

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

THE HONORABLE KRISTI LEA HARRINGTON, CIRCUIT COURT JUDGE

CIRCUIT COURT CIVIL ACTION NO. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price

v.

Investors Title Insurance Company,

Respondents,

Petitioner.

**APPENDIX TO PETITION
FOR WRIT OF CERTIORARI**

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S.C. Supreme Court

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B.
Price,

Appellant,

v.

Investors Title Insurance Company,

Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-08-458

Ronald E. Price and Diana R.B. Price,

Plaintiffs,

vs.

Investors Title Insurance Company,

Defendant.

FILED
2009 DEC 14 AM 11:46
CLERK OF COURT
BERKELEY, SOUTH CAROLINA

**ORDER COMPELLING PLAINTIFFS' SPECIFIC PERFORMANCE
OF THE MEDIATED SETTLEMENT AGREEMENT
AND DISMISSING THE CASE WITH PREJUDICE**

This matter comes before the Court on the motion of Defendant Investors Title Insurance Company ("Defendant") for specific performance and to enforce a settlement agreement reached during a mediation conference in this case ("Defendant's Motion"). A hearing on Defendant's Motion was held on Monday, July 27, 2009. After reviewing Defendant's Motion, the Affidavit of James Y. Becker and other exhibits attached thereto, and Plaintiffs' memorandum in opposition to Defendant's Motion, with the Affidavit of Diana R.B. Price and other exhibits attached thereto, and after considering the arguments made at the hearing, the Court finds that Defendant's Motion should be granted. Having granted Defendant's Motion, thereby ending this case, the remaining motions pending in this case are rendered moot and require no decision from the Court.

FINDINGS OF FACT

Plaintiffs Ronald E. Price ("Mr. Price") and Diana R.B. Price ("Mrs. Price"), after previously being represented by several different attorneys in this matter, proceeded *pro se* in

(2)

(3)

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this action from at least the mediation in November, 2008, through the hearing on July 27, 2009. On October 12, 2009, a Notice of Appearance on behalf of the Prices was filed by Tobias G. Ward, Jr., Esq. of the law firm of Todd & Ward, PC, in Columbia, South Carolina.

On November 20, 2008, Mr. and Mrs. Price participated in a mediation conducted by Dennis O'Neill, Esq., in Mount Pleasant, South Carolina. Mr. O'Neill is a certified mediator who was recommended by Mrs. Price. Present for the entire mediation were Mr. and Mrs. Price; Elizabeth Wainio, Esq., Claims Counsel for Defendant, who travelled to the mediation from her office in Chapel Hill, North Carolina; and Defendant's counsel, James Y. Becker, Esq. After approximately four hours of negotiations, the parties came to an agreement to settle the case, which was put in writing, signed by all parties present, and witnessed by Mr. O'Neill.

As stated in the Agreement, the parties agreed that its terms "shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and . . . may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein." In compliance with the terms of the Agreement, Defendant's counsel requested that Defendant issue the settlement check and prepared a formal Settlement Agreement and Release and Stipulation of Dismissal With Prejudice for Plaintiffs' consideration.

However, despite the Agreement's provisions, the following Tuesday, November 25th, Mrs. Price faxed a letter to the mediator, copying counsel for Defendant, whereby she and Mr. Price purported to repudiate the Agreement, claiming reasons they alleged "impaired" their "ability to reason that morning [of the mediation]."

CONCLUSIONS OF LAW

Having accepted Defendant's settlement offer and signing the Agreement, Mr. and Mrs. Price executed a binding contract with Defendant at the conclusion of the mediation. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) ("A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.")

A party may subsequently void a contract if he or she entered into the contract under duress. *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979). In order for duress to be sufficient to void a contract, the party claiming duress must show that he "has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values." *Holler v. Holler*, 364 S.C. 256, 267, 612 S.E.2d 469, 475 (Ct. App. 2005). A party cannot just make the claim that they felt intimidated by the circumstances but must "present evidence which unmistakably and convincingly shows the party's will was overborne by the defendant or someone on his behalf." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 209, 569 S.E.2d 371, 378 (Ct. App. 2002) (internal quotations and citations omitted).

Neither Mr. or Mrs. Price have presented such evidence in their submissions to the Court or in their argument at the hearing on this motion. In her letter to the mediator (Exhibit C to Defendant's Motion), Mrs. Price claims that she was under the influence of pain medication that caused a "greater state of desperation to bring the case to closure" and that she was "greatly intimidated by Mr. Becker's comments" concerning the pursuit of Defendant's motion for summary judgment and that she suffered "great anxiety to reflect upon Judge Dennis' forcing

[Handwritten signature]
12/19/08

[them] to represent [them]selves in depositions and facing him in that hearing setting." She claims her husband also has "medical issues" that were "intensified" by the mediation setting. However, despite her claims, she and her husband signed the Mediated Settlement Agreement in the presence of the mediator. As noted by the Affidavit of James Y. Becker, the Prices exhibited no signs of being under duress during the mediation conference or at the time they signed the Agreement. The Prices presented no evidence to the contrary. Clearly, their allegations do not show a state of such duress as to allow the contract to be voided, but rather show only their "buyer's remorse" as to the terms they agreed upon. Mr. and Mrs. Price cannot void a contract that they may now regret having entered into and, instead, must specifically perform their part of the bargain.¹

To compel specific performance on a contract, a court must find that the following three elements exist:

(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000).

The Agreement is clear evidence of a valid agreement, particularly having been prepared by a mediator at the conclusion of a mediation. The Agreement was signed by all parties and witnessed by the mediator. Further, Defendant ordered the settlement check and Defendant's counsel prepared a Settlement Agreement and Release and a Stipulation of Dismissal and e-

¹ Mr. and Mrs. Price cannot claim mistake as a result of any medication as a basis to void the contract either. "[A] party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor had no notice of such mistake and acts in perfect good faith." *L-J Inc. v. S.C. State Highway Dept.*, 270 S.C. 413, 429, 242 S.E.2d 656 (1978) (quoting 17 Am. Jur. 2d *Contracts* § 146 (1964)).

mailed the documents to Mr. and Mrs. Price for consideration and signature. Defendant has shown the Court that it remains ready, willing, and able to perform on its part of the mediation agreement.

Plaintiffs' argument for revoking the agreement under Rule 43(k), SCRCP, is misplaced. This rule applies to agreements between counsel, allowing a party to withdraw a settlement agreement reached by his or her counsel. At the time of the mediation, the Prices were not represented by counsel. Further, the Agreement was reached between the parties, and signed by Mr. and Mrs. Price themselves. It is a binding agreement between the parties that cannot be revoked or voided by a party, except in limited circumstances not present here.

Accordingly, Defendant is entitled to an order for specific performance of the settlement agreement. In the event Defendant seeks recovery of its fees and costs for its pursuit of this order compelling the specific performance of the Agreement, the Court will retain jurisdiction of this case to hear and decide any motion for such fees and costs upon Defendant's submission of the proper motion with accompanying affidavits.

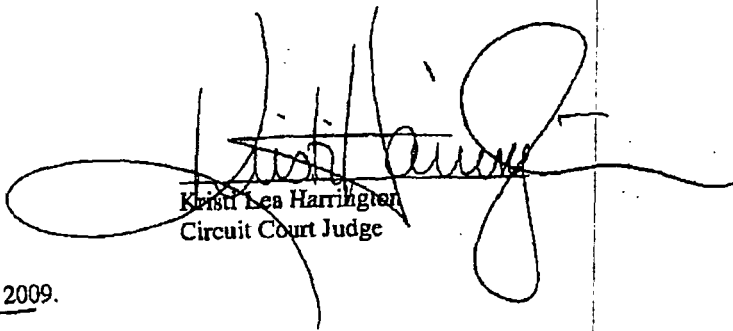
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

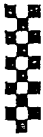
1) That Defendant's counsel must cause the settlement check, in the amount of \$12,500.00, to be delivered to Plaintiffs' counsel, Tobias G. Ward, Jr., Esq., within 10 days of the date of this Order; and

2) That the Plaintiffs' complaint and any and all claims that were or could have been asserted therein are hereby dismissed and ended with prejudice.

[Handwritten signature]
12/10

This 10th day of December, 2009.


Kristi Lea Harrington
Circuit Court Judge



JAN-04-2010 09:50

BERKELEY COUNTY

843 719 4509

P.01

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP0800458

Ronald E et al Price
Diana R b Price
Ronald E Price

Investors title insurance co

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 12(c), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court.

Motion to Alter or Amend Judgment for Specific Performance filed December 30, 2009 by Attorney Ward is hereby denied.

Dated at Moncks Corner, South Carolina, this .

12/31/09

Kristi Leach
PRESIDING JUDGE Kristi Leach Harrington

This judgment was entered on the December 30, 2009, and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Tobias Gavin Ward Jr. Todd & Ward, PC P.O. Box 1549
Columbia, SC 29202-1549
George J Kefalos

Emly Farr Haynsworth Sinkler Boyd, PA P.O. Box 11889
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCCA SCRPC Form 4 Revised 06/2008

(8) *Marvin P. Brown* / 175
TOTAL P.01

JUL-18-2008 14:38 BERKELEY COUNTY
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

B43 719 4529 P.62

CASE NO: 2007CP0800458

INVESTORS TITLE INSURANCE CO

PRICE, RONALD E ETAL
PRICE, DIANA R B
PRICE, RONALD E

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- () JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- () DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- () ACTION DISMISSED. (CHECK REASON): () Rule 12(b), SCRCP;
() Rule 41(a), SCRCP (Vol. Nonsuit); () Rule 43(k), SCRCP (Settled);
() Other _____
- () ACTION STRICKEN. (CHECK REASON): () Rule 40(j), SCRCP;
() Bankruptcy; () Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- () THIS CASE IS REFERRED TO THE MASTER-IN-EQUITY to enter final judgment and conduct any and all proceedings before and after trial. Any appeal shall be made to the Court of Appeals or Supreme Court as provided by statute.

IT IS ORDERED AND ADJUDGED:

() See attached order; (✓) Statement of Judgment by the Court;

ATTY KEFALOS IS RELIEVED AS COUNSEL PER THEIR REQUEST AT THE MAY 13, 2008 STATUS CONFERENCE.

Dated at Moncks Corner, South Carolina, this 22nd day of July, 2008

R. Muller
PRESIDING JUDGE/CLERK OF COURT

This judgment/order was entered on the 3 day of July, 2008
and a copy mailed first class this 3 day of July, 2008, to
attorneys of record or to parties (when appearing pro se) as follows:

KEFALOS, GEORGE J

FARR, EMILY H

ATTORNEY(S) FOR THE PLAINTIFF(S)
COURT REPORTER

ATTORNEY(S) FOR THE DEFENDANT(S)
CLERK OF COURT/DEPUTY CLERK
Mary Brown

TOTAL P.62

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

RONALD E. PRICE and
DIANA R.B. PRICE,

Plaintiffs,

-versus-

INVESTORS TITLE INSURANCE
COMPANY,

Defendant.

) IN THE COURT OF COMMON PLEAS

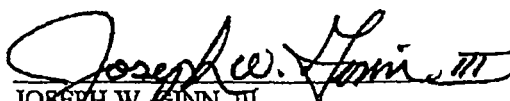
) CASE NO: 2007-CP-08- 458

SUMMONS
(Jury Trial Demanded)

FILED
2007 FEB 22 PM 12:15
CLERK OF COURT, SC

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY summoned and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the person whose name is subscribed below at 6 Carriage Lane, Suite A, Charleston, South Carolina 29407, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in this Complaint.


JOSEPH W. GINN, III
Attorney for Plaintiff
6 Carriage Lane, Suite A
Charleston, South Carolina 29407
843/571-0766

Charleston, South Carolina

February 20, 2007

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

RONALD E. PRICE and
DIANA R.B. PRICE,

Plaintiffs,

-versus-

INVESTORS TITLE INSURANCE
COMPANY,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO: 2007-CP-08- 458

COMPLAINT
(Jury Trial Demanded)

2007 FEB 22 PM 12:15
FILED
CLERK OF COURT
BERKELEY COUNTY, SC

THE PLAINTIFFS above-named, complaining of the Defendant above-named, would show and allege unto this Honorable Court as follows:

ONE: That Plaintiffs are residents of the County of Berkeley, State of South Carolina.

TWO: That upon information and belief, the Defendant, Investors Title Insurance Company, is a North Carolina title insurance company licensed to do business in South Carolina and insuring title risks in the County of Berkeley, State of South Carolina.

THREE: This matter involves real property located in the County of Berkeley, State of South Carolina.

FOUR: That the parties hereto and the things and matters alleged herein are all within the jurisdiction of this Honorable Court and venue is proper.

FIVE: That on or about September 13, 2003, the Plaintiffs signed a contract to purchase a tract of land in the County of Berkeley, State of South Carolina, known and designated as Lot 2 located in the subdivision known as Eagle Harbor, Phase II, St. James, Goose Creek Parish, containing 7.861 acres, more or less, and bearing Berkeley County TMS Number 194-00-2 of parent tract 194-00-2. A copy of said contract is attached hereto as Exhibit "A". Concurrently, on September 13, 2003, the Plaintiffs entered into a Standard Form Construction Agreement to build their residence on said property.

SIX: That on or about November 25, 2003, the Plaintiffs purchased the aforementioned tract of land. The deed by which the Plaintiffs purchased said tract is recorded in the Berkeley County RMC Office in Book [REDACTED] at Page 200. A copy of said deed is attached hereto as Exhibit "B" and is incorporated herein by reference.

SEVEN: That in conjunction with the closing and purchase of the above described property on November 25, 2003, the Defendant issued a title insurance commitment covering the Plaintiffs' property described in paragraph Five above (hereinafter referred to as "Plaintiffs' property"). A copy of the title insurance commitment is attached hereto as Exhibit "C" and is incorporated herein by reference. The Plaintiffs were not provided with a copy of said title commitment until on or about July 10, 2006, despite the requests of the Defendant for a copy of said Commitment.

EIGHT: That in connection with the purchase of Plaintiffs' property, they obtained an Owner's Policy of Title Insurance issued by Defendant, a copy of which is attached hereto as Exhibit "D" and incorporated herein by reference.

NINE: That subsequent to Plaintiffs' purchase of their property, Plaintiffs discovered various defects, which have resulted in devaluation of their property and/or has affected the marketability of their property. Plaintiffs submit that the following defects and/or risks are covered by the title insurance policy issued by the Defendant:

1. Fraud or misrepresentation of seller in stating special stipulation in the Purchase Agreement (Exhibit A) that the property could be subdivided, when in fact it could not be subdivided, and such terms and conditions were not excepted from coverage of policy.
2. Public recorded documents giving constructive notice of defects or violations:
 - (a) Eagle Harbor Subdivision, Phase II Plat, recorded September 2002; and
 - (b) Declarations of Restrictive Covenants, recorded February 2003.
3. Restricted from use as residential property due to non-compliance with SCDHEC requirements prior to sale of property to Plaintiffs.

4. Construction liens, unauthorized work of contractor due to non-compliance of SCDHEC and building code regulations, which subsequently forced Plaintiffs to demolish and dispose of uncompleted structure, due to its hazardous condition and risk. The terms and conditions of the Standard Form of Agreement between Owner and Contractor (Exhibit "E") were not excepted from coverage.

5. Seller's failure to perform wetland studies, as required under the Federal Coastal Zone Management Act, or other federal law or SC Code, Chapter 39, Title 48, or any other such regulations pursuant to local, state or federal laws, prior to selling the property to the Plaintiffs, which has resulted in the use of a portion of Plaintiffs' property being restricted, and the Defendant did not except this from policy coverage.

TEN: That the Plaintiffs provided a written claim for damages under their Owners Policy of Title Insurance by written correspondence dated March 14, 2004 and March 26, 2004. The Plaintiffs have also corresponded in writing with the Defendant concerning their claim numerous times since the original claim letters. The Defendant, through one of its employees, initially suggested that Plaintiffs' claims were not covered by the title insurance policy. However, Plaintiffs did not receive a formal written denial of their claims until October 9, 2006.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment)

ELEVEN: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Ten above as if fully set forth verbatim herein.

TWELVE: That Plaintiffs seek a declaratory judgment brought pursuant to South Carolina Code, annotated, §15-53-10 *et seq.*, whereby Plaintiffs seek this Court's declaration of whether the Defendant has responsibility for covering the loss claimed by Plaintiffs under either or both the mortgage title insurance policy and the owners title insurance policy issued by Defendant with respect to Plaintiffs' property, namely policy numbers OR-A-055849 and M-A 146678.

