ordered, completed, and filed in the Register of Deeds of Newberry County. As described by the Settlement Agreement, the cost of that survey was split three ways and was actually paid by the attorneys for the three parties. (R. p. 148, 142 - 143) Moreover, a formal settlement document embodying the terms of the earlier Settlement Agreement was drafted and circulated ("Subsequent Agreement"). (R. pp. 150 - 168). These documents were sent to Byrd's attorney. (R. pp. 136 - 141, 150 - 156).

Over two months passed as counsel for Respondents inquired as to why Byrd had not executed the documents. (R. pp. 137 - 141) Byrd eventually communicated through counsel that he was repudiating the Settlement Agreement.

ARGUMENT

A. INTRODUCTION

The lower court correctly noted that issues relating to settlement agreements, including their enforceability, are to be analyzed under general contract principles. *See, e.g., Patricia Grand Hotel, LLC v. MacGuire Enterprises, LLC*, 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007). “South Carolina common law requires that, in order to have a valid 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). *See also Vessell v. DPS Assocs. of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998) (applying South Carolina law). Where the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intention of the parties. *Id.*; *see also Mattox v. Cassidy*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986).

As the lower court explained, whether the parties expressed mutual assent to be bound to the essential and material terms “is based upon the intent and purposes as shown by all the circumstances.” *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996); *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 760 (D.S.C. 1999) (applying

South Carolina law). The parties' actions, as well as those of their attorneys, are relevant to the question of whether they intended to be bound. *Id.*, 66 F.Supp.2d at 761.

As the lower court noted, the analysis can be broken down into two questions: (1) did the parties intend to be bound and (2) did the parties state the material and essential terms of their settlement?

B. BYRD'S SON WAS NOT A PARTY TO THE SETTLEMENT AGREEMENT, AND HIS ASSENT WAS NOT ESSENTIAL TO ITS ENFORCEABILITY.²

Byrd's son purchased an adjacent parcel of property more than ten months after Byrd filed this lawsuit. Once the settlement was reached on November 23, 2009, Byrd sought to have the narrowing of the easement apply to his son as well. (R. pp. 142 - 143). As a result, three words related to his son were added to the first term of the Agreement. That paragraph reads in its entirety:

25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock - express grant superceding and canceling the 66' grant, son's parcel included.

(R. p. 148).

Entirely on the basis of those three words, Byrd seeks repeatedly in his brief to characterize Byrd's son as a "necessary" party to the November 2009 Settlement Agreement. (Brief of Appellant, p. 12). He goes on to describe Byrd's son as a "missing signatory." (Brief of Appellant, p. 11). Byrd's son was none of those. He was

² The question of Byrd's son role is raised in Byrd's arguments numbered I, III, IV and V.

mentioned in one term at Byrd's request. There is no "missing signatory" to the November Agreement. Byrd's son was simply not a party to the Settlement Agreement.

The confusion in Byrd's argument arises from the lack of clarity on what is to be enforced. The Settlement Agreement enforced by the lower court is the document signed by Byrd and the other parties at the end of the mediation conference on November 23, 2009. (R. p. 148) It is undisputed that no party to the Settlement Agreement expected another signatory to that document. There are three signature lines, one each for Byrd, Livingston, and TIAA. Byrd's son was never to be a signatory to that document. He would be given the option to have the easement across his property narrowed if he so chose, but he was never a party to the Settlement Agreement.

In considering what the parties intended in the Settlement Agreement, the lower court correctly first examined the use of the word "parties." The document itself clearly uses the term "parties" to mean only TIAA, Byrd, and Livingston. The first line references "the undersigned parties" (Byrd, Livingston, and TIAA). (R. pp. 148 -149). The Settlement Agreement provided that the cost of a new survey was to be "split among the parties." (R. p. 148). After signing the document, Byrd, Livingston, and TIAA each paid one-third (not one-fourth) the cost of the survey. (R. pp. 142 - 143). Another part of the Settlement Agreement states "Litigation dismissed, mutual releases among the parties," words that have no meaning if read to include Byrd's son. (R. p. 148). In short, there were only three parties to the Settlement Agreement signed on November 23, 2009:

Byrd, Livingston, and TIAA. Byrd's suggestion that his son was intended to be a party is simply incorrect.³

The Settlement Agreement, by including the three words "son's parcel included" in the one provision related to the narrowing of the easement, merely gave the son the option of accepting the same benefit for his property. He was given the option of having the easement narrowed across his parcel from sixty-six feet to twenty-five feet. For reasons that puzzled the lower court, the son apparently chose to reject this benefit. (R. pp. 12, 135). Regardless of whether the son rejected or accepted the benefit, that decision in no way affects whether Byrd himself, the "party" to both the lawsuit and to the Settlement Agreement, was himself bound. Contrary to Byrd's characterization, the son was simply not a party to the Settlement Agreement.

