

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**SC Court of Appeals**

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Roger M. Young, Sr.

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Case No. 2010-CP-10-09672

Appellate Case No. 2012-213351

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Hayden Jeffords, individually, and on behalf of all others similarly situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph LaDue, Deborah LaDue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown, Plaintiffs

Of whom Titus Gudel, Harold S. McEwan, William Scanlon, Delia Scanlon, Steven Goldberg, Brent McClaine, McKenzie Hutaff, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants, and

Of whom Jonn Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents,

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC< a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC: Alexandra Road Investors, LLC; Creekstone Mangement, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; East Coast Carpentry a/k/a ECC Contracting, LLC: Fuller Drywall & Paint, Ltd.; Delta Mechanical, Inc. a/k/a Carolina Delta Mechanical; Wasson Electric Heating & Air; Bay Club Homes, LLC; Terracon Consultants, Inc.; and Salvador Rubalcaba d/b/a Rubalcala Construction, Defendants

Of whom East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn and Kevin Ball are the Appellants.

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; and Bay Club Homes, LLC, Third Party Plaintiffs

v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third Party Defendants.

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**REPLY OF APPELLANTS STEVEN GOLDBERG, WILLIAM SCANLON,  
DELIA SCANLON, AND BRENT MCCLAIN TO RESPONDENTS'  
RETURN TO MOTION TO ENFORCE SETTLEMENT**

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There appears to be little substantive opposition to the enforcement of the Settlement Agreement. Rather, this matter is the classic case of buyer's remorse where Respondents settled a case, received the benefits of the settlement, and now do not want to comply with their obligations under the Settlement Agreement. By its very nature, the Settlement Agreement resolved issues that both parties disputed. Respondents wish to re-litigate those issues. Respectfully, the Court should enforce the Settlement Agreement that ended this litigation.

## INTRODUCTION

Appellants are seeking enforcement of a Settlement Agreement which calls for payment from Respondents' counsel, who has expressly disclaimed any interest in the funds it might ultimately pay. (See Exhibit 2 to Motion to Intervene & Exhibit B to proposed Return attached thereto ("Ten percent of the gross legal fees earned on the defective construction litigation are escrowed.... This letter is to confirm that the Construction Attorneys do not claim or assert any interest or entitlement to this 10% fee escrow.")).

The non-party POA has sought leave to file a Return that would oppose any payment from the POA's attorneys to Appellants' counsel. Respondents have adopted the POA's position in this regard. Respondent and the POA's position is flawed because the Motion to Enforce does not seek any payment from the POA or Respondents. Rather, Appellants seek ten percent of the net attorneys' fees from Respondents' counsel. Thus the main thrust of the opposition is to something that is not before this court: a POA payment to Appellants.

Appellants Goldbergs, Scanlons and McClain and their attorneys have followed the Settlement Agreement and indisputably:

1. Convinced expert Glick to continue on in the case (Settlement Agreement paragraph 1);
2. Withdrew their appeals (Settlement Agreement paragraph 2);
3. Irrevocably assigned their claims to the POA (Settlement Agreement paragraph 3);
4. Provided their full support (Settlement Agreement paragraph 5); and,

5. Assigned their work product and experts (Settlement Agreement paragraph 6);
6. Now, after signing the Settlement Agreement in October of 2013, after Appellants performed under the Settlement Agreement, and after the POA has settled its case, the POA and Appellants assert for the first time that Appellants are not entitled to the 10% of POA and Appellants' attorneys' net fees as called for in the Settlement Agreement.<sup>1</sup>

The Settlement Agreement that Appellants seek to enforce requires only a payment from Respondents' counsel to Appellants, and the Motion to Enforce specifically requests only 10% of net fees recovered. No party to this appeal, nor even the non-party POA seeking to intervene has suggested any objection to payment by Respondents' counsel of 10% of the net fees that Respondents' counsel has already recovered, as explicitly required by the agreement.

The POA's Motion to Intervene states that the 10% held in escrow is \$731,936.32 (see Motion to Intervene at p. 3) and that this amount is "ten percent of the gross legal fees earned." (See Motion to Intervene, ex. 2) Respondents have adopted this position (See Return at p. 2). \$731,936.32 is ten percent of \$7,319,363.20, and \$7,319,363.20 minus \$731,936.32 is \$6,587,426.88. Thus by Respondents' own statements and simple math, the net legal fees received by Respondents' counsel so far are, according to Respondents, \$6,587,426.88.

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<sup>1</sup> Appellants did not sign letters as set forth in the Settlement Agreement at paragraph 6 because no letters were provided to Appellants to sign.

There is no remaining factual inquiry left to make in this case, and judicial economy would be best served by declining Respondents' (via the POA's) invitation to take testimony in this matter. To the extent Respondents have adopted the POA's position regarding (1) standing and (2) objections to the enforcement of the settlement agreement, these arguments are without merit.