THIRTEEN: That Plaintiffs also seek this Court's declaration that Plaintiffs are owed coverage on their Owner's Policy, commensurate with that of the lender's policy, due to the fact that the policies were issued simultaneously, and the premium paid by the Plaintiffs afforded them with coverage matching that of the lender, in the amount of \$261,700.00.

FOURTEEN: That Plaintiffs are informed and believe that this issue of coverage and amount of coverage should be resolved by declaratory decision. Plaintiffs allege that they will suffer irreparable harm if their cause seeking a declaratory judgment is not heard.

FIFTEEN: That under the circumstances herein, there is a controversy of a justifiable nature between the parties, and your Plaintiffs are informed and believe that they are entitled to have the Court inquire into these matters and issue a declaratory judgment determining the rights of the parties with respect to the questions of coverage and amount of coverage by the Defendant.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract / Specific Performance)

SIXTEEN: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Fifteen above as if fully set forth verbatim herein.

SEVENTEEN: That the title insurance commitment and the title insurance policies issued by the Defendant with respect to Plaintiffs' property constitutes a contract between the Plaintiffs and Defendant.

EIGHTEEN: That the Plaintiffs have fully performed their obligations and all conditions required of them by the above referenced policies.

NINETEEN: That the failure and refusal of the Defendant to defend the Plaintiffs' title and pay the benefits due under its policies is a violation of its contractual duties to Plaintiffs and represents Breach of Contract.

TWENTY: That the Plaintiffs are entitled to recover damages resulting from the Defendant's Breach of Contract.

TWENTY-ONE: That further, because the Plaintiffs have adhered to and performed their obligations under the contract, including without limitation, paying the applicable premium, the Plaintiffs are entitled to an Order of Specific Performance, compelling the Defendant to defend the Plaintiffs' title.

FOR A THIRD CAUSE OF ACTION

(Bad Faith)

TWENTY-TWO: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Twenty-One above as if fully set forth verbatim herein.

TWENTY-THREE: That implied in the title insurance policies issued by Defendant, is a Covenant of Good Faith and Fair Dealings, which requires the Defendant to adjust Plaintiffs' claims in an objective, good faith manner.

TWENTY-FOUR: That Defendant has failed to evaluate Plaintiffs' claims objectively and has failed to take the actions required of it under its policies.

TWENTY-FIVE: That the Defendant, upon information and belief, conducted its investigation in an effort to deny Plaintiffs' claims, rather than with an objective attempt to correctly administer Plaintiffs' claims.

TWENTY-SIX: That the Defendant did virtually no investigation concerning Plaintiffs' claims until a substantial lapse in time had occurred.

TWENTY-SEVEN: That the Defendant has acted unreasonably in refusing to defend the Plaintiffs' title.

TWENTY-EIGHT: That the Defendant has acted in disregard of the terms of the contract of title insurance issued in this matter and of the Plaintiffs' rights and has acted in bad faith.

TWENTY-NINE: That the Defendant has breached the duty of Good Faith and Fair Dealing.

THIRTY: That the Defendant's denials of the Plaintiffs' covered were willful and in reckless disregard of the Plaintiffs' rights.

THIRTY-ONE: That as a result of the Defendant's bad faith, the Plaintiffs are entitled to actual damages, consequential damages, and punitive damages.

THIRTY-TWO: That if Plaintiffs prevail in this case, they will be entitled to recover all reasonable attorney's fees for prosecution of the case against the Defendant in an amount to be determined by the trial Court pursuant to South Carolina Code §38-59-40.

FOR A FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty)

THIRTY-THREE: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Thirty-Two above as if fully set forth verbatim herein.

THIRTY-FOUR: That the Defendant at all times owed a fiduciary duty to the Plaintiffs and that as a result of Defendant's conduct as set forth above, the Defendant has breached the fiduciary duty and the Plaintiffs were damaged as a result thereof.

FOR A FIFTH CAUSE OF ACTION

(Negligence and Negligence *Per Se*)

THIRTY-FIVE: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Thirty-Four above as if fully set forth verbatim herein.

THIRTY-SIX: That Defendant owed a duty to Plaintiffs to:

1. Act with reasonable promptness regarding the claims submitted by Plaintiffs;
2. Promptly investigate Plaintiffs' claims;
3. Make a good faith effort to promptly, fairly, and equitably settle Plaintiffs' claims;
4. Act without unreasonable delay;
5. Offer sufficient Owner Title Insurance Coverage to Plaintiff and have Plaintiffs sign form SC-305; and
6. Have Plaintiffs sign form SC-512a regarding Owner's Title Insurance Coverage.

THIRTY-SEVEN: That the Defendant breached its duties to Plaintiffs by:

1. Failing to act with reasonable promptness with respect to Plaintiffs' claims;
2. Failing to promptly investigate Plaintiffs' claims;

3. Failing to use good faith and to effect prompt, fair, and equitable settlement of claims as required by South Carolina Code Section 38-59-20; and
4. Failure to offer sufficient Owner's Title Insurance Coverage to Plaintiffs and have them sign all necessary forms that are required by South Carolina law, such as form SC-305 required by South Carolina Code Section 38-75-960 and form SC-512a, which amounts to Negligence *Per Se*.

THIRTY-EIGHT: That the Defendant, by its acts and/or omissions of its agents and employees, was negligent, careless, reckless, wanton, and grossly negligent in the particulars set forth above.

THIRTY-NINE: That as a direct and proximate result of the aforesaid wrongful conduct on the part of the Defendant, its agents, and/or employees, the Plaintiffs sustained damages in the amount of actual and punitive damages to be determined by the trier of fact in this case.

WHEREFORE, the Plaintiffs pray unto this Honorable Court for judgment against the Defendant as follows:

1. For judgment against the Defendant for actual damages, consequential damages, punitive damages, and attorney's fees, plus such other legal or equitable relief as this Honorable Court deems proper.
2. For a judgment declaring whether or not coverage exists under the title insurance policies issued by the Defendant for the losses suffered by the Plaintiffs, and in the case that such coverage does exist, for a determination of the proper amount of coverage and the monetary amount of coverage to be paid over to Plaintiffs and/or their mortgage lender, and satisfaction of the respective owners and mortgagee title insurance policies.

3. For such other and further relief as this Honorable Court may deem just and proper.


JOSEPH W. GINN, III
Attorney for Plaintiffs
6 Carriage Lane, Suite A
Charleston, SC 29407
843/571-0766
843/571-1225 (fax)

Charleston, South Carolina

February 20, 2007

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO. 2007-CP-08-458

Ronald E. Price and Diana R.B. Price,
Plaintiffs,
vs.
Investors Title Insurance Company,
Defendant.

ANSWER

Defendant Investors Title Insurance Company ("Investors Title") answers the Complaint as follows:

**FOR A FIRST DEFENSE
(General Denial)**

1. Investors Title denies each and every allegation of the Complaint except those which are hereinafter expressly admitted.
2. Investors Title admits the allegations of paragraph 1, upon information and belief.
3. Answering the allegations of paragraph 2, Investors Title states that it is a North Carolina corporation authorized to transact business in South Carolina and that it has issued title policies covering real property in Berkeley County.
4. Investors Title admits the allegations of paragraphs 3 and 4.
5. Answering the allegations of paragraph 5, Investors Title is without knowledge or information sufficient to form a belief as to the truth of these allegations and therefore denies the same.

6. Answering the allegations of paragraph 6, Investors Title admits the allegations that are matters of public record. As to the remaining allegations, Investors Title is without knowledge or information sufficient to form a belief as to the truth of these allegations and therefore denies the same.

7. Answering the allegations of paragraph 7, Investors Title craves reference to the title commitment attached as Exhibit C to the Complaint, denying all allegations that are inconsistent with said document. Investors Title is without knowledge or information sufficient to form a belief as to the truth of these allegations and therefore denies the same.

8. Investors Title admits the allegations of paragraph 8.

9. Answering the allegations of paragraph 9, Investors Title denies the "defects and/or risks" listed in paragraph 9 are covered by the Owner's Residential Title Insurance Policy (the "Policy"). As to the remaining allegations, Investors Title is without knowledge or information sufficient to form a belief as to the truth of these allegations and therefore denies the same.

10. Answering the allegations of paragraph 10, Investors Title craves reference to any correspondence between the parties, denying all allegations that are inconsistent with said documents.

11. Answering the allegations of paragraph 11, Investors Title incorporates herein all prior paragraphs of this Answer.

12. Answering the allegations of paragraph 12, 13, 14, and 15, Investors Title denies that Plaintiffs are entitled to declaratory relief as alleged in these paragraphs.

13. Answering the allegations of paragraph 16, Investors Title incorporates herein all prior paragraphs of this Answer.

14. Answering the allegations of paragraph 17, Investors Title admits only that the Policy is a fully integrated contract for insurance and its terms are limited to those expressed within the policy issued.

15. Answering the allegations of paragraph 18, Investors Title admits only that Plaintiffs have paid the premium necessary to consummate the contract for insurance.

16. Investors Title denies the allegations of paragraphs 19, 20, and 21.

17. Answering the allegations of paragraph 22, Investors Title incorporates herein all prior paragraphs of this Answer.

18. Answering the allegations of paragraph 23, Investors Title denies that it issued more than one policy to Plaintiffs concerning the real property described in the Policy. Investors Title admits the remaining allegations of paragraph 23.

19. Investors Title denies the allegations of paragraphs 24, 25, 26, 27, 28, 29, 30, 31, and 32.

20. Answering the allegations of paragraph 33, Investors Title incorporates herein all prior paragraphs of this Answer.

21. Investors Title denies the allegations of paragraph 34.

22. Answering the allegations of paragraph 35, Investors Title incorporates herein all prior paragraphs of this Answer.

23. The allegations of paragraph 36 state conclusions of law to which no response is required.

24. Investors Title denies the allegations of paragraphs 37, 38, and 39.

25. Investors Title denies that Plaintiffs are entitled to any relief, as requested in the prayer for relief in the Complaint.

FOR A SECOND DEFENSE
(Failure to State a Cause of Action)

26. The Complaint fails to state facts sufficient to constitute a cause of action against Investors Title upon which relief may be granted.

FOR A THIRD DEFENSE
(Statute of Frauds)

27. Plaintiffs' claims are barred, in whole or in part, by the Statute of Frauds.

FOR A FOURTH DEFENSE
(Comparative Negligence)

28. The doctrine of comparative negligence bars Plaintiffs from any recovery or, in the alternative, any recovery by Plaintiffs, which is denied, should be reduced in proportion to the amount of Plaintiffs' own negligence.

FOR A FIFTH DEFENSE
(Equitable Defenses)

29. Plaintiffs' claims are barred, in whole or in part, by all equitable doctrines available to Investors Title, including but not limited to, waiver, estoppel, and laches.

FOR A SIXTH DEFENSE
(No Private Cause of Action)

30. Plaintiffs have no private cause of action for any violation of the South Carolina Claims Practices Act, which violation Investors Title strictly denies.

WHEREFORE, having fully answered the Complaint, Investors Title prays that this Court inquire into the matters alleged herein, and for such other and further relief as the Court deems just and appropriate.

[SIGNATURE ON THE FOLLOWING PAGE]

HAYNSWORTH SINKLER BOYD, P.A.

By: 

James Y. Becker

Emily H. Farr

1201 Main Street, Suite 2200

Post Office Drawer 11889 (29211-1889)

Columbia, South Carolina 29201

(803) 779-3080 Tel

Attorneys for Defendant Investors Title
Insurance Company

April 25, 2007

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

RONALD E. PRICE AND DIANA R. B.
PRICE,

Plaintiff(s),

vs.

Investors Title Insurance Company,

Defendant(s),

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 07-CP-08-458

MOTION TO ALTER OR AMEND
JUDGMENT FOR SPECIFIC
PERFORMANCE

2009 DEC 10 PM 1:44
BERKELEY COUNTY, SC
CLERK OF COURT

FILED

The Plaintiffs Ronald E. Price and Diana R.B. Price ("Prices" or "homeowners"), hereby move this court pursuant to Rules 52(b) and 59(a) and (e) of the South Carolina Rules of Civil Procedure to alter or amend this court's judgment entered December 14, 2009 compelling specific performance of the mediation settlement agreement and dismissing the case with prejudice. The grounds for this motion are as follows:

STATEMENT OF THE CASE

43
This matter came before the court for a hearing on July 27, 2009 on three motions: the Prices' motion to amend their complaint and the Defendants' motions for specific performance of the mediation settlement and for summary judgment. Present at the hearing were the Prices, *Pro Se* and James W. Becker, Esq. for Investors Title Insurance Company ("Investors Title".) This court issued an order compelling specific performance of the mediation settlement and dismissing this action with prejudice. The court also determined the other motions were moot.

FACTUAL BACKGROUND

The Prices purchased Lot [REDACTED] consisting of 7.83 acres (the "Land") in the Eagle Harbor subdivision in Berkeley County on November 25, 2003. Investors Title issued a title insurance policy (the "Policy") in connection with this purchase. The Prices allege in their complaint that there are title defects which are covered under their Policy. Investors Title denied coverage and this lawsuit ensued.

Mediation took place on November 20, 2008 in Mount Pleasant, South Carolina with Dennis O'Neill, Esq. serving as mediator. Present at the mediation were the Prices, *Pro Se*, Elizabeth Wainio, Esq., Claims Counsel for Investors Title and, James Y. Becker, Esq., Investors Title local counsel. At the conclusion of the mediation, the parties executed the document attached as Exhibit D to Plaintiff's Memorandum in opposition. It is for this document which the court has issued an order of specific performance.

- K2*
- I. THE COURT SHOULD ALTER OR AMEND ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE PARTIES HAD A FINAL, ENFORCEABLE, DISPOSITIVE AGREEMENT WHEN THE UNDISPUTED EVIDENCE SHOWS THAT THERE WAS NEVER A "MEETING OF THE MINDS" AS TO ALL THE ESSENTIAL TERMS OF AN AGREEMENT, THE PARTIES CONTEMPLATED ADDITIONAL DOCUMENTS WOULD BE NEGOTIATED AND SIGNED AND THE PARTIES CONTINUED TO NEGOTIATE.**

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. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). Since mutual assent to essential terms is necessary to the existence of a contract, there can be no contract so long as, in the contemplation

Indeed, Mr. Becker did send an additional document entitled "Settlement Agreement and Release" on December 1, 2008 (Exhibit C to Plaintiff's Memorandum in Opposition); however, this agreement contained terms that what were not acceptable to the Prices including releasing parties and claims the Prices had not agreed to release and omitting terms which the Prices understood were part of the agreement including the issuance of a new title policy and the guarantee that DOT would issue an encroachment permit; therefore, the Prices rejected this proposed agreement.

Mr. Becker did send a revised draft in April 2009, but the parties could not agree on this draft either. No final settlement agreement containing all the essential terms was ever signed.

An examination of the e-mail correspondence between the parties (Attached hereto and incorporated by reference) establishes that the agreement specifically enforced by the court was not the final settlement agreement of the parties.

Emily Farr, Esquire (Investors' other counsel) states in an e-mail, on April 22, 2009,

Ref
"We are very close to being able to confirm whether or not we will be able to settle with you under the terms you discussed previously with Jamie Becker." (*Emphasis added.*)

Likewise, Jamie Becker states on the same date,

Ms. Price: I am optimistic that we can agree on all the terms you and I last discussed. We are only waiting on a call from Steve Brown. I think it makes eminent good sense to delay in the hearing in light of how close we are to finally settling this case on mutually agreeable terms. That will save both of us the time and effort (and dare I say the agony!) of appearing in court again.

Since there was never a meeting of the minds on all the essential terms of the settlement, since the parties contemplated executing a more definitive agreement that was never executed and since the parties continued to negotiate, it was error for the

court to enforce the mediation settlement agreement as being the final agreement of the parties to end this litigation.

II. THE COURT SHOULD ALTER OR AMEND ITS FINDINGS OF FACT AND CONCLUSION OF LAW THAT THE MEDIATION AGREEMENT WAS ENFORCEABLE BECAUSE THE AGREEMENT WAS NEVER ENTERED INTO THE RECORD AS REQUIRED BY RULE 43(K) SCRCP BEFORE BEING REVOKED BY THE PRICES.

Even if the mediation settlement agreement was enforceable as being the final agreement between the parties (which it was not) then it still was not enforceable by the court because it was never entered into the record prior to its being revoked by the Prices.

Rule 43(k) SCRCP provides as follows:

(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.² Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP (*emphasis added*.)