The lower court correctly noted that while the son was not bound by the Settlement Agreement, Byrd himself was bound. Byrd was a party to the Settlement Agreement that he agreed to, that he signed, and that his attorney then partially carried out on his behalf. The lower court correctly noted "The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable." (R. p. 12).

The lower court correctly focused on the question of Byrd's own actions and intent. Entirely separate from the questions related to the son, who could accept the benefit offered him or not, Byrd still bound *himself* with his signature on November 23,

3 The Subsequent Agreement (which Byrd fails to recognize is not the one that is the subject of the enforcement motion), was drafted to include Byrd's son as if he in fact desired to accept the benefit. It was never contemplated that the earlier Settlement Agreement was to include Byrd's son as a party.

2009. With his attorney present and advising him, Byrd personally agreed to the terms of the document and signed the document, and those terms are still binding on *him*.

Contrary to Byrd's argument, the inclusion of the three words referring to his son's parcel in the first paragraph of the settlement agreement has absolutely no effect on the enforceability of the settlement as to Byrd himself. See 14 J. Perillo, *Corbin on Contracts* § 75.8 (Rev. ed. 2001) ("A contracting party who agrees to render a performance or produce a result when success depends upon the cooperation of a nonparty is not usually excused when the nonparty fails to cooperate.").

Byrd points out that the Subsequent Agreement that was drafted and circulated included a line for Byrd's son to sign. Of course, that Subsequent Agreement was drafted immediately after the mediation when everyone believed the representation that Byrd's son would want the benefit of a narrower easement because it would reduce the encumbrance on his property. For that reason, it was contemplated that once he accepted that benefit, he would also need to sign the Subsequent Agreement. If he did not accept the offer, however, as he later in fact did not, it was simply a matter of drafting the Subsequent Agreement to omit him. None of that bears on the question of whether the November 23, 2009 Settlement Agreement is binding on the parties who signed it. There is no "missing party" to the November 23 Settlement Agreement, and Byrd's son could either take the benefit offered him or not. If he accepted that benefit, the subsequent documents would be drafted to include him. But his later inclusion or omission makes no difference to the legal question of whether the actual parties to the litigation and to the Settlement Agreement were bound.

C. THE FACT THAT ANOTHER WRITTEN AGREEMENT WAS EXPECTED TO FOLLOW DOES NOT AFFECT THE ENFORCEABILITY OF THE AGREEMENT SIGNED AT THE MEDIATION CONFERENCE.

In arguing that the parties to the November 23 Settlement Agreement did not intend to be bound, Byrd points to the fact that it mentions a more formal written agreement to follow. The Settlement Agreement signed on November 23, 2009 stated that “this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties.” (R. p. 148). The lower court correctly analyzed the unsettling implications of Byrd’s argument.

Formal settlement documents always follow mediations. If [the anticipation of a subsequent agreement] were enough to negate a settlement, all settlements reached in mediations would be unenforceable. . . . The fact that a formal agreement would follow is not fatal to the enforceability of the settlement. The fact that parties intended to carefully embody the terms of the settlement in a subsequent formal document is common practice.

(R. pp. 6-7).

As the lower court noted, Byrd's argument was rejected by the U.S. District Court in *Sadighi*. In that case, the Court applied South Carolina law in determining the enforceability of a settlement. The settlement document in *Sadighi* stated that it “was not intended as a final expression of the terms of the settlement. The exact terms will be expressed in a more comprehensive Settlement Agreement.” Based on that language, the party opposing enforcement had argued, as does Byrd here, that the letter was not an expression of intent to be bound, but simply a preliminary, unenforceable statement. The Court, applying South Carolina law, rejected that argument:

[A]n intent to memorialize a contract in a subsequent writing will not prevent a reviewing court from finding an enforceable contract so long as the parties intended to be bound by the earlier documents. . . . Neither party expressed any intent that a binding agreement depended upon the execution of future formal writings. In fact, the settlement agreement is to the contrary. . . . As a result, the actual signing of the formal settlement documents was "a mere formality," a memorialization of previously agreed upon terms, as the parties intended to be bound, regardless of an agreement to subsequently execute a formal Settlement Agreement.

