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July 24, 2012

Timothy D. Savidge, Esquire
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The Honorable Jenny Abbott Kitchings
Clerk of Court, S. C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Blaney A. Coskrey, III, Esquire
Capitol Center Tower
1201 Main St., Suite 1980
Columbia, SC 29201

RE: Byrd v. Livingston, et. al.
2008-CP-36-428
S. C. Court of Appeals Opinion No. 4973
Our File Number - 12113.1

Dear Lady and Gentlemen:

Enclosed please find a Petition for Writ of Certiorari and Appendix along with a copy of a Certificate of Service with regard to the above referenced case. Linda Allen with the Supreme Court asked that the words "Appellant and Defendant" be scratched from the first page of each document and that a new Certificate of Service be prepared showing service of these documents with the words now omitted from the front pages.

Mr. Brackett is on vacation this week but if you should have any questions, please do not hesitate to contact him on Monday, July 30 upon his return.

Thank you.

RECEIVED
JUL 25 2012
SC Court of Appeals

Sincerely,



Linda T. Abernethy
Legal Assistant to B. Michael Brackett, Esquire

/lta
enclosures

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 20 2012

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

PETITION FOR A WRIT OF CERTIORARI
on Behalf of Forrest Byrd

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TABLE OF CONTENTS

Statement of the Issues Presented for Review 1

Certification of Counsel 2

Statement of the Case 2

Statement of the Facts 3

Certiorari 5

Argument 6

I. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' Agreement in Principle was in effect something far more definitive and final - an independently enforceable Settlement Agreement, although the parties themselves did not describe it as such. (Section I in Court of Appeals' opinion.) 6

II. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' subsequent conduct evidenced that all parties had agreed to be bound by the Agreement in Principle without regard to the inclusion of the Son in the agreement. (Section II in Court of Appeals' opinion.) 8

III. The Court of Appeals erred in affirming the Circuit Court by concluding that the inclusion of Petitioner's Son was not a condition precedent to having an eventual final and binding settlement agreement. (Section III in Court of Appeals' opinion.) 11

IV. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' envisioned final settlement agreement was not governed by the law of joint contracts and did not require the signature of Byrd Son. (Section IV in Court of Appeals' opinion.) 14

Conclusion 15

TABLE OF AUTHORITIES

Cases

Ballenger Corp. v. City of Columbia, 331 S.E.2d 365 (S. C. App. 1985) 12

Burch v. South Carolina Cotton Growers' Co-op. Ass'n.,
181 S.C. 295, 187 S.E. 422 (1936) 12

Crestview Cemetery Ass'n v. Dieden, 356 P.2d 171 (Cal. 1960) 8

Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956) 15

Engineered Data Prods., Inc. v. Art Style Printing, Inc.,
71 F. Supp.2d 1073, 1078 (D.Colo.1999) 7

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) 5

Jacoby v. South Carolina State Bd. of Naturopathic Examiners,
219 S.C. 66, 64 S.E.2d 138 (1951) 5

Lawrence v. Clark, 115 S.C. 67, 104 S.E. 330 (1920) 12

Sadighi v. Daghighfkr. 66 F.Supp.2d 752 (D.S.C. 1999) 7

Sfreddo v. Sfreddo, 720 S.E.2d 145 (Va. App.2010) 12

Skycom Corp. v. Telstar Corp., 813 F.2d 810, 815 (7th Cir.1987) 7

Smith v. Worsham, 552 S.W. 2d 367 (Mo. App. 1977) 14

Tomlinson v. Sentry Engineering and Construction, Inc.
777 F.2d 918 (4th Cir. 1985) 12

Worley v. Yarborough Ford, Inc., 452 S.E.2d 622 (S.C. App. 1994) 11

Statutes

(None)

Other

Black's Law Dictionary (rev.4th ed. 1968), 287 5

Black's Law Dictionary (Rev.4th ed. 1968), 1386. 10

17 C.J.S. Contracts §62. 14, 15

17A C.J.S. Contracts §330 12

Rule 242(b), SCACR 5

4 S.C. Juris. Actions, § 25 (1991). 12

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the Circuit Court's Order finding that the Agreement in Principle was actually a final, binding and enforceable settlement agreement?