45
a
"Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). Because of this intent, the rule should not be construed to be limited to attorneys, but should also apply to agreements between *Pro Se* parties and attorneys. Indeed, the facts of this case illustrate the necessity of the rule.

Under Rule 43(k), for an agreement to be enforceable by the court (when not made in open court on the record), it must be signed and *entered in the record*. In this

² The Rule was amended effective April 29, 2009 to add "or reduced to writing and signed by the parties and their counsel". This amendment does not apply to this case other than to highlight that a mere signed agreement is not enforceable under the prior Rule 43(k) SCRCP.

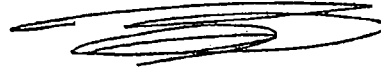
case, that has not be done and the Prices have repudiated the agreement; therefore, it should not be enforced by this court.

This case is analogous to *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006). In that case, just like this case, the parties entered into a mediated settlement agreement, but it was never entered into the record. Indeed, in *Buckley* it appears that the parties partially carried the agreement into effect with the husband paying the wife \$5,000 after the mediation and then \$1,500 per month. Despite this, the South Carolina Supreme Court refused to enforce the mediated settlement agreement because it was not entered into the record. The court noted that it did not matter whether or not the agreement was in writing, admitted or carried into effect if it did not comply with Rule 43(k) SCRCP. See Also *Farnsworth v. Davls Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.)

 This court should amend its order and find that the agreement is not enforceable pursuant to Rule 43(k) because it was never entered into the record before being rescinded by the Prices.

CONCLUSION

For the reasons set forth herein, this court should alter and amend its judgment and find that the mediation settlement agreement was not the final agreement of the parties and is unenforceable and was not in compliance with Rule 43(k) SCRCP as it was never recorded before being rescinded.



Tobias G. Ward, Jr. Esquire
Attorney for Plaintiff(s)
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Columbia, SC 29202
(803) 779-4383
(803) 799-7604(fax)
tgw@thw-law.com

Date: Dec. 23, 2009

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO.: 2007-CP-08-458

RONALD E. PRICE and)
DIANA R.B. PRICE,)
)
PLAINTIFFS,)
)
VS.)
)
INVESTORS TITLE INSURANCE COMPANY,)
)
DEFENDANT.)
_____)

MOTIONS HEARING

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Berkeley County Courthouse
Berkeley, South Carolina
on Monday, July 27, 2009, Commencing at 1:51 p.m.

SUSAN "MIA" PERRON, CCR, CVR-CM
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

(30)
COPY

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 document is going to include those things of which were
2 not already in this little small piece of paper, which
3 is half a -- it's half a page.

4 This is simply an agreement that we saw to
5 agreement on another piece of paper that would be
6 coming, as well as the stipulation. We talked about a
7 stipulation. So we saw those things coming. But then
8 we began to read this and it looks like --

9 THE COURT: You saw them coming, Mrs. Price? Or
10 you assumed by your interpretation of those words that
11 that's what would happen?

12 MRS. PRICE: Yes. That's exactly our intent.
13 When we signed that agreement, that was our intent.

14 THE COURT: So that day, you were able to read
15 and understand what you signed?

16 MRS. PRICE: We were -- yes, ma'am. We were
17 able to understand, on its surface, that there would be
18 another agreement coming. We did not read word for
19 word, and reread, and analyze the part where it talks
20 about this piece of paper could be filed, entered into
21 the record, without the consent and release -- that is
22 the part that confused us -- and the fact that these
23 things contradict each other within this piece of
24 paper.

25 So having read that, yes, we initially tried to

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 not be reference -- this couldn't be referenced as part
2 of that, which is pretty important. So that's why.

3 THE COURT: Mr. Price, is there anything about
4 the agreement that you signed on November 20th of 2008
5 -- at that time, did you understand what you were doing
6 and what you were signing?

7 MR. PRICE: Apparently not, because what I got
8 later in the time --

9 THE COURT: At the time, did you understand what
10 you were signing?

11 MR. PRICE: I thought I did.

12 THE COURT: Mrs. Price, at the time, did you
13 understand what you were signing?

14 MRS. PRICE: Yes, ma'am. I -- we thought we
15 were signing a document that was the beginning of
16 another document and the new document would, in fact,
17 have those terms that were essential, and we would have
18 that meeting of the minds that we saw an agreement, on
19 to the next step of a contract. We did not have that.
20 And when we recognized that the potential for that far
21 exceeded the scope of that piece of paper, as far as
22 the advantage of the defendant, we took the only action
23 we knew to take and that was, let's scratch that piece
24 of paper and start over again because we don't want
25 that piece of paper actually to be filed, even though

MIA PERRON, CCR, CVR-CM

(32)

-25-

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 number two: counsel for the defendants shall prepare a
2 release and consent order of dismissal of the above
3 action which shall be executed by the plaintiffs at
4 Haynsworth Sinkler Boyd's Charleston office at the time
5 the check referenced above is delivered to the
6 plaintiffs. The terms of this agreement could not be
7 simpler. There is a release and a consent order --

8 THE COURT: Evidently not, Mr. Becker, or we
9 wouldn't be here more than a year later.

10 MRS. PRICE: It hasn't been quite a year.

11 THE COURT: Mrs. Price.

12 MR. BECKER: My point there being, Your Honor,
13 that they -- it was -- it's clear to them, from reading
14 it, what they were signing and what they were agreeing
15 to.

16 THE COURT: And let's be clear to you, Mr.
17 Becker. I'm assuming that it was not clear. It's
18 still not clear to Mrs. Price and Mr. Price, because he
19 keeps referring to some sort of additional paperwork
20 that you are going to be sending, and stipulations that
21 you're going to enter into.

22 MR. BECKER: Well, that would be the release and
23 consent order of dismissal, is all.

24 THE COURT: I understand that, Mr. Becker. But
25 that's exactly why we are here. Mrs. Price does not

MIA PERRON, CCR, CVR-CM

(33)

-27-

From: Farr, Emily
Sent: Wednesday, April 22, 2009 10:16 AM
To: 'DIANA BRZOZOWSKI PRICE'
Cc: Becker, James
Subject: RE: Letter Dated April 3, 2009 - Case 2007-CP-08-458

Ms. Price,

To follow-up on the voicemail I just left you at the number below, attached is the response from SCDOT. The encroachment permit you were concerned about was obtained. We are very close to being able to confirm whether or not we will be able to settle with you under the terms you discussed previously with Jamie Becker. In light of this, it makes sense to request another continuance of the hearing while we are in the midst of settlement discussions.

Please give me a call at your earliest opportunity to discuss further, or just reply to this e-mail.

Thank you,

Emily H. Farr, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7705

Subject: RE: Letter Dated April 3, 2009 - Case 2007-CP-08-458
Date: Wed, 22 Apr 2009 11:15:02 -0400
From: jbecker@hsblawfirm.com
To: efarr@hsblawfirm.com; drbprice@msn.com

Ms. Price: I am optimistic that we can agree on all the terms you and I last discussed. We are only waiting on a call from Steve Brown. I think it makes eminent good sense to delay in the hearing in light of how close we are to finally settling this case on mutually agreeable terms. That will save both of us the time and effort (and dare I say the agony!) of appearing in court again.

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
1201 Main St., 22nd Floor
Columbia, South Carolina 29201-3232
803-540-7708

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

RONALD E. PRICE AND DIANA R. B.
PRICE,

Plaintiff(s),

vs.

Investors Title Insurance Company,

Defendant(s),

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 07-CP-08-458

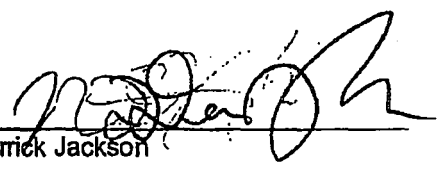
CERTIFICATE OF SERVICE

FILED
2009 DEC 30 PM 1:44
MARIE B. BRIDGES
CLERK OF COURT
BERKELEY JUDICIAL CIRCUIT

The undersigned, hereby certifies that on December 23, 2009, he served a copy
of the foregoing Motion to Alter or Amend Judgment on the following persons by mailing
a copy of the same by United States mail, postage prepaid, at the following addresses:

The Honorable Kristi Lea Harrington
P.O. Box 998
300B California Ave.
Moncks Corner, SC 29461

James Y. Becker, Esquire
Post Office Box 11889
Columbia, SC 29211-1889


J. Derrick Jackson

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO. 2007-CP-08-458

Ronald E. Price and Diana R.B. Price,
Plaintiffs,
vs.
Investors Title Insurance Company,
Defendant.

2008 DEC -5 11:14:37

**DEFENDANT'S MOTION FOR SPECIFIC PERFORMANCE AND
TO ENFORCE MEDIATION AGREEMENT**

Pursuant to Rule 7(b), SCRCP, Defendant Investors Title Insurance Company ("Defendant") moves for an Order for specific performance and to enforce a settlement agreement reached during a mediation conference in this case. In support of this motion, Defendant submits a color copy of the Mediated Settlement Agreement, dated November 20, 2008, (the "Agreement") and the Affidavit of James Y. Becker, attached hereto as Exhibits A and B, respectively.

FACTS

Plaintiffs Ronald E. Price ("Mr. Price") and Diana R.B. Price ("Mrs. Price"), after previously being represented by several different attorneys in this matter, are now proceeding *pro se* in this action. On November 20, 2008, Mr. and Ms. Price participated in a mediation conducted by Dennis O'Neill, Esq., in Mount Pleasant, South Carolina. Mr. O'Neill is a certified mediator who was recommended by Ms. Price. (Exhibit B at ¶ 5.) Present for the entire mediation were Mr. and Mrs. Price; Elizabeth Walnio, Esq., Claims Counsel for Defendant, who travelled to the mediation from her office in Chapel Hill, North Carolina; and Defendant's

counsel, James Y. Becker, Esq. (*Id.* at ¶ 6.) After approximately four hours, the parties came to an agreement to settle the case, which was put in writing, signed by all parties present, and witnessed by Mr. O'Neill. (*Id.* at ¶¶ 6-9; Exhibit A.)

As stated in the Agreement, the parties agreed that its terms "shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and . . . may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein." (Exhibit A.) In compliance with the terms of the Agreement, Defendant's counsel requested that Defendant issue the settlement check and prepared a formal Settlement Agreement and Release and Stipulation of Dismissal With Prejudice for Plaintiffs' consideration. (Exhibit B at ¶ 11.)

However, despite the Agreement's provisions, the following Tuesday, November 25th, Mrs. Price faxed a letter to the mediator, copying counsel for Defendant, whereby she and Mr. Price purported to repudiate the Agreement. She enclosed a "Settlement Agreement Revocation" that was sent to the Clerk of Court for filing.¹ (A copy of this correspondence is attached hereto as Exhibit C.) Plaintiffs seek to repudiate their agreement to settle the case based upon reasons they allege "impaired" their "ability to reason that morning [of the mediation]." (Exhibit C.)

ARGUMENT

Having accepted Defendant's settlement offer and signing the Agreement, Mr. and Mrs. Price executed a binding contract with Defendant at the conclusion of the mediation. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) ("A contract is an obligation

¹ This correspondence was faxed after the Court had already canceled a court-ordered status conference in reliance on the case being settled, which was scheduled for Monday, November 24, 2008.

which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.")

A party may subsequently void a contract if he or she entered into the contract under duress. *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979). In order for duress to be sufficient to void a contract, the party claiming duress must show that he "has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values." *Holler v. Holler*, 364 S.C. 256, 267, 612 S.E.2d 469, 475 (Ct. App. 2005). A party cannot just make the claim that they felt intimidated by the circumstances but must "present evidence which unmistakably and convincingly shows the party's will was overborne by the defendant or someone on his behalf." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 209, 569 S.E.2d 371, 378 (Ct. App. 2002) (internal quotations and citations omitted).

Neither Mr. or Mrs. Price can present such evidence from a settlement reached from mediation. Mrs. Price claims that she was under the influence of pain medication that caused a "greater state of desperation to bring the case to closure" and that she was "greatly intimidated by Mr. Becker's comments" concerning the pursuit of Defendant's motion for summary judgment and that she suffered "great anxiety to reflect upon Judge Dennis' forcing us to represent ourselves in depositions and facing him in that hearing setting." She claims her husband also has "medical issues" that were "intensified" by the mediation setting. However, despite her claims, she and her husband signed the Mediated Settlement Agreement in the presence of the mediator. They exhibited no signs of being under duress during the mediation conference or at the time they signed the Agreement.. (See Exhibit B at ¶ 10.) Clearly, these

claims do not show a state of duress such to allow the contract to be voided, but rather show a reflection on what occurred and "buyer's remorse" as to the terms they agreed upon. Mr. and Mrs. Price should not be allowed to void a contract that they may now regret having entered into and, instead, should be ordered to specifically perform their part of the bargain.²

To compel specific performance on a contract, a court must find that the following three elements exist:

(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Ingram v. Kasey's Assoc., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000).

The Agreement is clear evidence of a valid agreement, particularly having been prepared by a mediator at the conclusion of a mediation. The Agreement has been signed by all parties and witnessed by the mediator. Further, Defendant has ordered the settlement check and Defendant's counsel has prepared a Settlement Agreement and Release and a Stipulation of Dismissal and e-mailed the documents to Mr. and Mrs. Price for consideration and signature. (Exhibit B at ¶ 11.) Defendant remains ready, willing, and able to perform on its part of the mediation agreement.

Accordingly, Defendant is entitled to an order for specific performance directing Plaintiffs to accept the settlement check and sign the Settlement Agreement and Release and the Stipulation of Dismissal, as contemplated by the Agreement.

² Mr. and Mrs. Price should not be able to claim mistake as a result of any medication as a basis to void the contract either. "[A] party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor had no notice of such mistake and acts in perfect good faith." *L-J Inc. v. S.C. State Highway Dept.*, 270 S.C. 413, 429, 242 S.E.2d 656 (1978) (quoting 17 Am. Jur. 2d *Contracts* § 146 (1964)).

CONCLUSION

For the reasons stated above, Defendant asks that the Court enter an Order enforcing the Agreement. Defendant further requests that its payment of the settlement amount be offset by its attorneys fees and costs in moving for this relief; and that it be granted such other and further relief as the Court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

By: 

James Y. Becker
Emily H. Farr

1201 Main Street, Suite 2200
Post Office Drawer 11889 (29211-1889)
Columbia, South Carolina 29201
(803) 779.3080

Attorneys for Defendant

December 4, 2008



IN THE STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Case No.: 2007-CP-08-458

RONALD E. PRICE AND
DIANA R.B. PRICE
(Plaintiffs)

vs

INVESTORS TITLE INSURANCE
COMPANY
(Defendant)

SETTLEMENT AGREEMENT

THE MEDIATED SETTLEMENT AGREEMENT DATED November 20, 2008, by, between
Ronald E. Price and Diana R.B. Price and Investors Title Insurance Company, is as follows:

1. The Defendant shall pay to the Plaintiffs, the sum of Twelve Thousand Five Hundred AND 00/100 (\$ 12,500.00) Dollars which sum shall be delivered to Plaintiffs' within 30 days of this Agreement.
2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs at Haynsworth, Sinker, Boyd's Charleston Office at the time the check referenced above is delivered to the Plaintiffs'.
3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.
4. Each Party shall be responsible for his / her / its own attorney's fees and costs associated with this action. The Defendant shall pay the mediator's fee in full.

AGREED TO THIS 20th DAY OF NOVEMBER, 2008, BY THE UNDERSIGNED.

WITNESSES:

DENNIS OWENS
MEDIATOR

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO. 2007-CP-08-458

Ronald E. Price and Diana R.B. Price,
Plaintiffs,
vs.
Investors Title Insurance Company,
Defendant.



AFFIDAVIT OF JAMES Y. BECKER, ESQ.

Personally appeared before me, James Y. Becker, Esq., who, being duly sworn, deposes and states as follows:

1. I am an attorney with the law firm of Haynsworth Sinkler Boyd, P.A., attorneys for the Defendant in this case.
2. On June 3, 2008, I took the depositions of Ronald E. Price and Diana R. B. Price, the *pro se* Plaintiffs in this action. I was able to observe the Plaintiffs demeanor during approximately 6 hours of depositions.
3. On August 11, 2008, Ms. Diana R. B. Price, one of the *pro se* Plaintiffs in this matter, took the depositions of three employees of the Defendant, Investors Title Insurance Company ("Investors Title"), in this case in Chapel Hill, N.C. I was able to observe Ms. Price's demeanor during approximately four hours of depositions. At the conclusion of these depositions, I discussed the concept of mediation with Mrs. Price as a possible way to resolve this case, and provided her with a lengthy explanation of mediation as a form of alternative dispute resolution.