66 F.Supp.2d at 763-64.

The reasoning of the Court in *Sadighi* applies here as well: The parties clearly intended to be bound by the November 23, 2009 Settlement Agreement. The fact that the subsequent documents agreed upon were yet to be drafted in no way makes their Settlement Agreement unenforceable. If the rule were otherwise, virtually no settlement reached at any mediation would be enforceable, in effect calling into doubt the value of the entire mediation process.⁴ In particular, settlement agreements involving interests in real estate will almost always require subsequent documents. In this case, it would have been impossible and extremely inefficient to draft the easement documents while the parties, their attorneys, and the mediator were sitting there at the mediation table.

Formal settlement documents always follow mediations. The anticipation that

⁴ Byrd relies heavily on the heading that was used on the Settlement Agreement. The lower court correctly found the phrase "Agreement in Principle" to be ultimately insignificant in weighing the evidence of the parties' intent. The lower court correctly concluded that headings cannot be used to create an ambiguity where none exists. *See McInnis v. McInnis*, 348 S.C. 585, 560 S.E.2d 632 (Ct. App. 2002). The lower court correctly concluded: "Because the conduct of the parties subsequent to the Agreement so clearly indicates their intent to be bound, the Court concludes that this phrase was merely intended to indicate that a more formal agreement would follow, as is customary in mediations such as this." (R. p. 9).

another formal document will follow does not render the settlements reached at those mediations somehow unenforceable. This very argument was rejected by the U.S. District Court in *Sadighi*. In that case, the settling document stated that it “was not intended as a final expression of the terms of the settlement. The exact terms will be expressed in a more comprehensive Settlement Agreement.” Based on that language, the party opposing enforcement had argued, as apparently does Byrd here, that the letter was not an expression of intent to be bound, but simply a preliminary, unenforceable statement.

Despite the inclusion of this language, the Court in *Sadighi* nevertheless enforced the settlement. Applying South Carolina law, the Court explained:

Failure to complete formal settlement papers does not indicate that a settlement agreement was not in fact reached. . . . Indeed, an intent to memorialize a contract in a subsequent writing will not prevent a reviewing court from finding an enforceable contract so long as the parties intended to be bound by the earlier documents. . . [T]he actual signing of the formal settlement documents was a “mere formality,” a memorialization of previously agreed upon terms, as the parties intended to be bound, regardless of an agreement to subsequently execute a formal Settlement Agreement.

Sadighi, 66 F.Supp2d at 763-64 (D.S.C. 1999) (citations omitted).

The Court’s reasoning in that case controls here as well. The fact that the parties intended to carefully embody the terms of the settlement in a subsequent formal document has no bearing on the enforceability of what was agreed to on November 23, 2009. The question remains one of intent: Did the parties intend to be bound by the document that they signed on November 23, 2009? The contents of the document, as

well as the circumstances of its execution, indicate that they did intend to be so bound.

Byrd's argument regarding the alleged preliminary nature of the agreement is without merit.

D. THE SUBSEQUENT ACTIONS OF THE PARTIES AND THEIR ATTORNEYS SUPPORT RATHER THAN UNDERMINE THE ENFORCEABILITY ARGUMENT.

The lower court correctly observed that the actions of the parties and their attorneys strongly indicates that they intended to be bound. Where there is doubt about the parties' intent, Courts rely heavily on the subsequent actions of the parties in determining whether they intended to be bound at the time of the initial agreement. *See, e.g., Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222, 226 (Ct. App. 1997) ("[S]ubsequent acts are relevant to show whether a contract was intended."). Contrary to the argument made by Byrd, the subsequent actions of the parties and their attorneys fully support the lower court's conclusion that they intended to be bound.

The *Sadighi* court noted that the attorneys acted in ways to indicate that they thought they had achieved a binding settlement. After the settlement was reached, discovery deadlines passed, no more depositions were taken, and deadlines for amendments to the pleadings passed. The Court noted: "This conduct speaks volumes." *Sadighi*, 66 F.Supp.2d at 761. Similarly, the emails among the attorneys after the signing of the November 23, 2009 Settlement Agreement supports the lower court's conclusion tat the parties intended to be bound.