**I. APPELLANTS HAVE STANDING TO ENFORCE THEIR SETTLEMENT AGREEMENT**

Respondents have adopted the POA's argument that Goldberg has no standing to file the Motion to Enforce a Settlement Agreement to which he is a party. This objection is spurious as Goldberg's case was on appeal and the case settled during the appeal. By settling Goldberg's appeal, Goldberg has an interest and standing in the enforcement of the very Settlement Agreement which binds him. It is too late for Respondents to change the Settlement Agreement as Goldberg dismissed his appeal as part of the Settlement Agreement. If Respondents now believe that Goldberg should not have had an appeal, Respondents should have raised that issue at the trial level or in its brief on appeal instead of entering into the Settlement Agreement with Goldberg. Finally, this argument is mooted by the joinder of Appellants William Scanlon, Delia Scanlon, and Brent McClaine.

**II. THE SETTLEMENT AGREEMENT IS ENFORCEABLE**

Respondents assert that the Settlement Agreement that their attorneys drafted and signed is defective because it violated SCRCP Rule 43 (k), SCACR Rule 407, 1.5<sup>2</sup>,

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<sup>2</sup> The POA identifies the Rule as 5.1, however, Appellant believes the correct reference is 1.5.

is void against public policy, and the services for the fee were not sufficient. Each argument is addressed below.

**A. Rule 43(k) is inapplicable.**

Respondents have adopted the POA's argument that Civil Rule 43(k) requires trial court approval of the Settlement Agreement. Rule 43 explicitly governs "Conduct of Trial" and subsection (k) explicitly applies only to agreements "affecting the proceedings" at the trial level. That the entirety of the Rules of Civil Procedure apply only to trial courts is patent. By their own terms, the scope of the Civil Rules is limited to "suits," see Rule 1, SCRCP, which an appeal is not, and the Supreme Court has separately promulgated procedural rules for this court that "govern[] practice an procedure in appeals, petitions, and motions in ... the Court of Appeals." See Rule 101, SCACR. Were it not so, Civil Rule 3 would require that an action in this Court be commenced with the filing of a summons and complaint. See Rule 3, SCRCP. Furthermore, if the Civil Rule 43(k) requirement of court approval of a settlement agreement applied to the settlement of appeals, the unstoppable force of that rule would meet the immovable object of Appellate Rule 261, which says that such agreements "need not be submitted to the appellate court unless approval by the appellate court, a lower court or tribunal is required before the agreement can be effective, or the parties desire to have the agreement approved." Rule 261, SCACR. The parties made no such requirement in the agreement nor expressed any such desire.

Furthermore, as set forth above, the Settlement Agreement has been partially performed and admitted to exist. There is no requirement for compliance with Rule 43(k) when a Settlement Agreement has been partially performed or admitted to exist.

Reed v. Associated Investments of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 97 (Ct. App. 2000) (“[T]he purpose of rules such as 43(k) is to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. ... Rule 43(k) does ‘not apply where the agreement is admitted or has been carried into effect.”)(quoting Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 494-95, 458 S.E.2d 533, 534-35 (1995)(internal quotations omitted)).

Finally, even if Rule 43(k) applies, it has been complied with. Rule 43(k) provides in pertinent part:

**(k) Agreements of Counsel.** No agreement between counsel affecting the proceedings in an action shall be binding unless **reduced to the form of a consent order or written stipulation signed by counsel and entered in the record**, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

(**emphasis added**). Here, there is a written settlement document, signed by counsel and notice of the agreement entered into the record through the order dismissing the appeal. Respectfully, Rule 43(k) has been complied with, there is no manner of unwinding this settlement at this late date, and the Settlement Agreement should be enforced.

**B. Rule 1.5 is inapplicable.**

Respondents have adopted the POA's argument that the Settlement Agreement drafted by their lawyer should not be enforced because it violates Rule 1.5. If accepted the argument turns the rule upside down, making the rule illogical. “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” See SCACR Rule 407 Scope

at comment 1. The scope of Rule 1.5's division of fees is: "A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm." Rule 1.5 at comment 7.

Here, Appellants William Scanlon, Delia Scanlon, and Brent McClaine (who are not lawyers), Appellant Goldberg (who is a lawyer but not acting as such in this appeal) and their counsel (who are lawyers) settled a case on appeal where the payment for the settlement would flow from the net collected and earned fees of Respondents' lawyers. The Settlement Agreement calls for Respondents' lawyers to act after Respondents' lawyers collected their fees; not before. As a result, Rule 1.5 is inapplicable as it is not two lawyers sharing fees for representing a client. Rather, it is a Settlement Agreement where Respondents and their lawyers sought to satisfy Appellants in a Settlement Agreement and used future recovered attorneys' fees as the source for payment. It is not a division of fees.