4. Sometime thereafter, Ms. Price inquired again about mediation, and my colleague Emily Farr and I recommended a number of mediators with whom I had experience, including Karl Folkens, Esq. and Tom Wills, Esq. As demonstrated by the e-mail threads attached as Exhibit 1, Ms. Price had lengthy conversations with both Mr. Folkens and Mr. Wills about mediation, and she also investigated numerous other mediators.

5. Ultimately, Ms. Price recommended Dennis O'Neill, Esquire, as a mediator in this case, and Investors Title accepted her recommendation.

6. On November, 20, 2008, I attended the mediation of the above-referenced case, was conducted by Mr. O'Neill at his office in Mount Pleasant, South Carolina. Also present for the entire mediation were Mr. and Mrs. Price, and Elizabeth Wainio, Esquire, Claims Counsel for the defendant, who traveled from Chapel Hill, North Carolina for the mediation. The mediation lasted approximately four hours from 9:00 a.m. to 1:00 p.m..

7. At the beginning of the mediation, Mrs. Price, on behalf of herself and Mr. Price, presented a thorough explanation and analysis of their claims against Investors Title. In connection with this presentation, Ms. Price prepared and presented a detailed brief in support, totaling twelve pages.

8. The parties thereafter engaged in extensive discussions and negotiations in at least two conferences with all parties present and in separate discussions through the mediator.

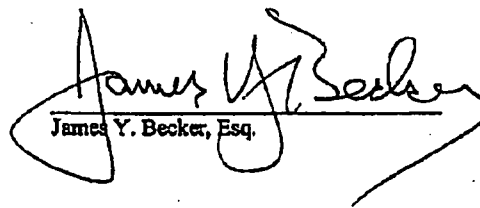
9. The mediation concluded with a signed Settlement Agreement which was executed by all parties to the mediation, a copy of which is attached as Exhibit 2.

10. During the entire mediation, Mr. and Mrs. Price appeared to me to be fully competent and in full control of their mental and physical faculties. I observed no signs that either Mr. Price or Mrs. Price were under any duress during the course of the mediation or at the time the parties signed the Settlement Agreement. Based on my previous opportunities to

observe Mr. and Mrs. Price, I do not believe they were impaired in any way during the mediation conference.

11. I confirmed with Elizabeth Wainio on November 25, 2008, that a settlement check had been ordered and that it should be mailed to me within 7 to 10 days. I e-mailed a proposed Settlement Agreement and Release and Stipulation of Dismissal to Mrs. Price on December 1, 2008, for her and Mr. Price's review and signatures.

12. Investors Title remains, ready, willing, and able to perform its obligations under the Settlement Agreement signed at the mediation conference.


James Y. Becker, Esq.

SWORN TO AND SUBSCRIBED BEFORE ME
This 4th day of December, 2008.


Notary Public for South Carolina
My Commission Expires 01/26/10

Becker, James



From: DIANA BRZOZOWSKI PRICE [drbprice@msn.com]
Sent: Wednesday, October 08, 2008 12:51 PM
To: Becker, James
Subject: RE: Price v. Investors Title; possible mediators

We do not want someone who underwrites title insurance, so I did not call Mr. Folkens. I did call all the others listed. Mr. Peterson called me back and I was tied up. Then I called him back and have not heard from him. I have not heard from the other two on your list.

I did contact Tom Wills and we had a rather lengthy discussion. He recommended Mr. Dennis O'Neal, from Mt. Pleasant, 884.9494, who is very knowledgeable of title insurance and does closings, but does not underwrite title insurance. Mr. O'Neal knows you and members of your firm, he thought you'd be comfortable with him. He does mediations on Tues and Thursdays and it sounds like we'd be able to get scheduled within 3-4 weeks.

He told me that Mr. Wills was the "best" in South Carolina, so I took that as support of the comments you had made about Mr. Wills and his reputation.

Diana

Subject: RE: Price v. Investors Title; possible mediators
Date: Tue, 7 Oct 2008 10:28:25 -0400
From: jbecker@hsblawfirm.com
To: drbprice@msn.com
CC: efarr@hsblawfirm.com; cariall@hsblawfirm.com

They can take place anywhere that is most convenient for all involved. For example, I have mediated a case pending in South Carolina in Washington, D.C., because that's where the mediator the parties chose was located.

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7706

From: DIANA BRZOZOWSKI PRICE [mailto:drbprice@msn.com]
Sent: Tuesday, October 07, 2008 8:07 AM
To: Becker, James
Subject: RE: Price v. Investors Title; possible mediators

Mr. Becker,

We thought mediations commonly take place where the court is.

Subject: RE: Price v. Investors Title; possible mediators
Date: Thu, 2 Oct 2008 14:46:24 -0400

12/4/2008

(46)

(47)

From: jbecker@hsblawfirm.com
To: drbprice@msn.com
CC: efarr@hsblawfirm.com; cartall@hsblawfirm.com

Ms. Price:

Tom would be good, assuming he has some experience with title insurance, which I don't know at this time. I was really trying hard to stick with mediators in the Columbia and Florence areas, so that the travel demands would be essentially equal for you and Investors Title.

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7708

From: Farr, Emily
Sent: Thursday, October 02, 2008 2:12 PM
To: Becker, James
Subject: FW: Price v. Investors Title; possible mediators

Jamie?

From: DIANA BRZOZOWSKI PRICE [mailto:drbprice@msn.com]
Sent: Thursday, October 02, 2008 2:11 PM
To: Farr, Emily
Subject: RE: Price v. Investors Title; possible mediators

Mr. Becker gave me the impression that one mediator--Tom Willis, from Charleston, would be on the list. We also need contact (phone) information to contact.

Subject: Price v. Investors Title; possible mediators
Date: Thu, 2 Oct 2008 13:16:19 -0400
From: efarr@hsblawfirm.com
To: drbprice@msn.com
CC: jbecker@hsblawfirm.com

Ms. Price,

Below are four mediators that we would agree to have mediate this case. We looked for mediators in either Florence or Columbia in order to keep travel costs down by picking a midway point between you and Steve Brown. I used the names suggested by Karl Folkens and then some mediators used by other lawyers in our firm that were recommended. Then, we found out whether or not the potential mediator had experience with title insurance. The names below are both excellent mediators and have a good solid knowledge of title insurance. Please let us know which one (or ones) you and your husband would agree to mediate and we will begin arrangements to schedule the mediation.

- 1) Karl Folkens of the Folkens Law Firm (Florence)
- 2) James Peterson of Clarke, Johnson, Peterson & McLean (Florence)
- 3) Walter Todd, Jr. of Todd & Ward, PC (Columbia)
- 4) James Bruner of Bruner Power Robbins Wall & Mullins LLC (Columbia)

As I mentioned on the telephone, please feel free to call me or Jamie Becker if you have any questions about the mediators listed above.

Thank you,
Emily Farr
Haynsworth Sinkler Boyd, P.A.
Phone: 803-540-7705
Fax: 803.765.1243

12/4/2008

(47)

(48)

Mallo:efarr@hsblawfirm.com
<http://www.hsblawfirm.com>

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IRS CIRCULAR 230 NOTICE: Internal Revenue Service regulations generally provide that, for the purpose of avoiding federal tax penalties, a taxpayer may rely only on formal written advice meeting specific requirements. Any tax advice in this message, or in any attachment to this message, does not meet those requirements. Accordingly, any such tax advice was not intended or written to be used, and it cannot be used, for the purpose of avoiding federal tax penalties that may be imposed on you or for the purpose of promoting, marketing or recommending to another party any tax-related matters. mmcorp

12/4/2008

(48)

(49)

Becker, James

From: Becker, James
Sent: Wednesday, November 05, 2008 12:22 PM
To: 'Karl Folkens'
Subject: RE: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens or others

Karl: yes, Ms. Price was simply unwilling to go with anyone that we recommended, and you were my first and top recommendation. Ultimately she picked a mediator in Charleston, whose name I can't even remember right now, and our client agreed to use him. The mediation is scheduled for a couple of weeks from now.

Thanks for all of your assistance with this. I know I will see you again in the not too distant future.

Best regards,

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7708

From: Karl Folkens [mailto:karl@folkenslaw.com]
Sent: Monday, November 03, 2008 6:12 PM
To: Becker, James
Subject: Re: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens or others

Jamey,

The Plaintiff called and we had a long talk. I gave her the names of some other mediators to consider.

Has a decision been reached?

Karl

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

Subject: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens or others
From: Becker, James <jbecker@hsblawfirm.com>
To: Karl Folkens <karl@folkenslaw.com>
Cc: "Farr, Emily" <efarr@hsblawfirm.com>, "Ariail, Charlotte" <carail@hsblawfirm.com>, "DIANA BRZOWSKI PRICE" <dbrprice@msn.com>, "Nell Courtney" <nell@folkenslaw.com>
Date: Tuesday, September 09, 2008 2:03:06 PM

Karl: Thank you very much for this information and these suggestions.

Ms. Price: Please review this information and let me know if you would like to discuss the recommendations that Karl has provided. I continue to believe that Karl Folkens would be an excellent mediator for our case, but we are open to others. Please let me hear from you on this as soon as possible.

12/4/2008

(49)

(50)

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7708

From: Karl Folkens [mailto:karl@folkenslaw.com]
Sent: Tuesday, September 09, 2008 1:57 PM
To: Becker, James
Cc: Farr, Emily; Ariail, Charlotte; DIANA BRZOWSKI PRICE; Nell Courtney
Subject: Re: FW: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens

In the Florence area, I would recommend Richard Hinson of Turner Padgett Graham & Laney. He doesn't do title insurance work at all, but does a significant amount of insurance defense work. As a Plaintiff's lawyer, I use Richard on most of my cases since he is a "facilitative" mediator and works the process very well.

I would also recommend Jim Peterson of Florence. Jim is the City Attorney and also does a significant amount of insurance defense work. But, he is also VERY knowledgeable about title issues. In fact, I just concluded a property title case with him, and I was very impressed at his knowledge of title matters. Jim is one of the original mediators in South Carolina and has served on the Mediation and Arbitration Certification Board since its inception. He is not quite as good at process as Richard, but he makes up for it with superior knowledge in property matters.

In the Columbia area, Walt Todd would be one I would also nominate; but I don't know if you're specifically looking in Florence. Walt and I do many CLE's on ADR together, and he would be good on this kind of case.

I would guess Richard has a resolution rate of about 85% - 90% and Jim's is about 60% - 70%. I would peg Walt at around 75% - 80%.

Let me know if you or the Plaintiffs need or want any additional information on any other possible candidates.

The Plaintiffs can also view my bio at our website:
http://www.folkenslaw.com/Karl_bio.htm

Karl

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

Subject: FW: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens
From: Becker, James <jbecker@hsblawfirm.com>
To: karl@folkenslaw.com
Cc: "Farr, Emily" <efarr@hsblawfirm.com>, "Ariail, Charlotte" <carriail@hsblawfirm.com>, "DIANA BRZOWSKI PRICE" <drbprice@msn.com>
Date: Monday, September 08, 2008 5:56:36 PM

12/4/2008

(50)

(51)

Karl: the *pro se* Plaintiffs in this case have never mediated a case before and thus have never chosen a mediator. For a number of reasons, i.e., demeanor, personality, experience, and location, you are the only mediator I have recommended. Understandably, however, the Plaintiffs would like to consider at least one other mediator before we make a decision. Thus, the Plaintiffs would like for me to ask you for a recommendation. If you were not to serve as the mediator, who would you recommend?

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7706

From: DIANA BRZOZOWSKI PRICE [mailto:drbprice@msn.com]
Sent: Thursday, September 04, 2008 6:06 AM
To: Becker, James
Subject: RE: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens

Mr. Becker, he sounds promising.

I looked at the bio Ms. Farr sent me a link for, but that did not really seem helpful. Do you have any other sources of information on him? Did you ask him "who" he would hire in such a case?

Thanks, Diana

Subject: Price v. Investors Title Ins. Co.; possible mediation w/ Karl Folkens
Date: Tue, 2 Sep 2008 10:13:41 -0400
From: jbecker@hsblawfirm.com
To: drbprice@msn.com
CC: efarr@hsblawfirm.com; cariall@hsblawfirm.com

Ms. Price: please see below the response I got from Karl Folkens. Please give me a call if you have any questions or concerns. Otherwise, are you OK to proceed with Karl Folkens?

James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7706

From: Karl Folkens [mailto:karl@folkenslaw.com]
Sent: Friday, August 29, 2008 7:10 PM

12/4/2008

(51)

(52)

To: Becker, James
Cc: Farr, Emily; Ariail, Charlotte; Neil Courtney
Subject: Re: Price v. Investors Title Ins. Co.; possible mediation

Jamie,

I'm a policy issuing agent for United General. I was a fact and expert witness recently in a title insurance case in Florence County. I've been licensed for 22 years. For what it's worth, I scored a 100% on the exam. I actually love these cases!

Please coordinate any scheduling through Neil Courtney in my office. In addition to being my office manager, Neil is my partner in the title insurance company as she, too, is a policy-issuing agent.

Let me know if you have any more questions.

Karl

cc: Emily, Charlotte and Neil

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

Subject: Price v. Investors Title Ins. Co.; possible mediation
From: Becker, James <jbecker@hsblawfirm.com>
To: karl@folklenslaw.com
Cc: "Farr, Emily" <efarr@hsblawfirm.com>, "Ariail, Charlotte" <cariall@hsblawfirm.com>
Date: Friday, August 29, 2008 2:54:54 PM

Karl:

I would like to speak with you about potentially mediating this case. It involves *pro se* Plaintiffs, Ronald and Diana Price, who have sued Investors Title Insurance Company alleging bad faith failure to pay on a title insurance policy, breach of contract, etc.

Do you have any previous experience with title insurance or mediating a case involving title insurance? Please reply by e-mail or give me a call.

James Y. Becker, Esq.

Haynsworth Sinkler Boyd, P.A. | 1201
Main Street, 22nd Floor | Columbia, South
Carolina 29201-3232

d: 803.540.7706 | f: 803.765.1243

jbecker@hsblawfirm.com |

www.hsblawfirm.com

12/4/2008

(52)

(53)

EXHIBIT

2

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

RONALD E. PRICE AND
DIANA R.B. PRICE
(Plaintiffs)

vs

INVESTORS TITLE INSURANCE
COMPANY
(Defendant)

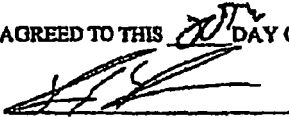
IN THE COURT OF COMMON PLEAS
Case No.: 2007-CP-08-458

SETTLEMENT AGREEMENT

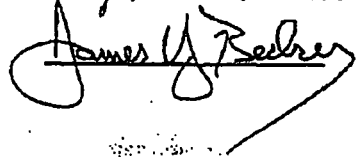
THE MEDIATED SETTLEMENT AGREEMENT DATED November 20, 2008, by, between
Ronald E. Price and Diana R.B. Price and Investors Title Insurance Company, is as follows:

1. The Defendant shall pay to the Plaintiffs, the sum of Twelve Thousand Five Hundred AND 00/100 (\$ 12,500.00) Dollars which sum shall be delivered to Plaintiffs' within 30 days of this Agreement.
2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs at Haynsworth, Sinker, Boyd's Charleston Office at the time the check referenced above is delivered to the Plaintiffs'.
3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.
4. Each Party shall be responsible for his / her / its own attorney's fees and costs associated with this action. The Defendant shall pay the mediator's fee in full.

AGREED TO THIS 20th DAY OF NOVEMBER, 2008, BY THE UNDERSIGNED.









November 25, 2008

Ronald and Diana Price

Summerville, SC 29483

Dennis O'Neal, Mediator
O'Neal & Phipps, LLC
260 West Coleman Blvd, Ste A
Mt. Pleasant, SC 29464
843-971-9292 (fax)

Subject: Revocation of Settlement Agreement

Reference: November 20, 2008 Mediation and Settlement Agreement, Case 2007-CF-08-458

I requested Mr. Becker call me yesterday, but have not gotten a response, so I felt it was best not to delay this action.

We have considered the circumstances and outcome of the meeting and signed agreement. Likewise, we have acknowledged facts which were causing us greater stress and duress, than we knew at the time and therefore, we must revoke the mediation settlement agreement, referenced above.