In this case, it was *Byrd's attorney* who inquired by email as to where the formal

agreement was, noting on December 7, 2009: "The quicker we can get this done, the better for everyone." (R. p. 137) A few weeks later, after counsel for TIAA and Livingston had drafted the formal agreement, Byrd's attorney wrote: "I'm still trying over here. I'll let you know the moment I have something for you. Believe me, I empathize with your position. Indulge me a little longer, however." (R. p. 139). On January 25, 2010, more than two months after the settlement, Byrd's attorney wrote: "... I hope to get something to you this week. I am supposed to meet with Mr. Byrd again in the coming days, and will get back with [Livingston's attorney and TIAA's attorney] then." *Id.* A few days later⁵ Parker wrote that his client had been busy and he was going to meet with him the following Monday. (R. p. 140 - 141).

These emails demonstrate that Byrd's attorney believed the settlement to be binding and had apparently run into problems with his own client. Parker served a Motion to Be Relieved as Byrd's counsel on February 16, 2010, and Byrd obtained new counsel at that time. "It will never do, in the absence of fraud, to allow the undoubted attorneys of record for a party to a suit to enter into a solemn agreement to settle and adjust the issues and subject-matter of a suit and then later, if it is done, because for any reason the party is dissatisfied, to allow him to repudiate this agreement and employ different counsel to upset and set aside what his first counsel has done." *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244, 246-47 (Ct. App. 2007).

The lower court also correctly relied on the parties' other post-settlement

⁵ The date stamp on this email is incorrect. As indicated in the forwarding email from Timothy Savidge, the email was actually written on January 29, 2010. (R. pp. 136 - 140 - 141).

behavior. The deadlines in the Scheduling Order for filing the agreed-upon dispositive motions passed. (The Order had provided that cross-motions were to be filed by December 15, 2009 and heard at the term of court beginning January 4, 2010.) (R. pp. 17 - 18). As the lower court noted, this suggests that everyone believed the case to be settled.

The lower court also correctly noted that significant portions of the Settlement Agreement were actually carried out. The parties obtained the new survey contemplated by the Settlement Agreement. That survey was actually filed in the Newberry County Register of Deeds. (R. pp. 157 - 158). The Agreement had provided that “any costs associated with carrying out the agreement, such as surveys (not including attorneys’ fees) shall be split equally among the parties.” (R. p. 148) As the lower court noted, it is telling that Byrd’s attorney, in fact, paid his one-third share of that survey. (R. pp. 142 - 143). As in the *Sadighi* case, “this conduct speaks volumes.” *See Scurry v. Edwards*, 232 S.C. 53, 100 S.E.2d 812 (S.C. 1957) (noting in context of an oral contract for the sale of real property, part performance renders enforceable a contract that would otherwise have been unenforceable).

In short, the lower court correctly analyzed the conduct of the parties after the November 23, 2009 Settlement Agreement was signed. It correctly concluded that all parties not only intended to be bound, but believed themselves to be bound.

E. THE VARIOUS CONTRACT DOCTRINES ARGUED BY BYRD HAVE NO APPLICATION HERE.

Byrd’s argument searches for a helpful contract doctrine without success. There is no “condition precedent” in the November 23, 2009 Settlement Agreement. A

condition precedent “connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.” *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 331 S.E.2d 365 (Ct.App.1985). The words “son’s parcel included” cannot possibly be read as a condition precedent.” The phrasing, to constitute a condition precedent would have to have been the equivalent of: “Byrd’s obligations under this agreement arise only if and when his son subsequently agrees as well.” If that had been the language used, the binding contractual obligation would arguably arise against Byrd only upon the occurrence of the condition precedent. The actual Settlement Agreement entered into in this case uses no language remotely approaching a condition precedent. Byrd is bound.

Byrd also seeks to apply the law of “joint contracts,” relying heavily on *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956). In *Dean*, the Court simply concluded that an agreement was unenforceable because the actual parties to that agreement did not all agree. *Id.* That case is easily distinguishable from the present case in which all the parties to the November 23, 2009 Settlement Agreement (Byrd, Livingston, and TIAA) did, in fact, indicate their assent to be bound and were, as a matter of law, bound. It is clear from the Settlement Agreement that there were only three parties: Byrd, TIAA, and Livingston. Whether Byrd’s son later opted in is immaterial to its enforceability by and against the parties to the Agreement. No person’s signature was missing from the November 23 Settlement Agreement.