- I. **The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' Agreement in Principle was in effect something far more definitive and final - an independently enforceable Settlement Agreement, although the parties themselves did not describe it as such.** (Section I in Court of Appeals' opinion.)

- II. **The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' subsequent conduct evidenced that all parties had agreed to be bound by the Agreement in Principle without regard to the inclusion of the Son in the agreement.** (Section II in Court of Appeals' opinion.)

- III. **The Court of Appeals erred in affirming the Circuit Court by concluding that the inclusion of Petitioner's Son was not a condition precedent to having an eventual final and binding settlement agreement.** (Section III in Court of Appeals' opinion.)

- IV. **The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' envisioned final settlement agreement was not governed by the law of joint contracts and did not require the signature of Byrd Son.** (Section IV in Court of Appeals' opinion.)

CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that the Petitioner/Appellant filed a Petition for Rehearing in the Court of Appeals on May 31, 2012, (App. 8-13). The Petition for Rehearing was denied by Order filed June 22, 2012. (App. 22).

STATEMENT OF THE CASE

On September 10, 2008 Petitioner 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, Petitioner 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 Petitioner's land was burdened by easement rights granted by Livingston to TIAA.

Respondent Livingston served a general denial. (R44).

Respondent TIAA generally denied Petitioner'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). Petitioner 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." (R114).

After subsequent efforts to execute the "more formal and detailed written Settlement Agreement" called for in the Agreement in Principle were unsuccessful,¹ Respondents

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

filed their Motion To Enforce Settlement Agreement and For Sanctions/Petition for Rule to Show Cause” dated February 19, 2010. (R145-168). Petitioner 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 Agreement in Principle is enforceable and that Petitioner must carry out the terms of the Agreement in Principle. (R1).

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

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

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

The Court of Appeals issued its opinion on May 16, 2012, affirming the circuit court’s Order enforcing the disputed mediation agreement. (App. 1-7). Petitioner filed a Petition for Rehearing on May 31, 2012, (App. 8-13). The Petition for Rehearing was denied by Order filed June 22, 2012. (App. 22).

STATEMENT OF THE FACTS

From the pleadings and the July 30, 2010 Order, the underlying dispute is generally described as involving a real estate transaction in which Petitioner purchased from Respondent Livingston, at auction, a parcel of unimproved rural land, approximately 53 acres. The facts in the underlying action were disputed, especially the allegations with respect to whether the Petitioner had been put on inquiry notice of the existence of an easement at or prior to the closing of the transaction. Petitioner 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 record until after

the closing. Respondents claim that Petitioner 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 Agreement in Principle 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 (R114). The Agreement in Principle included Petitioner’s son, Forrest Steven Byrd, II (herein “Byrd Son”), as a party to the agreement in principle notwithstanding that he was not a party to the underlying action and was not present at the mediation conference. (R114, l. 13-15). The Agreement in Principle provided that it 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 Agreement in Principle. (R136-141).

The Respondents’ attorneys prepared and delivered to Petitioner 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 Agreement in Principle, and all drafted showing Byrd Son as a party and a signatory. Byrd Son refused to become involved. (R135). Because Byrd Son would not execute the proposed Settlement Agreement and Release and would not execute the new proposed easement instruments, the Petitioner took the position that a final, enforceable settlement agreement had not been reached and

² The Agreement in Principle was signed by the parties themselves and not by the attorneys or the mediator.

that he was not bound by the Agreement in Principle and was unwilling to execute the more formal and detailed Settlement Agreement and Release and Easement instruments. Petitioner was ready to go to trial.

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

CERTIORARI

Certiorari is an appellate proceeding for a higher court's reexamination of an action or decision of an inferior tribunal and provides a remedy to correct errors of law of inferior tribunals. Black's Law Dictionary (rev. 4th ed. 1968), 287; Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987); Jacoby v. South Carolina State Bd. of Naturopathic Examiners, 219 S.C. 66, 64 S.E.2d 138 (1951). Because a writ of certiorari is a matter of judicial discretion, there is no finite list of grounds or reasons for granting review by writ of certiorari, but Rule 242(b), SCACR, sets forth the most commonly recognized reasons.