We attended that mediation in good faith and do remain committed to settlement in this case, but our ability to reason that morning was impaired, and in retrospect, we should have requested rescheduling.

I was under the influence of medication, which was prescribed to me, after seeking medical attention at the hospital emergency room in Yoakum Texas—receiving an injection of strong antibiotics and prescribed further for the following seven days, as well as strong pain medication, which was prescribed. If you require proof of that ER treatment or the medication resulting, I can provide that upon your request.

Being under the influence of those medications, I was faced with a greater state of desperation to bring this case to closure and therefore my ability to reason with the circumstances was adverse to our interests/claims in this case. I was more greatly intimidated by Mr. Becker's comments, which sounded almost threatening in his pursuit of the summary judgment. It also caused me great anxiety to reflect upon Judge Dennis' forcing us to represent ourselves in depositions and facing him in that hearing setting.

My husband has medical issues, which were intensified with the added stress of that event, as well. He was recently informed that he is medically disqualified to enter Iraq or Afghanistan, due to his medical condition. He is diabetic and has high blood pressure, of which he is taking medication to control.

Had we been alert, we would have acknowledged that the Defendants were not demonstrating compromise or good faith in a fair settlement.

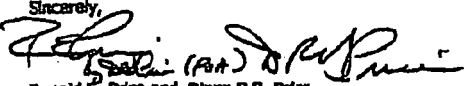
We signed the agreement, feeling coerced, and were unable to reason the circumstances or the content of the agreement—in particular, comments relating to satisfying the rules of SCRPC, absent a consent order and with prejudice as to all claims which were asserted or could have been. These comments were not a part of the discussions. We also failed to ensure the issuance of a new title policy was included in that agreement, which was a part of the discussion and the encroachment permit at the entrance of the subdivision, allowing legal access to our property. Nor did we get clarification as to what the settlement amount was paying for or how this settlement affected our old cases relating issues.

We are notifying you of this decision at this time and are sending this letter to Mr. Becker as well. We are willing to pay for our portion of the mediation fees or reimburse Investors Title Insurance Company for our portion of those fees, as appropriate. We do consider the meeting and time did initiate the settlement process and was not a waste of time.

Mr. Becker told me on August 10th, mediation is a good process to pursue and it is not binding. I have not found anything in the ADR or the SCROP which states that the agreement we signed is enforceable without a release and voluntary dismissal. I also did not find any reference which allows this agreement to be filed and recorded, in the absence of an appropriate consent order—not verbally discussed with us.

Although, Judge Dennis told us to proceed Pro Se, we will again attempt to locate Counsel to further represent us. If we cannot, we will continue to represent ourselves. I have contacted the court, as shown by the letter attached.

Sincerely,


Ronald E. Price and Diana R.B. Price

Enclosure

Cc: Rhonda Colley, Clerk of Court
300-B California Avenue
P. O. Box 219
Mandeville Corner, South Carolina 29481
Fax: 843.719.4511

✓ James Becker/Emily Farr
Haynsworth, Sinkler, and Boyd, PA
1201 Main Street, 22nd Floor
Columbia, SC 29211-1889
Fax: 803.765.1243

November 25, 2008

Ronald E. Price and Diana R. B. Price

Summerville, SC

Rhonda Colley, Clerk of Court
300-B California Avenue
P. O. Box 219
Moncks Corner, South Carolina 29461
Fax: 843.719.4511

Reference: Case Price v. Investors Title Insurance Company, 2007-CP-08-458
Settlement Agreement, November 20, 2008, Revocation

Ms. Colley,

Attached is a letter I am sending to the Mediator—Dennis O'Neal and a copy served to Mr. Becker to revoke our settlement agreement.

As we indicated in that letter, we do believe the time in that meeting was not a waste and that it should be viewed as the initiation of finding final settlement in this case. We acted in good faith in participating in that meeting and will do so in any further negotiations.

Attached is our letter revoking that agreement.

We request that the status conference be rescheduled. Please advise me of any further action, that will be required for me to initiate this action.

Sincerely,


Diana R.B. Price

Enclosure

Cc: ~~Mr. Dennis O'Neal~~
Mr. James Becker and Ms. Emily Farr

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

RONALD E. PRICE and
DIANA R. B. PRICE,

Plaintiffs,

Vs.

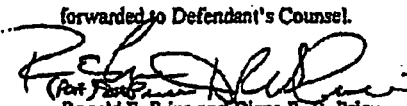
INVESTORS TITLE INSURANCE
COMPANY

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-08-0458

SETTLEMENT AGREEMENT
REVOCATION

The Plaintiffs have revoked the settlement agreement dated November 20, 2008. Rationale for that revocation has been documented and forwarded to the Mediator, as well as copied and forwarded to Defendant's Counsel.


Ronald E. Price and Diana R. B. Price

Summerville, SC

843

843

drbprice@msm.com

Attorney, Pro Se

Certificate of Service by Fax and Mail

The undersigned hereby certifies that a true copy of this foregoing has been served upon opposing counsel by faxing to the appropriate fax number and by mailing a copy properly addressed with the sufficient postage affixed there, this November 25, 2008


Diana R. B. Price

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

RONALD E. PRICE and
DIANA R.B. PRICE,

Plaintiffs,

vs.

INVESTORS TITLE INSURANCE
COMPANY

Defendant,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-080458

FILED
AUG 17 PM 3:36
CLERK OF COURT
BERKELEY COUNTY SC

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that the undersigned hereby gives notice to the
above named Defendants, and to the Berkeley County Court of Common Pleas, that the Plaintiffs,
Ronald E. Price and Diana R.B. Price, are representing Themselves, Pro Se, until such time
Plaintiffs can obtain new Counsel.

August 17, 2007
Summerville, SC

By: [Signature]
Ronald E. Price a/o Diana R.B. Price, Pro Se
Summerville, SC
(843) (843)
drbprice@msn.com

Aug 17, 2007
Summerville, South Carolina

Certificate of Service

The undersigned hereby certified that a true copy of this foregoing has been
served upon opposing counsel by mailing a copy properly addressed with the
sufficient postage affixed there this 15 day of August, 2007.

[Signature]

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

RONALD E. PRICE and)
DIANA R. B. PRICE,)

Plaintiffs,)

vs.)

INVESTORS TITLE INSURANCE)
COMPANY)

Defendant)

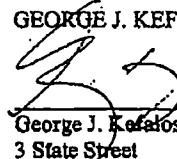
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-08-0458

NOTICE OF APPEARANCE

TO: DEFENDANT INVESTORS TITLE INSURANCE COMPANY:

PLEASE BE ADVISED of the appearance of George J. Kefalos, as attorney for the
Plaintiffs, Ronald E. Price and Diana R.B. Price, in the above-captioned matter.

GEORGE J. KEFALOS, PA


George J. Kefalos
3 State Street
Charleston SC 29401
(843) 722-6612 pb
(843) 377-1310 fax
george@kefaloslaw.com

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina

November 6, 2007

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

RONALD E. PRICE AND DIANA R. B.
PRICE,

Plaintiff(s),

vs.

Investors Title Insurance Company,

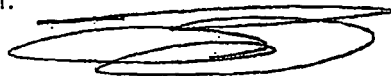
Defendant(s),

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CASE NO. 07-CP-08-458

NOTICE OF APPEARANCE

Please note the appearance by Tobias G. Ward, Jr. as counsel for the Plaintiff(s)
in the above referenced matter.



Tobias G. Ward, Jr. Esquire
Attorney for Plaintiff(s)
PO Box 1549
Columbia, SC 29202
(803) 779-4383
(803) 799-7604(fax)
tgw@thw-law.com

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2009 OCT -7 AM 10:17

FILED

Date: Oct 5 2009

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2007-CP-08-0458
RONALD E. PRICE and	)	
DIANA R. B. PRICE,	)	
	)	AMENDED
Plaintiffs,	)	
	)	
Vs.	)	
	)	
INVESTORS TITLE INSURANCE	)	
COMPANY	)	
Defendant	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SPECIFIC PERFORMANCE
AND TO ENFORCE MEDIATION SETTLEMENT AGREEMENT**

Pursuant to Rule 43(k), SCRCP, Plaintiffs object to Defendant's motion for an order for specific performance. In support of Plaintiffs objection: Plaintiff's Affidavit, December 31, 2008, **Exhibit A**; Email threads (Dec 3 – Aug 29, 2008) **Exhibit B**; Defendant's SETTLEMENT AGREEMENT AND RELEASE & STIPULATION OF DISMISSAL WITH PREJUDICE, **Exhibit C**; SETTLEMENT AGREEMENT, Nov 20, 2008, **Exhibit D**; MEDIATION AGREEMENT, Nov 20, 2008, **Exhibit E**; Title Policy (in part), **Exhibit F**, and Table of Authorities, **Exhibit G**.

For reasons set forth in the following memorandum, Defendant's motion should be denied.

FACTS AND PROCEDURAL HISTORY

Plaintiffs filed a complaint against Defendant in Feb 2007. June 3, 2008, after Defendant's deposing of Plaintiffs for approximately 9 hours, Defendant made settlement offer to Plaintiffs. On July 2, Plaintiffs responded with counter offer. Defendant did not respond to Plaintiffs counter offer. Defendant filed Summary Judgment (SJ), July 10, refer to **Exhibit A, Para 1**.

Aug 11, Plaintiffs deposed Defendants. After depositions, Defendant suggested mediation for resolution. Plaintiffs agreed to consider. On/about Aug 20, via phone conversation, Plaintiffs and Defendant agreed to schedule a mediation conference, refer to **Exhibit A, Para 2**.

Plaintiff, actively pursued locating a mediator, refer to **Exhibit B**, emails Sept 2 – Oct 15. Defendant eliminated two of Plaintiffs suggested mediators, without discussion with them. Plaintiffs eliminated Defendant's #1 choice mediator, after discussion with him, refer to **Defendant's Motion, Exhibit 2**, Nov 5 email. Defendant's delay in selecting a mediator, resulted in Court scheduling a status conference for Nov 24. On/about Nov 10, mediator sent Plaintiffs an agreement to sign, **Exhibit E**, refer to **Exhibit A, Para 3**.

Nov 20, 2008 all parties signed **MEDIATION AGREEMENT, Exhibit E**, making all communications of mediation confidential. **SETTLEMENT AGREEMENT, Exhibit D** was one of those communications. **Exhibit D, Item 2** states a release and consent order would be done. It was not apparent to Plaintiffs, **Exhibit D** contained ambiguity and certain items of discussion were not reflected in the document, and could be deleted from the future agreement (consent). Upon detailed review of **Exhibit D**, Plaintiffs noted no statements of binding effect or specific rules under the SCRCF, ADR, or Local Civil Rules for compliance as was on **Exhibit E, Pg 2 of 3**—refer to **Exhibit A, Para 4**.

Nov 24, Plaintiffs attempted to contact Defendant—outlined in Nov 25 communications to the Court, **Defendant's Motion Exhibit C**. Plaintiffs were compelled to revoke **SETTLEMENT AGREEMENT, Exhibit D**, maintaining confidentiality of the mediation, **Exhibit E**, and the removing potentially binding effect of **Exhibit D**, if approved and recorded by the Court. Plaintiffs were concerned Defendant, may in fact, submit **Exhibit D** to the Court, as per:

“Item 3: The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case...”

Plaintiffs recognized that statement as ambiguous and directly opposing preceding item:

“Item 2: Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs at Haynsworth, Sinkler, Boyd's Charleston Office at the time the check referenced above, is delivered to the Plaintiffs'.”

Refer to **Exhibit A, Para 5**.

Dec 1, Defendant forwarded, via email, **SETTLEMENT AGREEMENT AND RELEASE & STIPULATION FOR DISMISSAL WITH PREJUDICE, Exhibit C**. Plaintiffs could not agree to it. Plaintiffs served Defendant with their motion and leave for motion to amend the Feb 2007 complaint.

Dec 4, Defendant moved for enforcement of the mediation/settlement agreement-- Plaintiffs' rescinded Nov 25. Defendant further requested SJ, if Defendant's motion to enforce was denied. Dec 8, Defendant withdrew SJ motion, refer to **Exhibit A, Para 6**.

A hearing was held March 18 and continued by the Court. Thereafter Defendant reentered SJ motion and contacted Plaintiffs to restart settlement negotiations. The Court scheduled another hearing for April 27. Defendants requested continuance to redraft agreement. Plaintiffs agreed with understanding redraft would cover Plaintiffs concerns. Not receiving a reasonable redraft, and to avoid further delay, Plaintiffs drafted and forwarded to Defendant an agreement, o/a May 29, which incorporated material terms/concerns "compromise" to benefit both parties, based on past offers, recent discovery and current status of ability to perform. Defendant rejected Plaintiff's agreement and forwarded to Plaintiffs the same SETTLEMENT AGREEMENT AND RELEASE, of December 1, 2008. Plaintiffs declined acceptance.

ARGUMENT IN SUPPORT

SCRCP, Rule 43(k):

"Agreements of Counsel. No agreement between counsels 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."

Farnsworth v. Davis Heating and Air Conditioning, Inc., 367 S.C. 634, 627 S.E. 2d 724 (2006),

Defendant brought a motion to enforce a purported settlement agreement. The Supreme Court held:

"(1) plaintiff could withdraw assent to settlement agreement between counsel, before the agreement was reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, and (2) such requirement, that the written agreement must be entered in the record, applies to written settlement agreements that the parties admit was duly executed."

Farnsworth had accepted offer from Davis. Subsequently, Farnsworth rescinded the agreement. Davis admittedly received notice that Farnsworth withdrew her assent, but still proceeded to file a motion to compel the agreement, although the agreement had effectively ceased to exist, when Davis' received Plaintiffs' notice of rescission. The Court noted that the lower court "ordered Farnsworth to comply with an agreement that did not exist." *Farnsworth* reiterates that SCRCP Rule

43(k) "is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation."

Young v. Cooler 347 S.C. 362, 555 S.E. 2d 410 (Ct. App. 2001), presumption of the trial court was that there was an enforceable settlement agreement. The Court found that Rule 43(k), SCRCP requirements were not met, "purported settlement offer that did not satisfy rule governing settlement agreements could not be enforced." and suggested a previously signed letter was merely in the nature of an offer "letter was not intended to be final written documentation of any agreement."

In *Ashford Corp. v Palmetto Constr. Group, Inc.*, 318 S.C.492, 493-94, 458 S.E. 2d 533, 534 (1995) the Court held:

"civil procedure rule requiring all agreements regarding pending litigation to be either announced in open court or reduced to consent order or written stipulation and entered record is applicable to settlement agreements" and "the application of Rule 43(k) will not result in uncertainty regarding settlements. Instead, the application of Rule 43(k) will increase the certainty of settlement agreements by avoiding disputes *495 such as the one in this case." The Court further stated "Appellants also argue that Rule 43(k) is inapplicable to this case since the agreement they are attempting to enforce is between respondent and appellants' insurer and that this agreement was merely confirmed by the parties' counsel. To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one. "

It is widely held that an agreement starts with a "meeting of the minds". *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989) reiterates this support by indicating an agreement without "meeting of the minds" is not a valid or enforceable agreement:

"In order to have valid and enforceable contract, there must be meeting of the minds between the parties with regard to all essential and material terms of the agreement." and "The 'meeting of the minds' required to make a contract is not based on secret purpose or intention on part of one party, 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. "

To further strengthen the position of the Court, AmJur § 49, Enforcement of Agreement, clearly states:

"A Court has the power to enforce the terms of a settlement agreement if the agreement either is incorporated into the court's final judgment or provides expressly for continuing jurisdiction over dispute arising out of the settlement."

Lowcountry Open Land Trust (Respondent) v. Charleston Southern University (Appellant), 376 S.C. 399, 656 S.E. 2d 775, (Ct. App 2008):

"A court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction."

We did a rewrite of Defendant's settlement agreement and stipulation of what we see as all "essential and material terms", described in *Player*, not mentioned in the Nov 20 settlement agreement. Our rewrite was the result of the renegotiation that Defendant's requested in March, but rejected in June, in lieu of requesting the Court to enforce strictly what they want, without a "meeting of the minds", as described in *Player*. Our agreement incorporated SCRCF Rule 43(k) to confirm "certainty", as described in *Ashford*. Essential elements were a "compromise" of getting and giving. A material fact, in this case, is the significant disparity between the agreement that Defendant is insisting we sign, and the Title Policy, which currently is over \$125K in coverage, **Exhibit F**. We were willing to accept the low cash amount, with the inclusion of several material terms, all of which Defendant acknowledged as reasonable at their request to renegotiate. This furthers to bring Plaintiffs to believe that Defendant operates in a manner inconsistent with fair dealings, and as described in SC Code § 38-59-20. Improper claim practices:

"Any of the following acts by an insurer doing accident and health insurance, property insurance, casualty insurance, surety insurance, marine insurance, or title insurance business, if committed without just cause and performed with such frequency as to indicate a general business practice, constitutes improper claim practices:

(6) Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorneys' fees to recover the amount reasonably due or payable.