The Court in *Dean* analyzes a different situation, namely, what happens when an agreement is lacking the signature of a party whom the other parties actually intended to

be a party to that agreement. Under those circumstances, as the Court in *Dean* explains, the Court must decide whether the contractual obligations are “joint.” *Id.*, 229 S.C. at 437, 93 S.E.2d at 209. If the obligations can only be performed jointly, the Court explains, then the contract itself is joint, and cannot be enforced without all parties’ assent. On the other hand, a contract “is severable when, in its nature and purpose, it is susceptible of division and apportionment.” *Id.*, 229 S.C. at 438, 93 S.E.2d at 210. *See also Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Whether a provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

Even if this analysis of joint and several obligations applied in this case (which, again, it does not because there is no missing party to Agreement in question), the discussion in *Dean* supports rather than undermines the conclusion that this Agreement is enforceable. First, the benefit received (a narrowed easement) is not even an “obligation,” much less a “joint obligation.” Second, it is clear that the parties fully intended to settle this dispute apart from the three words mentioning the son’s parcel. Here, it is entirely possible to narrow the easement and impose the other agreed-upon terms of the Settlement Agreement on all parties to that Agreement, without regard to Byrd’s son. The son’s easement would remain the status quo, unaffected by the settlement. *Dean* fully supports the finding of the lower court that the son’s benefit is severable and that the rest of the Settlement Agreement remains binding upon Byrd.

CONCLUSION

The lower court noted that Byrd had a case of "buyer's remorse" after the settlement and sought to use whatever arguments were available to him to upset a binding settlement. (R. p. 14). That effort should not be rewarded. Public policy encourages settlements, the mediation process, and the enforcement of this settlement.

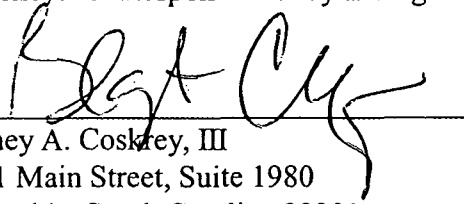
Respondents respectfully request that the Court affirm the lower court's order and enforcement of this settlement agreement.

Respectfully submitted,



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July 25 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2008-CP-36-428

Forrest Byrd, ... Appellant,

v.

Judy Livingston and TIAA Timberlands, II, LLC, ... Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

CASES

Crestview Cemetery Ass’n v. Dieden, 356 P.2d 171 (Cal. 1960) 2

STATUTES

None

OTHER

None

Notwithstanding what is addressed or not addressed herein, Appellant expressly restates, and does not waive, any argument made in Appellant's Final Brief.

ARGUMENT

Respondents' argument and the trial court's reasoning boil down to this: the November 23, 2009 Agreement in Principle (hereinafter "AIP")¹ is a valid, enforceable, stand-alone contract notwithstanding what its own language and the subsequent conduct of the above-captioned parties indicate with respect to the Appellant's intent and the other signatories' intent to be bound without Byrd Son's assent or agreement. Respondents' argument, taken to its logical conclusion, is that the signatories to the November 23, 2009 AIP entered into a complete and fully enforceable agreement, but if Byrd Son would later sign on, a new and more fully expressed agreement that would include Byrd Son would supplant the AIP. This is a result not spelled out or contemplated in the AIP. There was to be one, single, ultimate agreement, and not a first agreement to be enforced unless and until it was replaced with a second agreement that included an additional party.

1. Agreement in Principle was a purposeful and meaningful term. The term employed by Appellant and Respondents to describe the November 23, 2009 document was "Agreement in Principle." (R114). The trial court and the Respondents say that it does not matter because a heading used in the document may not be controlling on the question of intent. But, in this case the term "Agreement in Principle" is not just used as a heading in the document, it is used in the body of the document as well.

¹ It is especially irritating for the trial court and the Respondents to continually identify the November 23, 2009 AIP as a Settlement Agreement. The document itself uses both terms, thereby demonstrating that the parties knew the difference between a Settlement Agreement and an AIP.

Appellant submits that the choice of that term is significant in discerning intent. Had the November 23, 2009 document been headed "Settlement Agreement" with more formal documents to follow, the trial court's analysis and conclusion would be on stronger footing. But, it is an incontrovertible fact that the document was labeled by the parties themselves as only an AIP, and rightfully so based on the content of the proposed final settlement documents that followed. As a further indication of the conditional, open-ended nature of the AIP, it says that it is an AIP "including the following terms." (R114, first paragraph). That terminology clearly shows that the terms actually set out in the written AIP are intended to be only a partial recitation of a larger set of terms not then fully agreed to and not then expressed in the AIP. This is evidence of the fact that the parties to the AIP knew the difference between a preliminary agreement in principle and a more comprehensive settlement agreement.