The writ should be granted in this case because: 1) the case involves novel questions of law regarding contracting parties' use of the term "agreement in principle" and what effect the use of that term has on the enforceability of contracts in general and mediation settlement agreements in particular; 2) the extent to which a party can be bound to terms negotiated during mediation but which were not finally and definitively agreed to as evidenced by the parties' use of the term "Agreement in Principle" rather than "Settlement Agreement" or "Mediation Settlement Agreement;" 3) the Court of Appeals has adopted a "cram down" approach to mediation in this case

that renders meaningless the terms used by the parties themselves to describe the result of the mediation; 4) the Court of Appeals opinion is a manifest injustice that saddles the Petitioner with an agreement he did not make.

ARGUMENT

I. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' Agreement in Principle was in effect something far more definitive and final - an independently enforceable Settlement Agreement, although the parties themselves did not describe it as such. (Section I in Court of Appeals' opinion.)

Use of Term "Agreement in Principle"

The parties deliberately named the document in dispute an "Agreement in Principle." There is no evidence of record that the name was a mistake or a scrivener's error. After it became evident that the Agreement in Principle would never ripen into a full-fledged final settlement agreement because Petitioner's son declined to become a party to a final agreement, the Respondents resorted to ignoring the name that they themselves gave to the document. Words have consequences. Contracting parties are told in myriad court opinions that in the area of contracts, one should be careful about and attentive to the terminology used in a contract. But here, when the parties expressly agreed, as confirmed by their signatures, that the document evidenced only an Agreement in Principle, the Court of Appeals has allowed the document to be retroactively renamed and reconfigured into something the Petitioner did not agree to at mediation.

“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. There is no South Carolina state appellate court opinion addressing the issue of enforcing an “agreement in principle” as if it were a final and binding contract/settlement agreement. There is an opinion from the South Carolina Federal District Court that touches on the question, but it is distinguishable on its facts. In Sadighi v. Daghighfekr, 66 F.Supp.2d 752 (D.S.C. 1999) the court held that “the mere fact that a formal agreement would follow is not fatal to the enforceability of the settlement.” Although this case was cited in the parties’ briefs, and was included in oral argument, for reasons not made known by the Court of Appeals the Sadighi case was not cited in the opinion. Sadighi involved a meticulously detailed “agreement to settle,” not remotely similar to the abbreviated, and somewhat careless, agreement in principle herein, and a set of surrounding circumstances not present herein.

Severance

The trial court and Court of Appeals erred in severing the Byrd son provision from the Agreement in Principle when nothing in the language of the Agreement in Principle, or in the proposed new formal documents intended to comprise the new and improved Settlement Agreement or in the parties’ conduct subsequent to the Agreement in Principle, evidences an intent that any provision could be severed leaving the rest as enforceable. This is particularly true of the Byrd son language.

That the son did not attend the mediation and was not a party to the pending legal action and had no part to play in his land being included in the Agreement in Principle is of no moment, and the Court of Appeals erred in concluding that it was. The critical inquiry is whether the three parties in the mediation agreed to the inclusion of Son's property as a condition to reach the finish line of a final and binding settlement agreement. The answer is "yes" based on the signatures of the parties and the content of the subsequent formal settlement documents.

II. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties' subsequent conduct evidenced that all parties had agreed to be bound by the Agreement in Principle without regard to the inclusion of the Son in the agreement.
(Section II in Court of Appeals' opinion.)

The "principle of practical construction" as explained in Crestview Cemetery Ass'n v. Dieden, 356 P.2d 171 (Cal. 1960) is apropos:

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.

When the Circuit Court's Order and the Court of Appeals' opinion identify 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 Respondents' attorneys and that the documents clearly and obviously contemplated and intended that Byrd Son was a party who was intended 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 or ignored the best evidence of subsequent conduct.

Byrd Son was identified in the subsequent 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).

The Court of Appeals opinion sets out five post-agreement-in-principle activities of the Petitioner or his attorney that demonstrate an intent to be bound by the Agreement in Principle. (App. 6, l. 1-19). But the record also contains evidence that demonstrates that Petitioner and his attorney were still working on reaching a final agreement but had not yet done so. For example:

- Parker (Petitioner’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)³;
- 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 and the Court of Appeals, Petitioner’s attorney did not then believe that the Agreement in Principle was final and

³ “Prospective” is defined as looking forward into the future, Black’s Law Dictionary (Rev. 4th ed. 1968), 1386, not a term suggesting the existence of an agreement already in place.