CONCLUSION

Upon recognition that the mediated SETTLEMENT AGREEMENT was ambiguous, not in Plaintiffs best interests, not a "meeting of the minds" or potentially resulting in a "one-sided" agreement from Defendant, Plaintiffs revoked the agreement prior to performance, enforceability or entry into the record. There is no evidence as defined by Defendant to compel specific performance on a contract. In this case, the elements to enforce a contract do not exist, as described by Defendant. There is no authority to force the Plaintiffs to sign a consent or release that is clearly not a "meeting of the minds" or at least a mutual intention of the Nov 20 settlement agreement. Defendant furthers to show that no valid, enforceable contract existed, in drafting Exhibit C as their intention of the actual

agreement, entitling it "SETTLEMENT AGREEMENT AND RELEASE" and extensively broadening the scope to the advantage of the Defendant.

Plaintiffs have shown that Defendant's motion for an order of specific performance and enforcement is not valid and Defendant's cite of Rule 41(a)(1)(B), SCRPC, in the STIPULATION FOR DISMISSAL WITH PREJUDICE, Exhibit C, is inapplicable, since "voluntary" dismissal of this case does not exist. The intention or literal compliance under Rule 43(k), SCRPC has not been met, and there is no other rule that should be more appropriately applied in this case. Plaintiffs were acting as parties and their own Counsel. Defendant had both Counsel and Defendant Representative sign the agreement regarding pending litigation.

For the reasons stated above, Defendant's motion should be denied. Plaintiffs further asks the Court for whatever fair compensation it deems just and proper to offset this act by Defendant against the Plaintiffs.



Ronald E. Price and/or Diana R. B. Price, July 24, 2009

[REDACTED]
Summerville, SC [REDACTED]

843 [REDACTED]

843 [REDACTED]

drbprice@msn.com

Attorneys. Pro Se

Certificate of Service by EMail

The undersigned hereby certifies that a true copy of this foregoing has been served upon opposing counsel by emailing a copy properly addressed, this date, July 24, 2009.



Ronald E. Price and/or Diana R. B. Price

[REDACTED]
Summerville, SC [REDACTED]

843 [REDACTED], drbprice@msn.com

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY.) CASE NO.: 2007-CP-08-458

RONALD E. PRICE and)
DIANA R.B. PRICE,)
)
PLAINTIFFS,)
)
VS.)
)
INVESTORS TITLE INSURANCE COMPANY,)
)
DEFENDANT.)

MOTIONS HEARING

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Berkeley County Courthouse
Berkeley, South Carolina
on Monday, July 27, 2009, Commencing at 1:51 p.m.

SUSAN "MIA" PERRON, CCR, CVR-CM
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

(67)
COPY

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 document is going to include those things of which were
2 not already in this little small piece of paper, which
3 is half a -- it's half a page.

4 This is simply an agreement that we saw to
5 agreement on another piece of paper that would be
6 coming, as well as the stipulation. We talked about a
7 stipulation. So we saw those things coming. But then
8 we began to read this and it looks like --

9 THE COURT: You saw them coming, Mrs. Price? Or
10 you assumed by your interpretation of those words that
11 that's what would happen?

12 MRS. PRICE: Yes. That's exactly our intent.
13 When we signed that agreement, that was our intent.

14 THE COURT: So that day, you were able to read
15 and understand what you signed?

16 MRS. PRICE: We were -- yes, ma'am. We were
17 able to understand, on its surface, that there would be
18 another agreement coming. We did not read word for
19 word, and reread, and analyze the part where it talks
20 about this piece of paper could be filed, entered into
21 the record, without the consent and release -- that is
22 the part that confused us -- and the fact that these
23 things contradict each other within this piece of
24 paper.

25 So having read that, yes, we initially tried to

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 not be reference -- this couldn't be referenced as part
2 of that, which is pretty important. So that's why.

3 THE COURT: Mr. Price, is there anything about
4 the agreement that you signed on November 20th of 2008
5 -- at that time, did you understand what you were doing
6 and what you were signing?

7 MR. PRICE: Apparently not, because what I got
8 later in the time --

9 THE COURT: At the time, did you understand what
10 you were signing?

11 MR. PRICE: I thought I did.

12 THE COURT: Mrs. Price, at the time, did you
13 understand what you were signing?

14 MRS. PRICE: Yes, ma'am. I -- we thought we
15 were signing a document that was the beginning of
16 another document and the new document would, in fact,
17 have those terms that were essential, and we would have
18 that meeting of the minds that we saw an agreement, on
19 to the next step of a contract. We did not have that.
20 And when we recognized that the potential for that far
21 exceeded the scope of that piece of paper, as far as
22 the advantage of the defendant, we took the only action
23 we knew to take and that was, let's scratch that piece
24 of paper and start over again because we don't want
25 that piece of paper actually to be filed, even though

Price vs. Investors Title Insurance
Motions Hearing
July 27, 2009

1 number two: counsel for the defendants shall prepare a
2 release and consent order of dismissal of the above
3 action which shall be executed by the plaintiffs at
4 Haynsworth Sinkler Boyd's Charleston office at the time
5 the check referenced above is delivered to the
6 plaintiffs. The terms of this agreement could not be
7 simpler. There is a release and a consent order --

8 THE COURT: Evidently not, Mr. Becker, or we
9 wouldn't be here more than a year later.

10 MRS. PRICE: It hasn't been quite a year.

11 THE COURT: Mrs. Price.

12 MR. BECKER: My point there being, Your Honor,
13 that they -- it was -- it's clear to them, from reading
14 it, what they were signing and what they were agreeing
15 to.

16 THE COURT: And let's be clear to you, Mr.
17 Becker. I'm assuming that it was not clear. It's
18 still not clear to Mrs. Price and Mr. Price, because he
19 keeps referring to some sort of additional paperwork
20 that you are going to be sending, and stipulations that
21 you're going to enter into.

22 MR. BECKER: Well, that would be the release and
23 consent order of dismissal, is all.

24 THE COURT: I understand that, Mr. Becker. But
25 that's exactly why we are here. Mrs. Price does not

MIA PERRON, CCR, CVR-CM

(70)

-27-



IN THE STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Case No.: 2007-CP-08-458

RONALD E. PRICE AND
DIANA R.B. PRICE
(Plaintiffs)

vs

INVESTORS TITLE INSURANCE
COMPANY
(Defendant)

SETTLEMENT AGREEMENT

THE MEDIATED SETTLEMENT AGREEMENT DATED November 20, 2008, by, between
Ronald E. Price and Diana R.B. Price and Investors Title Insurance Company, is as follows:

1. The Defendant shall pay to the Plaintiffs, the sum of Twelve Thousand Five Hundred AND 00/100 (\$ 12,500.00) Dollars which sum shall be delivered to Plaintiffs' within 30 days of this Agreement.
2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs at Haynsworth, Sinker, Boyd's Charleston Office at the time the check referenced above is delivered to the Plaintiffs'.
3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.
4. Each Party shall be responsible for his / her / its own attorney's fees and costs associated with this action. The Defendant shall pay the mediator's fee in full.

AGREED TO THIS 20th DAY OF NOVEMBER, 2008, BY THE UNDERSIGNED.

WITNESSES:

DENNIS G. GENTRY
MEDIATOR

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

RONALD E. PRICE and
DIANA R. B. PRICE,

Plaintiffs,

Vs.

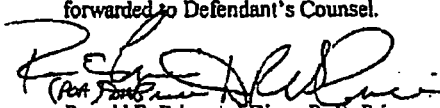
INVESTORS TITLE INSURANCE
COMPANY

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-08-0458

SETTLEMENT AGREEMENT
REVOCATION

The Plaintiffs have revoked the settlement agreement dated November 20, 2008. Rationale for that revocation has been documented and forwarded to the Mediator, as well as copied and forwarded to Defendant's Counsel.

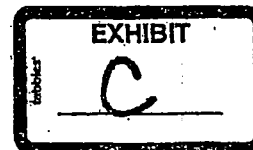

Ronald E. Price and Diana R. B. Price

Summerville, SC 29401
843. [REDACTED]
843. [REDACTED]
drbprice@msn.com
Attorney. Pro Se

Certificate of Service by Fax and Mail

The undersigned hereby certifies that a true copy of this foregoing has been served upon opposing counsel by faxing to the appropriate fax number and by mailing a copy properly addressed with the sufficient postage affixed there, this November 25, 2008


Diana R. B. Price



November 25, 2008

Ronald and Diana Price

Summerville, SC

Dennis O'Neal, Mediator
O'Neil & Philps, LLC
260 West Coleman Blvd, Ste A
Mt. Pleasant, SC 29464
843-971-9292 (fax)

Subject: Revocation of Settlement Agreement

Reference: November 20, 2008 Mediation and Settlement Agreement, Case 2007-CP-08-458

I requested Mr. Becker call me yesterday, but have not gotten a response, so I felt it was best not to delay this action.

We have considered the circumstances and outcome of the meeting and signed agreement. Likewise, we have acknowledged facts which were causing us greater stress and duress than we knew at the time and therefore, we must revoke the mediation settlement agreement, referenced above.

We attended that mediation in good faith and do remain committed to settlement in this case, but our ability to reason that morning was impaired, and in retrospect, we should have requested rescheduling.

I was under the influence of medication, which was prescribed to me, after seeking medical attention at the hospital emergency room in Yoakum, Texas—receiving an injection of strong antibiotics and prescribed further for the following seven days, as well as strong pain medication, which was prescribed. If you require proof of that ER treatment or the medication resulting, I can provide that upon your request.

Being under the influence of those medications, I was faced with a greater state of desperation to bring this case to closure and therefore my ability to reason with the circumstances was adverse to our interests/claims in this case. I was more greatly intimidated by Mr. Becker's comments, which sounded almost threatening in his pursuit of the summary judgment. It also caused me great anxiety to reflect upon Judge Dennis' forcing us to represent ourselves in depositions and facing him in that hearing setting.

My husband has medical issues, which were intensified with the added stress of that event, as well. He was recently informed that he is medically disqualified to enter Iraq or Afghanistan, due to his medical condition. He is diabetic and has high blood pressure, of which he is taking medication to control.

Had we been alert, we would have acknowledged that the Defendants were not demonstrating compromise or good faith in a fair settlement.

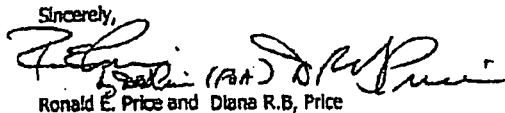
We signed the agreement, feeling coerced, and were unable to reason the circumstances or the content of the agreement—in particular, comments relating to satisfying the rules of SCRPC, absent a consent order and with prejudice as to all claims which were asserted or could have been. These comments were not a part of the discussions. We also failed to ensure the issuance of a new title policy was included in that agreement, which was a part of the discussion and the encroachment permit at the entrance of the subdivision, allowing legal access to our property. Nor did we get clarification as to what the settlement amount was paying for or how this settlement affected our old cases relating issues.

We are notifying you of this decision at this time and are sending this letter to Mr. Becker as well. We are willing to pay for our portion of the mediation fees or reimburse Investors Title Insurance Company for our portion of those fees, as appropriate. We do consider the meeting and time did initiate the settlement process and was not a waste of time.

Mr. Becker told me on August 10th, mediation is a good process to pursue and it is not binding. I have not found anything in the ADR or the SCRCF which states that the agreement we signed is enforceable without a release and voluntary dismissal. I also did not find any reference which allows this agreement to be filed and recorded, in the absence of an appropriate consent order—not verbally discussed with us.

Although, Judge Dennis told us to proceed Pro Se, we will again attempt to locate Counsel to further represent us. If we cannot, we will continue to represent ourselves. I have contacted the court, as shown by the letter attached.

Sincerely,



Ronald E. Price and Diana R.B. Price

Enclosure

Cc: Rhonda Colley, Clerk of Court
300-B California Avenue
P. O. Box 219
Moncks Corner, South Carolina 29481
Fax: 843.719.4511

James Becker/Emily Farr
Haynsworth, Sinkler, and Boyd, PA
1201 Main Street, 22nd Floor
Columbia, SC 29211-1889
Fax: 803.765.1243

November 25, 2008

Ronald E. Price and Diana R. B. Price
[REDACTED]
Summerville, SC [REDACTED]

Rhonda Colley, Clerk of Court
300-B California Avenue
P. O. Box 219
Moncks Corner, South Carolina 29461
Fax: 843.719.4511

Reference: Case Price v. Investors Title Insurance Company, 2007-CP-08-458
Settlement Agreement, November 20, 2008, Revocation

Ms. Colley,

Attached is a letter I am sending to the Mediator—Dennis O'Neal and a copy served to Mr. Becker to revoke our settlement agreement.

As we indicated in that letter, we do believe the time in that meeting was not a waste and that it should be viewed as the initiation of finding final settlement in this case. We acted in good faith in participating in that meeting and will do so in any further negotiations.

Attached is our letter revoking that agreement.

We request that the status conference be rescheduled. Please advise me of any further action, that will be required for me to initiate this action.

Sincerely,


Diana R.B. Price

Enclosure

Cc: Mr. Dennis O'Neal
✓ Mr. James Becker and Ms. Emily Farr

C

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT AND RELEASE is entered into as of the ____ day of December, 2008, by Ronald E. Price ("Mr. Price") and Diana R.B. Price ("Mrs. Price") (collectively referred to as the "Prices");

WHEREAS, the Prices filed a complaint on February 22, 2007, in the Court of Common Pleas, Berkeley County, South Carolina, captioned *Ronald E. Price and Diana R.B. Price v. Investors Title Insurance Company*, Case Number 07-CP-08-0458 (the "Civil Action"), asserting claims arising from a Residential Insurance Policy (the "Policy") issued to the Prices by Investors Title Insurance Company ("Investors Title");

WHEREAS, Investors Title filed a responsive pleading denying the allegations of the Prices' complaint filed in the Civil Action;

WHEREAS, the Prices and Investors Title agreed to settle their disputes in the Civil Action, rather than proceed with litigation over the acts and events more particularly described by the parties in their respective pleadings in the Civil Action;

NOW, THEREFORE, in consideration of the promises contained herein, and for other valuable consideration, the receipt and sufficiency of which the Prices hereby acknowledge, they agree as follows:

1. In exchange for the payment of \$12,500.00 from Investors Title, the Prices shall dismiss Investors Title with prejudice from the Civil Action by signing the Stipulation of Dismissal With Prejudice attached hereto as Exhibit 1 and release Investors Title as provided for in Paragraph 2 below;

2. Mr. Price and Mrs. Price, for themselves individually and for their respective heirs, estates, executors, administrators, personal representatives, successors, assigns, masters, principals, insurers, agents, attorneys, and representatives intend to and do hereby jointly and severally release, acquit, and forever discharge Investors Title and its officers, directors, agents, servants, employees, attorneys, representatives, shareholders, beneficiaries, successors, predecessors, assigns, affiliates, insurers, administrators, and successors in interest; Investors Title's parent, holding, subsidiary, affiliated, and related entities; any business entity or division owning or controlling Investors Title in whole or in part (all of the foregoing persons and entities are hereinafter collectively referred to as the "Released Parties") from any and all past, present, or future claims, contingent claims, counterclaims, third-party claims, liabilities, demands, lawsuits, judgments, actions, suits at law or in equity, causes of action, accountings, rights, obligations, covenants, contracts, agreements, damages, punitive damages, costs, fees, attorneys' fees, interest, and any liability of any kind or nature whatsoever, direct or derivative, known or unknown, choate or inchoate, and whether or not the Released Parties are at fault (the foregoing hereinafter collectively referred to as "Claims") that Mr. Price and Mrs. Price had, now has, may have at any time in the future, or claim to have had, against the Released Parties arising from or related to any and all matters, dealings, occurrences, duties, actions, failures to act, omissions, events, obligations, covenants, contracts, agreements, sales, warranties, representations, documents, transactions, and instruments, including without limitation, the Civil Action and the Policy, from the beginning of time through and including the date of this Agreement.