In return for the promised payment, Appellants dismissed their appeal and took other actions under the Settlement Agreement. The Appellant-clients' dismissal is not legal work, nor was anything Appellants were obligated to do in exchange for the 10% payment. This Court should not now entertain Respondents' regret in entering a Settlement Agreement where disputed issues were resolved by interpreting one aspect of a multi-party settlement of many disputed issues as a division of attorneys' fees under Rule 1.5.

### **C. The Settlement Agreement Is Not Void Against Public Policy.**

Respondents have adopted the POA's argument that the Settlement Agreement drafted by their lawyer and signed by their lawyer violates public policy. Respondents

are incorrect. The public policy of this state is to encourage and enforce Settlement Agreements. "It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements." Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992). If Respondents are upset with the Settlement Agreement reached by their lawyers on their behalf, then they must look to their own lawyers for answers. Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) ("[W]e uphold and reaffirm the long standing rule that a client is bound by his attorney's actions in the settlement of a case. Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.")( internal citations omitted).

#### **D. Enforceability of the Settlement Agreement**

Respondents should not be allowed to avoid their obligations under the Settlement Agreement because the Respondents cannot dispute that they have received the Settlement Agreement benefits of: (1) assignment of Appellants' claims (Settlement Agreement paragraph 3); (2) dismissal of Appellants appeal (Settlement Agreement paragraph 2) ; (3) Appellants full support (Settlement Agreement paragraph 5); and (4) assignment of work product and experts (Settlement Agreement paragraph 6).

The only objection that Appellants have to the Settlement Agreement is whether Appellants have done enough work to receive 10% of the fee. Respectfully, this argument is without merit. The argument was raised for the first time nine months after the signing of the Settlement Agreement and is simply buyer's remorse. Respondents

have received the benefit of the Settlement Agreement, which cannot possibly be quantified after the fact because it involved dismissal of disputed claims and cooperation of an expert whose value in encouraging the defendants to settle likewise cannot be quantified. Respondents' counsel offered ten percent of its fees as Respondents' counsel's proposed value for the consideration given by Appellants.

Respondents have waited too long to voice concerns over the terms of the Settlement Agreement. Respondents have reaped the benefits of the Settlement Agreement now they have to comply with their obligations. Whether Respondents now feel that Appellants did 10% of the work is irrelevant; Respondents settled this disputed issue as part of the Settlement Agreement on their own proposed terms.

#### **CONCLUSION**

This Court should enforce the Settlement Agreement. By its nature, the Settlement Agreement resolved disputed issues between the parties. Respondents now suddenly wish to re-litigate one of the disputed issues, the value of Appellants' work. It is undeniable that benefits flowed from the Appellants to the Respondents. Respectfully, this Court should enter an Order in favor of the Appellants and enforce the Settlement Agreement for ten percent of the admitted amount of net collected attorneys' fees, or \$658,742.69.

[SIGNATURE PAGE TO FOLLOW]



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This 2<sup>nd</sup> ay of October, 2014

Columbia, South Carolina

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC < a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Mangement, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; and Bay Club Homes, LLC, Third Party Plaintiffs

v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third Party Defendants.

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**PROOF OF SERVICE**

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I, Jo-Elaine Boyd, of Rikard & Protopapas, do hereby certify that a copy of

- ***Reply of Appellants Steven Goldberg, William Scanlon, Delia Scanlon, and Brent McClain to Respondents' Return to Motion to Enforce Settlement***

has been served on all counsel by U.S. Mail on October 2, 2014 addressed as follows:

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Joshua F. Evans, Esq.  
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I Keith McCarty, Esq.  
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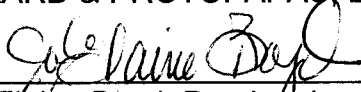
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**SC Court of Appeals**

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October 2, 2014

**Via Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

Re: Hayden Jeffords, et al. v. East Bridge Town Lofts, et al.  
Circuit Court Case No: 2010-CP-10-9672  
Appellate Case No: 2012-213351

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of *REPLY OF APPELLANTS STEVEN GOLDBERG, WILLIAM SCANLON, DELIA SCANLON, AND BRENT MCCLAIN TO RESPONDENTS' RETURN TO MOTION TO ENFORCE SETTLEMENT* and the original and two copies of the Proof of Service.

I would appreciate your returning a clocked copy of each to my courier. If you have any questions, comments, or concerns, please do not hesitate to contact me.

Best regards,

  
Peter D. Protopapas

PDP/jb  
encls.

cc: Justin Lucey, Esq.  
Joshua Evans, Esq.  
Edward D. Buckley, Jr., Esq.  
*CONTINUED ON PAGE TWO*

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**SC Court of Appeals**

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