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 trial court's Order and the Court of Appeals' opinion.

III. The Court of Appeals erred in affirming the Circuit Court by concluding that the inclusion of Petitioner's Son was not a condition precedent to having an eventual final and binding settlement agreement. (Section III in Court of Appeals' opinion.)

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 the Court of Appeals: "[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." (App. 7, l. 9-18). This misses the point. Petitioner's 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 final and binding 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. Petitioner incorporates herein the authorities cited in his Brief and Reply Brief.

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 Court of Appeals’s opinion implies that the reason for inclusion of Byrd son’s property was not essential to the Agreement in Principle and, consequently, was a meaningless add-on term. A court ordinarily must select a construction which gives effect to each part of a contract and reject constructions resulting in a determination that a word or term is surplusage. 17A C.J.S. Contracts §330. South Carolina law is in accord. If at all possible, words in a contract are not to be treated as mere surplusage. Tomlinson v. Sentry Engineering and Construction, Inc., 777 F.2d 918 (4th Cir. 1985) applying South Carolina law, including Burch v. South Carolina Cotton Growers’ Co-op. Ass’n, 181 S.C. 295, 187 S.E. 422 (1936). 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); Sfredo v. Sfredo, 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.)

The particular term of the Agreement in Principle that includes Byrd Son's property interest is the first term expressed in the document. It reads: "25' easement (measured equally from the 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." (R.114). "Son's parcel included" is an unambiguous declaratory statement; it is not stated in a passive or interrogatory or optional sense. It could have been so stated by the parties, but was not.

The Court of Appeals cited with approval the trial court's language that "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly." (App.7, l. 4-6). This is not true. By implication, the entire agreement is conditional because it is an "Agreement in Principle" and not a final "Settlement Agreement."

The Court of Appeals' reasoning is unpersuasive throughout the opinion but especially so with respect to the conclusion that inclusion of the son was not a condition precedent to reaching a final and binding settlement agreement. The Court of Appeals again quotes the trial 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]. 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.

(App. 7, l. 9-18.)

The first sentence is nonsensical because that is the essence of conditions precedent. For instance, in real estate contracts, obligations are frequently conditioned on the buyer obtaining financing. If the buyer "asks" that a financing term be included, and it is agreed to by the seller, and the buyer

cannot get financing, has the buyer been “rewarded?” It is important to remember that the inclusion of the language “son’s parcel included” was not placed in the Agreement in Principle unilaterally by the Petitioner. **It was expressly agreed to by all three parties.**

The above quote proceeds on to say that Petitioner is arguing that the “very inclusion” of the term “son’s parcel included” renders the Agreement unenforceable. This is blatantly incorrect. It is not the inclusion of the term that is the problem, it is the fact that the condition required by the term has not been satisfied and that therefore a final and binding settlement agreement has not been attained.

The issues addressed above were raised in the Court of Appeals either as primary or subsidiary questions. The only other issue raised to the Court of Appeals that has not yet been addressed herein is issue no. 7 on p. 2 of Appellant’s Brief. The court of Appeals merely adopted the trial court’s ruling and analysis with respect to this issue. (App. 7, l. 22-25).

IV. The Court of Appeals erred in affirming the Circuit Court by concluding that the parties’ envisioned final settlement agreement was not governed by the law of joint contracts and did not require the signature of Byrd Son. (Section IV in Court of Appeals’ opinion.)

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, 229 S.C. 430, 93 S.E.2d 206 (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.

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

CONCLUSION

Petitioner respectfully petitions this Court to grant a writ of certiorari to review the decision of the Court of Appeals for the special and important reasons that the Court of Appeals erred in enforcing a contingent and conditional Agreement in Principle as if it is a final and binding settlement agreement. Accordingly, this Court should grant this petition, reverse the Court of Appeals and thereby reverse the Circuit Court.