3. The Prices shall not file, bring, continue, participate in, or (unless required by law, subpoena, or court order) cooperate with any lawsuit, claim, complaint, or judicial, administrative, or other proceeding brought by any person against the Released Parties or any of them, with respect to any Claims waived, released, or discharged pursuant to Paragraph 2 hereof.

4. The Prices warrant and represent that they have not sold, assigned, granted, or transferred to any other person, corporate or natural, any claims or interests concerning the Civil Action or that were capable of being asserted in the Civil Action.

5. Nothing herein shall be deemed to be evidence of an admission or concession on the part of any of the Released Parties of any liability or wrongdoing whatsoever.

6. The Prices acknowledge that they had the choice to be represented by competent counsel throughout all the negotiations that preceded the execution of this Agreement and that they had a full opportunity to negotiate the terms of agreement prior to executing this Agreement. The Prices further acknowledge that they have each read this Agreement and assent to all terms and conditions contained herein without any reservation whatsoever.

7. All terms of this Agreement are contractual and not mere recitals. All negotiations relating to this Agreement are merged herein. There are no promises, agreements, conditions, undertakings, warranties, or representations, oral or written, express or implied, among the parties as to such matters other than as set forth herein. No waiver, change, or modification of this Agreement shall be valid unless the same is in writing and is signed by the party to be bound thereby.

8. Facsimile or electronic copies of this Agreement and the signatures hereto may be used with the same force and effect as the original. This Agreement shall be deemed fully executed and effective when the parties have executed at least one of the counterparts, even though no single counterpart bears all such signatures.

9. The singular number, when used herein, shall include the plural, and vice versa, as the context may require. The masculine, feminine, and neuter genders shall include such other genders as are appropriate.

10. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement nevertheless shall remain in full force and effect.

11. This Agreement shall be governed by the laws of the State of South Carolina.

IN WITNESS WHEREOF, the below-named parties duly executed this Agreement as of the day and year first stated above

Ronald E. Price

Diana R. B. Price

Pro Se Plaintiff

Pro Se Plaintiff

EXHIBIT 1

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

RONALD E. PRICE AND
DIANA R.B. PRICE

(Plaintiffs)

vs

INVESTORS TITLE INSURANCE
COMPANY

(Defendant)

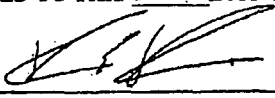
IN THE COURT OF COMMON PLEAS
Case No.: 2007-CP-08-458

SETTLEMENT AGREEMENT

THE MEDIATED SETTLEMENT AGREEMENT DATED November 20, 2008, by, between
Ronald E. Price and Diana R.B. Price and Investors Title Insurance Company, is as follows:

1. The Defendant shall pay to the Plaintiffs, the sum of Twelve Thousand Five Hundred AND 00/100 (\$ 12,500.00) Dollars which sum shall be delivered to Plaintiffs' within 30 days of this Agreement.
2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs at Haynsworth, Sinker, Boyd's Charleston Office at the time the check referenced above is delivered to the Plaintiffs'.
3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.
4. Each Party shall be responsible for his / her / its own attorney's fees and costs associated with this action. The Defendant shall pay the mediator's fee in full.

AGREED TO THIS 20th DAY OF NOVEMBER, 2008, BY THE UNDERSIGNED.



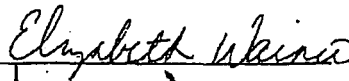
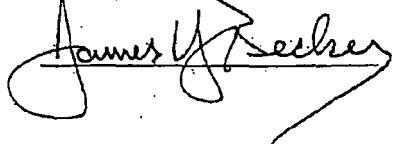




EXHIBIT 1

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT AND RELEASE is entered into as of the _____ day of April, 2009, by _____

WHEREAS, the Prices filed a complaint on February 22, 2007, in the Court of Common Pleas, Berkeley County, South Carolina, captioned *Ronald E. Price and Diana R.B. Price v. Investors Title Insurance Company*, Case Number 07-CP-08-0458 (the “Civil Action”), asserting claims arising from a Residential Title Insurance Policy (the “Policy”) issued to the Prices by Investors Title Insurance Company (“Investors Title”);

WHEREAS, Investors Title filed a responsive pleading denying the allegations of the Prices' complaint filed in the Civil Action;

~~WHEREAS, the Parties and Investors have agreed to settle their disputes~~ in the Civil Action, rather than proceed with litigation over the acts and events more particularly described by the parties in their respective pleadings in the Civil Action;

NOW, THEREFORE, in consideration of the promises contained herein, and for other valuable consideration, the receipt and sufficiency of which the Prices hereby acknowledge, they agree as follows:

1. ~~Investors. The shall pay the sum of \$12,500,000 to~~ the Prices in settlement of all claims the Prices may have from the ALTA closing protection letter provided in connection with the Policy.

Investors will issue an endorsement to the Allstate risk policy, which increases the amount of insurance to \$10 million.

3. In exchange for the payment of \$12,500.00 and the endorsement of the ALTA Owner's Policy of Title Insurance described in paragraphs 1 and 2 above, the Prices shall dismiss Investors Title with prejudice from ~~Investors Title as provided for in Paragraph 4 below~~ of Dismissal With Prejudice attached hereto as **Exhibit 1** and release Investors Title as provided for in Paragraph 4 below:

Mr. Price and Mrs. Price for themselves individually and for their respective heirs, assigns, administrators and legal representatives, have sold, transferred, conveyed, assigned, released, remitted, quitclaimed, and otherwise disposed of, and do hereby jointly and severally release, acquit and forever discharge investors, title and its officers, directors, agents, servants, employees, partners, legal representatives, underwriters, beneficiaries, successors, predecessors, assigns, affiliates, insurers, administrators, and successors in interest, investors and their heirs, holding in trust, and their heirs, assigns, successors, any business entity, or any step-downs or control in investors, full and whole or in part, all of the foregoing persons and entities, in hereinafter collectively referred to as the Released Parties, from any and all past, present or future claims, demands, suits, actions, or claims, in any way connected therewith, and all

~~5/1/2018~~ The Parties acknowledge that the Prices have or may assert claims against parties other than the Released Parties relating to the real property that was insured by the Policy. The Parties acknowledge that the foregoing release does not release any claims that the Prices may have against such parties, specifically including the defendants named in the civil action pending in the Berkeley County Court of Common Pleas, captioned *Ronald E. Price and Diana R.B. Price v. [REDACTED]* ~~1/1/2018~~

7. The Prices warrant and represent that they have not sold, assigned, granted, or transferred to any other person, corporate or natural, any claims or interests concerning the Civil Action or that were capable of being asserted in the Civil Action.

9. [REDACTED]

11. Facsimile or electronic copies of this Agreement and the signatures hereto may be used with the same force and effect as the original. This Agreement shall be deemed fully

executed and effective when the parties have executed at least one of the counterparts, even though no single counterpart bears all such signatures.

12. The singular number, when used herein, shall include the plural, and vice versa, as the context may require. The masculine, feminine, and neuter genders shall include such other genders as are appropriate.

13. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement nevertheless shall remain in full force and effect.

14. This Agreement shall be governed by the laws of the State of South Carolina.

IN WITNESS WHEREOF, the below-named parties duly executed this Agreement as of the day and year first stated above

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ronald E. Price and Diana R.B. Price
Summerville, SC
843-~~████████~~, and ~~████████~~
Fax: 843-~~████████~~

May 2, 2007

James Y. Becker
Emily H. Farr
Haynsworth Sinkler Boyd, P.A.
PO Box 11889
Columbia, SC 29211

RE: Price Vs. Investors Title Insurance Co., Case No. 2007-CP-08-0458

We are notifying you that we have relieved Mr. Joseph Ginn as our Counsel.

We are actively pursuing new Counsel and expect to have representation within 30 days.
We request your consideration in corresponding with us directly, until that time.

We received your letter dated March 22, 2007, as well as your Answer to the complaint, dated April 25, 2007, on April 25th. We did not receive any document, which confirms the extension time you were granted for the filing of your Answer. If you would, please send us a copy of that document, we would appreciate it.

We look forward to a mutually respectful relationship, despite these adversarial circumstances.

Sincerely,


Ronald E. Price & Diana R.B. Price

Cc: Mary Brown, Berkeley County Clerk of Court
Joseph Ginn

Haynsworth Sinkler Boyd, PA
Date Rec'd 5-7-07
C/M # 17243, 22
Docketed 246/EH7
Routing

SCANNED

November 25, 2008

Ronald and Diana Price

Summerville, SC

Dennis O'Neal, Mediator
O'Neill & Phipps, LLC
260 West Coleman Blvd, Ste A
Mt. Pleasant, SC 29464
843-971-9292 (fax)

Subject: Revocation of Settlement Agreement

Reference: November 20, 2008 Mediation and Settlement Agreement, Case 2007-CP-02-458

I requested Mr. Becker call me yesterday, but have not gotten a response, so I felt it was best not to delay this action.

We have considered the circumstances and outcome of the meeting and signed agreement. Likewise, we have acknowledged facts which were causing us greater stress and duress, than we knew at the time and therefore, we must revoke the mediation settlement agreement, referenced above.

We attended that mediation in good faith and do remain committed to settlement in this case, but our ability to reason that morning was impaired, and in retrospect, we should have requested rescheduling.

I was under the influence of medication, which was prescribed to me, after seeking medical attention at the hospital emergency room in Yoakum Texas--receiving an injection of strong antibiotics and prescribed further for the following seven days, as well as strong pain medication, which was prescribed. If you require proof of that ER treatment or the medication resulting, I can provide that upon your request.

Being under the influence of those medications, I was faced with a greater state of desperation to bring this case to closure and therefore my ability to reason with the circumstances was adverse to our interests/claims in this case. I was more greatly intimidated by Mr. Becker's comments, which sounded almost threatening in his pursuit of the summary judgment. It also caused me great anxiety to reflect upon Judge Dennis' forcing us to represent ourselves in depositions and facing him in that hearing setting.

My husband has medical issues, which were intensified with the added stress of that event, as well. He was recently informed that he is medically disqualified to enter Iraq or Afghanistan, due to his medical condition. He is diabetic and has high blood pressure, of which he is taking medication to control.

Had we been alert, we would have acknowledged that the Defendants were not demonstrating compromise or good faith in a fair settlement.

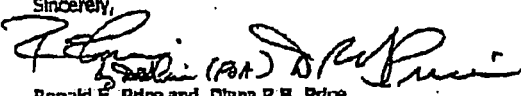
We signed the agreement, feeling coerced, and were unable to reason the circumstances or the content of the agreement--in particular, comments relating to satisfying the rules of SCRPC, absent a consent order and with prejudice as to all claims which were asserted or could have been. These comments were not a part of the discussions. We also failed to ensure the issuance of a new title policy was included in that agreement, which was a part of the discussion and the encroachment permit at the entrance of the subdivision, allowing legal access to our property. Nor did we get clarification as to what the settlement amount was paying for or how this settlement affected our old cases relating issues.

We are notifying you of this decision at this time and are sending this letter to Mr. Becker as well. We are willing to pay for our portion of the mediation fees or reimburse Investors Title Insurance Company for our portion of those fees, as appropriate. We do consider the meeting and time did initiate the settlement process and was not a waste of time.

Mr. Becker told me on August 10th, mediation is a good process to pursue and it is not binding. I have not found anything in the ADR or the SCRCF which states that the agreement we signed is enforceable without a release and voluntary dismissal. I also did not find any reference which allows this agreement to be filed and recorded, in the absence of an appropriate consent order—not verbally discussed with us.

Although, Judge Dennis told us to proceed Pro Se, we will again attempt to locate Counsel to further represent us. If we cannot, we will continue to represent ourselves. I have contacted the court, as shown by the letter attached.

Sincerely,


Ronald E. Price and Diana R.B. Price

Enclosure

Cc: Rhonda Colley, Clerk of Court
800-B California Avenue
P. O. Box 219
Moncks Corner, South Carolina 29481
Fax: 843.719.4511

James Becker/Emily Farr
Haynsworth, Sinkler, and Boyd, PA
1201 Main Street, 22nd Floor
Columbia, SC 29211-1889
Fax: 803.765.1243

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

RONALD E. PRICE and
DIANA R. B. PRICE,

Plaintiffs,

Vs.

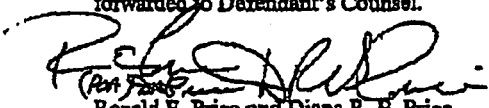
INVESTORS TITLE INSURANCE
COMPANY

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-08-0458

SETTLEMENT AGREEMENT
REVOCATION

The Plaintiffs have revoked the settlement agreement dated November 20, 2008. Rationale for that revocation has been documented and forwarded to the Mediator, as well as copied and forwarded to Defendant's Counsel.


Ronald E. Price and Diana R. B. Price

Summerville, SC

843.

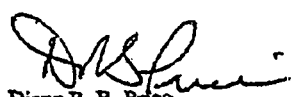
843.

drbprice@msn.com

Attorney. Pro Se

Certificate of Service by Fax and Mail

The undersigned hereby certifies that a true copy of this foregoing has been served upon opposing counsel by faxing to the appropriate fax number and by mailing a copy properly addressed with the sufficient postage affixed there, this November 25, 2008


Diana R. B. Price

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of Common Pleas**

Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

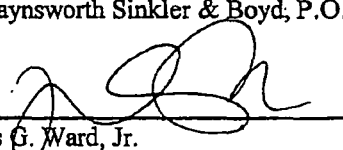
Ronald E. Price and Diana R.B. Price, Appellant,

v.

Investors Title Insurance Company, Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Record on Appeal, Certificate of Counsel and Proof of Service by depositing a copy of them in the United States Mail, postage prepaid addressed to its attorney of record, James Y. Becker, at his office Haynsworth Sinkler & Boyd, P.O. Box 11889, Columbia, SC 29211. on June 4, 2010.


Tobias G. Ward, Jr.
J. Derrick Jackson
Post Office Box 1549
Columbia, South Carolina 29202
(803) 779-4383
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 08 2010
SC Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

BRIEF OF RESPONDENT

Hamilton Osborne, Jr.
James Y. Becker
Emily H. Farr
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 11889
Columbia, South Carolina 29211-1889
803-779-3080

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in enforcing a settlement agreement that was reduced to writing and signed by the parties at the conclusion of a mediated settlement conference?

2. Did Rule 43(k), SCRCP, require the written settlement agreement signed by the parties to be entered in the record in order to be enforced?

STATEMENT OF THE CASE

Respondent adopts Appellants' Statement of the Case with the following exceptions:

- Respondent denies that the matters on which Appellants base their claims are covered by the title insurance policy Respondent issued to Appellants. (R. p. 12, ¶ 9; R. p. 20, ¶ 9.)
- Respondent does not know whether Appellants or their counsel received a copy of the order dated December 10, 2009, and filed December 14, 2009.

FACTS

When Appellants, Ronald and Diana Price (the "Prices"), commenced this action against Respondent, Investors Title Insurance Company ("Investors Title"), in February, 2007, they were represented by Joseph W. Ginn, III, a member of the South Carolina Bar, as their attorney. (R. pp. 10-18.) By letter dated May 2, 2007, the Prices notified counsel for Investors Title that they had relieved Mr. Ginn as their counsel and that they expected to have other representation within 30 days. (R. p. 82.) On August 17, 2007, the Prices filed a Notice of Appearance stating that they were representing themselves until such time as they could obtain new counsel. (R. p. 58.)

By a Notice of Appearance dated November 6, 2007, George J. Kefalos, a member of the South Carolina Bar, gave notice that he was appearing for the Prices. (R. p. 59.) A form order dated July 2, 2008, stated that "Atty Kefalos is relieved as counsel [for Plaintiffs] per their request at the May 13, 2008 status conference." (R. p. 9.) The Prices thereafter represented themselves *pro se* until Tobias G. Ward, Jr., their current counsel, served a Notice of Appearance dated October 5, 2009. (R. p. 60.)

By mutual agreement, the Prices and Investors Title engaged in mediated settlement negotiations on November 20, 2008, at which time the Prices were still representing themselves *pro se*. Mrs. Price actively investigated the mediators proposed by counsel for Investors Title and refused to accept any of them. The mediator who was ultimately selected, Dennis O'Neill, was proposed by Mrs. Price and accepted by Investors Title. (R. pp. 44, 46-47.)

At the mediation, the Prices presented a thorough explanation and analysis of their claims against Investors Title. In connection with this presentation, Mrs. Price prepared and presented a detailed brief in support, totaling twelve pages. The mediation lasted approximately four hours with extensive discussion and negotiations in at least two conferences with all parties present and in separate discussion through the mediator. (R. p. 44.)