2. The subsequent proposed Settlement Agreement was a purposeful and meaningful document. Appellant points to the subsequent conduct of the signatories to the AIP, particularly to the proposed terms of the subsequent formal documents contemplated by the AIP and as drafted and proposed by Respondents, as being significant in discerning intent. (R116, R126, R131). The trial court and Respondents say that this does not matter. The trial court concluded that the content of the subsequent Settlement Agreement was essentially meaningless and offered nothing to the search for intent. Byrd Son could be included or not; it really was unimportant; a trivial detail. In this, the trial court was wrong.

The "principle of practical construction" is explained in Crestview Cemetery Ass'n v. Dieden, 356 P.2d 171 (Cal. 1960):

That the actions of the parties should be used as a reliable means of interpreting an ambiguous contract is, of course, well settled in our law . . . ‘The acts of the parties under the contract afford one of the most reliable means of arriving at their intention; and, while not conclusive, the construction thus given to a contract by the parties before any controversy has arisen as to its meaning will, when reasonable, be adopted and enforced by the courts.’ . . . ‘The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. . . .’

...

This rule of practical construction is predicated on the common sense concept that ‘actions speak louder than words.’ Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.

Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. That is undoubtedly a correct general statement of the law . . . But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the ‘ambiguity’ required to bring the rule into operation. If this were not the rule the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different.

3. Byrd Son’s interest. Why did the trial court essentially ignore the subsequent conduct of the parties with respect to the content of the proposed ultimate settlement documents? Because the trial court made critical and erroneous assumptions with respect to Appellant’s and Byrd Son’s position on the width of the easement. The trial court’s Order states that “the effect of binding the Son to the settlement would bestow only benefits upon him,” (R12, 1. 7-9), apparently thinking that

narrowing the easement from 66' to 25' through Byrd Son's adjacent parcel would be beneficial to Byrd Son while having no effect or a neutral effect on Appellant's parcel. Rather than looking to the effect of the agreement on Byrd Son, whose intent with respect to the AIP is irrelevant, the court should have asked itself the question of why Appellant would want the easement across Byrd Son's parcel to be narrowed from 66' to 25'. Why would that be important to Appellant rather than being a neutral thing?

The road/easement across Byrd Son's parcel is the access route to Appellant's parcel. (R36). A 66' easement across Byrd Son's parcel would be subjected to a greater burden than would a 25' easement. Larger vehicles, more vehicles, potential for more concentrated development, all of which would impact Appellant's parcel in terms of current enjoyment. If Byrd Son does not agree to narrow the easement across his land, Appellant could choose not to settle with Respondents and to continue his effort to obtain relief from the Respondents. What Appellant views as the benefits of having a narrower easement across the adjacent parcel is sufficient to justify the concessions he otherwise makes in the AIP. ²

Respondents describe Byrd Son's interest as an "option to have the easement across his property narrowed if he so chose," (Resps. Initial Brief, p.9, l. 10-1), but the AIP does not describe Byrd Son as receiving only an option as the easement without being bound to the other terms of the AIP or to the subsequent settlement agreement. The word "option" does not appear in the AIP.

Respondents' arguments on the unnecessary participation by Byrd Son are belied by the fact

² In a related argument meant to show that Byrd Son was not intended to be a necessary party and was really an afterthought, Respondents argue with respect to Byrd Son that "Byrd's son, mentioned only once, in three words at the end of the first bullet item. . ." (Resps. Initial Brief, p. 6, l. 7-8). There is no magic number of repetitions or number of words required to include a subject in a document.

that Byrd Son was included in the proposed formal settlement documents and was expressly described therein as "... a party to this Agreement." Respondents knew and understood the AIP because their own proposed ultimate settlement documents reflect such. The rub is that no one then thought that Byrd Son would object, and when he did, Respondents were forced to torture the AIP to make it confess to be something it was not intended to be.

Respondents argue that unrelated to the future involvement of Byrd Son, the Appellant "... bound himself with his signature on November 23, 2009." But, bound himself to do what? There is nothing in the AIP or in the subsequent documents that compels the conclusion that Appellant intend to, and agreed to, be bound to all of the terms of the AIP absent agreement of Byrd Son on the easement term. Lacking the assent of Appellant, and Byrd Son, on the easement term, there was and is no enforceable settlement.

4. No Meeting of the Minds. Respondents' arguments demonstrate that there was no meeting of the minds on the result of the mediation in the event that Byrd Son chose not to agree to the easement term. Without a meeting of the minds, there is no enforceable agreement.

CONCLUSION

The trial court's Orders dated July 30, 2010 and November 5, 2010 should be reversed and the matter remanded to the circuit court for trial.



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