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Attorney for Petitioner

July 20, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM NEWBERRY COUNTY
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Frank R. Addy, Jr., Circuit Court Judge

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S.C. Supreme Court

Forrest Byrd, Petitioner

v.

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

CERTIFICATE OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Petitioner in the above-captioned matter, do hereby certify that I have served counsel for the Respondents and S. C. Court of Appeals with a copy of **Petitioner's Petition for Writ of Certiorari and Appendix** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 24th day of July, 2012 at the following addresses:

Timothy D. Savidge, Esquire
P.O. Box 419
Prosperity, SC 29127
Attorney for Respondent Judy Livingston

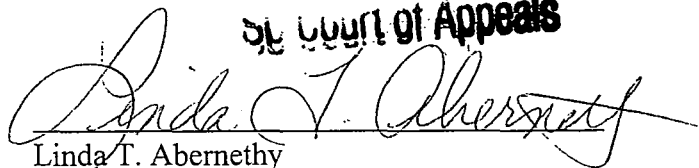
The Honorable Jenny Abbott Kitchings
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CLERK OF COURT OF APPEALS


Linda T. Abernethy

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THE STATE OF SOUTH CAROLINA
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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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SC Court of Appeals

INDEX

South Carolina Court of Appeals
Opinion No. 4973, filed May 16, 2012 1

Appellant’s Petition for Rehearing, filed May 31, 2012 8

Respondent’s Return to Petition for Rehearing
filed June 13, 2012 14

Appellant’s Reply to Respondent’s Return
to Petition for Rehearing filed June 18, 2012 19

Order of Court of Appeals Denying
Petition for Rehearing, filed June 22, 2012 22

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), SCRCP, 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. Aabstract 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.

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

RECEIVED

MAY 31 2012

SC Court of Appeals

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); Sfreddo v. Sfreddo, 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.



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May 31, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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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

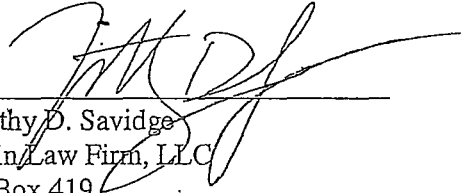
being offered him at his father's request. They have no other significance, and do not, as Appellant argues, somehow retroactively render unenforceable the November 23 Agreement signed by Appellant. They simply reflect the assumption that the son would accept what was being offered, a narrowed easement. 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).

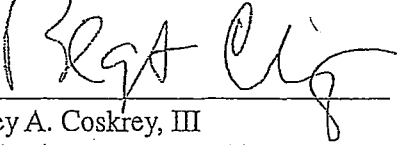
For the reasons described herein, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

Respectfully submitted, .



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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

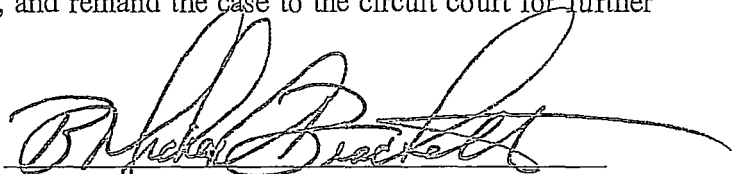
big picture, giving effect to every term, demonstrates that the Agreement in Principle was no more than an agreement to agree (or not) in the future.

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,

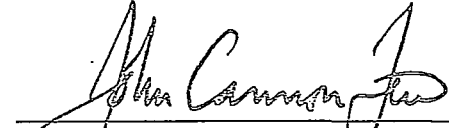
v.

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

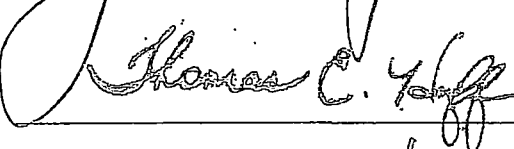
Appellate Case No. 2010-180569

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.



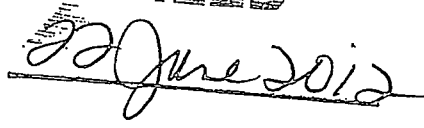
Huff, J.



Short, J.

Columbia, South Carolina

cc:
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Timothy D. Savidge
Blaney A. Coskrey, III

FILED

June 2012