At the conclusion of the settlement conference, the Prices and Investors Title executed a written Settlement Agreement stating as follows:

1. The Defendant shall pay to the Plaintiffs, the sum of Twelve Thousand Five Hundred AND 00/100 (\$ 12,500.00) Dollars which sum shall be delivered to Plaintiffs' [sic] within 30 days of this Agreement.
2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed

by the Plaintiffs at Haynsworth. Sinker, Boyd's Charleston Office at the time the check referenced above is delivered to the Plaintiffs' [sic].

3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.

4. Each Party shall be responsible for his/her/its own attorney's fees and costs associated with this action. The Defendant shall pay the mediator's fee in full.

(R. p. 71.)

On November 25, 2008, five days after execution of the Settlement Agreement, the Prices served a document entitled "Settlement Agreement Revocation." (R. p. 85.) The Prices explained their reasons for revoking the Settlement Agreement in a letter to the mediator on the same date. (R. pp. 83-84.) They said they had decided to revoke the Settlement Agreement because their "ability to reason that morning was impaired." Mrs. Price said that she was taking pain medications and that "[b]eing under the influence of those medications, I was faced with a greater state of desperation to bring this case to closure" Mrs. Price also said that her husband was diabetic and had high blood pressure, which he was taking medication to control. (R. p. 83.)

The Prices concluded their explanation for revoking the Settlement Agreement with the following statement:

We signed the agreement, feeling coerced We also failed to ensure the issuance of a new title policy was included in that agreement, which was part of the discussion and the encroachment permit at the entrance of the subdivision, allowing legal access to our property.

(R. p. 83, emphasis added.)

On December 4, 2008, Investors Title served a Motion for Specific Performance and to Enforce Mediation Agreement. (R. pp. 37-55.) The motion was heard on July 27, 2009, and on December 10, 2009, the circuit court issued an Order Compelling Plaintiffs' Specific Performance of the Mediated Settlement Agreement and Dismissing the Case with Prejudice. (R. pp. 2-7.) In the Order, the circuit court concluded that the Settlement Agreement "is clear evidence of a valid agreement, particularly having been prepared by a mediator at the conclusion of a mediation." (R. p. 5.) The circuit court further concluded that Investors Title had shown that "it remains ready, willing, and able to perform on its part of the mediation agreement." (R. p. 6.)

ARGUMENT

The Prices no longer assert that they were coerced to sign the Settlement Agreement. Instead, they now argue that the Settlement Agreement is not binding on them because there was never a meeting of the minds on all the essential terms of a contract and because the Settlement Agreement was not entered on the record. Investors Title will demonstrate that these arguments are without merit.

I. THE SETTLEMENT AGREEMENT IS A BINDING CONTRACT.

"The elements required for formation of a contract are an offer, acceptance, and valuable consideration. In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement." *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 225, 647 S.E.2d 488, 494 (2007) (citations omitted).

In this case, Investors Title made an offer to pay money to the Prices to settle the case, and the Prices accepted that offer. Valuable consideration was provided by the agreement of Investors Title to pay the Prices \$12,500 and by the agreement of the Prices

to execute a release and to dismiss their lawsuit. The essential elements of a contract to settle thus clearly exist.

The Prices argue that no contract exists because the parties contemplated that "something remained to be done," but they made no such argument when they purported to revoke the Settlement Agreement. Instead, they asserted that their ability to represent themselves had been impaired by health problems and medications and that they had been subjected to coercion. Their failure to make the same argument now demonstrates that their earlier assertions were merely pretenses and they were simply trying to avoid a bargain with which they had become dissatisfied.

In any event, the Settlement Agreement itself demonstrates that it was intended to be a binding contract because it expressly states as follows:

The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.

(R. p. 71, ¶ 3.) Clearly, if the Settlement Agreement itself could be entered into the record to conclude the case, nothing remained to be done to create a binding contract of settlement.

The Prices argue that the release prepared by counsel for Investors Title indicates that something remained to be done to create a binding contract, but this argument is specious. Contracts frequently contemplate the preparation and execution of additional documents *to fulfill the terms of the contract after the contract is formed*. For example, every contract for the sale of real property contemplates the subsequent preparation and execution of a deed, and such contracts often contemplate the subsequent preparation and

execution of other documents (e.g., a purchase-money note and a mortgage securing the note). The fact that such additional documents remain to be prepared and executed does not render the contract void or unenforceable.

The Settlement Agreement is similar. The preparation and execution of a release and an order or stipulation of dismissal to which paragraph 2 of the Settlement Agreement refers were not things remaining to be done to create a binding contract. They were instead the means by which the contract already made would be carried out. Consequently, the subsequent communications between the Prices and counsel for Investors Title concerning the terms of the proposed release do not establish that the Settlement Agreement was not a binding contract.

Virtually every settlement agreement relating to active litigation will remain executory until an order or stipulation of dismissal and, in most cases, a release have been prepared and signed. The position that the Prices take in this case ignores the distinction between a settlement agreement that is binding but executory and a settlement agreement that is not binding because it does not include all essential elements of a contract. Adopting that position would make settling lawsuits unnecessarily and unreasonably difficult and uncertain, and it would not serve the public interest in promoting the voluntary settlement of litigation.

The Prices object to the release prepared by counsel for Investors Title because it does not contain provisions that they thought were terms of the settlement but that are not mentioned in the Settlement Agreement. Those provisions include, according to the

Prices, the issuance of a new title insurance policy and a guarantee that SCDOT would issue an encroachment permit.¹

The Prices are not entitled to assert that their acceptance of the Settlement Agreement was somehow conditioned upon the later addition of provisions they wanted it to contain. "A party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet." *Arant v. Mack*, 204 S.C. 287, 294, 28 S.E.2d 846, 849 (1944) (quoted with approval in *Parker v. Byrd*, 309 S.C. 189, 194, 420 S.E.2d 850, 853 (1992)).

Similarly, the Prices are not entitled to revise or revoke the Settlement Agreement because it does not contain provisions that they wanted it to contain.

When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. *Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.* A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009) (citations omitted, emphasis added).

Finally, the fact that the Settlement Agreement does not specify the terms of the release to be executed by the Prices does not render the Settlement Agreement invalid as a contract.

... [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision

¹ The Prices also assert that the release should include a provision for reimbursement of their mediation fees, but that subject is already covered by the last sentence of the Settlement Agreement, which states, "The Defendant shall pay the mediator's fee in full."

may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.

Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 285, 672 S.E.2d 816, 820 (Ct. App. 2009) (quoting *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct. App. 1984) (internal citations omitted)). In addition, there exists in every contract an implied covenant of good faith and fair dealing, the purpose of which is to require the parties to do those things reasonably necessary to fulfill the express terms of the contract. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966); *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 465 S.E.2d 84 (1995).

The Prices are seeking to void the Settlement Agreement at least in part because it does not contain provisions that were included in earlier settlement offers. The Prices are not, however, entitled to incorporate the terms of earlier settlement offers into the Settlement Agreement. "Generally, 'a written agreement between two persons merges all prior talk and negotiations about the subject of the agreement.'" *Parker v. Byrd*, 309 S.C. 189, 192, 420 S.E.2d 850, 852 (1992) (quoting *Gantt v. Van der Hoek*, 251 S.C. 307, 317, 162 S.E.2d 267, 272 (1968)). Having manifested their acceptance of the Settlement Agreement by their signatures on the Agreement, the Prices are bound by the terms of the Agreement just as Investors Title is also bound.²

² In the statement of facts in their Brief, the Prices discuss further settlement negotiations that occurred between them and counsel for Investors Title after the Motion for Specific Performance was filed. Portions of this discussion mischaracterize the evidence in the record. In any event, all negotiations that occurred after the Settlement Agreement was signed were merely attempts to avoid further expenses of litigation. Investors Title tried to placate the Prices in order to bring the litigation to an end, but after the Prices demanded that Investors Title pay them \$25,000 rather than the \$12,500 to which they had agreed, Investors Title terminated the negotiations.

II. THE SETTLEMENT AGREEMENT DID NOT HAVE TO BE ENTERED ON THE RECORD.

The Prices argue that the Settlement Agreement is not enforceable because it was not entered on the record. To support this argument, the Prices cite Rule 43(k), SCRCP, which stated as follows when the Settlement Agreement was signed: “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” Rule 43(k), SCRCP (emphasis added)

Buckley v. Shealy, 370 S.C. 317, 635 S.E.2d 76 (2006), held that Rule 43(k) as it then existed barred the enforcement of a settlement agreement signed by the parties but not entered on the record even though Rule 43(k), by its own terms, applied only to agreements between counsel. The Supreme Court did not explain why Rule 43(k) applied to an agreement signed by the parties themselves rather than their counsel. Instead, the Supreme Court simply omitted the words “between counsel” when quoting Rule 43(k). 370 S.C. at 322, 635 S.E.2d at 78.

Rule 43(k) was later amended to state,

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.*

The Prices did not rely on the negotiations that occurred after the Settlement Agreement was signed when they opposed the motion of Investors Title to enforce the Settlement Agreement. Instead, they first mentioned the negotiations in their Rule 59(e) motion dated December 23, 2009, to alter or amend the order enforcing the Settlement Agreement. (R. pp. 24-35.) The trial court denied the motion without a hearing in a form order dated December 31, 2009. (R. p. 8.) Consequently, Investors Title never filed a response to the motion that would have refuted the Prices’ assertions..

Order, 2009-04-29-04 (S.C. Sup. Ct. Apr. 24, 2009) (emphasis added). This amendment became effective on April 29, 2009.

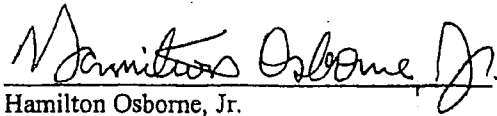
Although the amendment to Rule 43(k) occurred after the Settlement Agreement was executed, the Rule as amended should be applied retroactively. "When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings." *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992) (holding that a statute was procedural and should be applied retroactively), *cert. denied*, 508 U.S. 915 (1993, *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 352 n.5, 520 S.E.2d 614, 616 n.5 (1999)). The rules of construction used to interpret statutes also apply to the South Carolina Rules of Civil Procedure. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.").

Rule 43(k) is clearly procedural, and the amendment occurred before the hearing on Investors Title's motion to enforce the Settlement Agreement. The Rule should thus be applied retroactively to this case.

The Settlement Agreement executed by the Prices and Investors Title complies with Rule 43(k) as amended on April 29, 2009, because it was signed by the Prices, who were acting as their own counsel, by a representative of Investors Title, and by counsel for Investors Title. The Settlement Agreement is thus entitled to enforcement.

CONCLUSION

For the foregoing reasons, the order of the circuit court should be affirmed.



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June 8, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

RECEIVED

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SC Court of Appeals

Ronald E. Price and Diana R.B. Price,

Appellants,

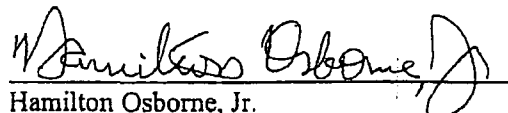
v.

Investors Title Insurance Company,

Respondent.

CERTIFICATE OF COMPLIANCE

I certify that the final Brief of Respondent complies with Rule 211(b), SCACR.



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Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

PROOF OF SERVICE

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
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Case No. 2007-CP-08-0458

Ronald E. Price and Digna R. E.
Price

Appellants

v.

Investors Title Insurance
Company

Respondent

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE PARTIES HAD A FINAL, ENFORCEABLE, DISPOSITIVE AGREEMENT WHEN THE UNDISPUTED EVIDENCE SHOWS THAT THERE WAS NEVER A "MEETING OF THE MINDS" AS TO ALL THE ESSENTIAL TERMS OF AN AGREEMENT, THE PARTIES CONTEMPLATED ADDITIONAL DOCUMENTS WOULD BE NEGOTIATED AND SIGNED AND THE PARTIES CONTINUED TO NEGOTIATE.
- II. DID THE TRIAL COURT ERR IN DISMISSING THE PLAINTIFFS CLAIM THAT THE MEDIATION AGREEMENT IS NOT ENFORCEABLE BECAUSE THE AGREEMENT WAS NEVER ENTERED INTO THE RECORD AS REQUIRED BY RULE 43(K) SCRCP BEFORE BEING REVOKED BY THE PRICES.

STATEMENT OF THE CASE

This matter was commenced by the Appellants, Ronald and Diana Price ("the Prices") by filing a Summons and Complaint on February 22, 2007 against Respondent, Investor's Title Insurance Company ("Investors") alleging five causes of actions related to title defects relating to residential real property on which the Prices constructed their home (R. 10). Investors filed an Answer dated April 27, 2007 denying liability (R. 19). Mediation took place on November 20, 2008. Present at the mediation were the Prices, *Pro Se*, Elizabeth Wainio, Esq., Claims Counsel for Investors Title and, James Y. Becker, Esq., Investors Title local counsel. At the conclusion of the mediation, the parties executed a document entitled "Settlement Agreement" (R. 71).

On November 26, 2008, the Prices filed a "Settlement Agreement Revocation." (R. 72). On December 2, 2008, the Prices filed a motion for leave to file an amended complaint. On December 5, 2008, Investors filed a motion for specific performance of the mediated Settlement Agreement. The Prices

filed a memorandum in opposition to this motion on January 5, 2009 (R. 61). A hearing was held on Investor's motion for specific performance on July 27, 2009 (R. 67). Present at this hearing were the Prices, *Pro Se* and James W. Becker, Esquire for Investors. On October 7, 2009, Tobias G. Ward, Jr., Esquire filed a Notice of Appearance on behalf of the Prices (R. 60).

By order dated December 10, 2009 and filed December 14, 2009, the Honorable Kristi Lea Harrington entered an order compelling specific performance of the settlement agreement (R. 2). Neither the Prices nor their counsel, Mr. Ward received a written copy of this order. On December 22, 2009, Investors' counsel sent a letter to Mr. Ward stating that the order compelling specific performance had been entered in the Berkeley County records on December 14, 2009 in the same form as the proposed order submitted by Investor's counsel.

On December 23, 2009, counsel for the Prices filed and served a motion to alter or amend the order compelling specific performance (based on the proposed order) (R. 24). This was denied by a Form 4 order filed on December 31, 2009 (R. 8). On January 12, 2010, counsel for the Prices obtained a copy of the court's December 14, 2009 order compelling specific performance. On January 13, 2010, the Prices timely served Notice of Appeal on Investors' counsel, and on January 20, 2010, timely filed this appeal with this Court and the clerk of the lower court pursuant to Rule 203 SCACR.

FACTS

The Prices purchased Lot 20 consisting of 7.83 acres (the "Land") in the Eagle Harbor subdivision in Berkeley County on November 25, 2003. Investors

issued a title insurance policy (the "Policy") in connection with this purchase. The Prices allege in their complaint that there are title defects which are covered under their Policy (R. 12, line 9).

On June 3, 2008, during Plaintiffs deposition in the case, Steven Brown, Vice-President of Investors Title made a settlement offer: \$10,000.00 in cash, issuing a new title policy at the current market value of the property, and assurance that the SCDOT encroachment permit at the entrance of the Eagle Harbor Subdivision would be obtained to ensure legal access to the property. On July 2, 2008, the Prices made a counter offer to Defendant for \$50,000.00, the new title insurance policy, and the encroachment permit. Investors did not respond to this counteroffer.

On August 11, 2008, during Defendant's depositions, counsel for Investors reiterated, the June 3, 2008 settlement offer and suggested mediation when that offer was rejected. The case was mediated on November 20, 2008. Present at the mediation were the Prices, *Pro Se*, Elizabeth Wainio, Esq., Claims Counsel for Investors Title and, James Y. Becker, Esq., Investors Title local counsel.

During the mediation, Investors acknowledged the settlement proposal made at the depositions (including the new title policy and SCDOT encroachment permit) and increased the cash settlement to \$12,500. Investors also agreed to reimburse the Prices for their deposit of the mediation fees (\$500.) The Prices executed the "Settlement Agreement" and expected to receive further documentation in the form of a "Consent Order" which would include the terms requiring a new title policy, the SCDOT encroachment permit, and reimbursement of mediation fees (R. 31, line 4-8; R. 34).

After a few days, the Prices became concerned about some of the wording in the agreement which was not discussed in the mediation and the omission of additional terms which were discussed but omitted, presumably to be part of the "Consent Order". Accordingly they attempted to contact Mr. Becker to discuss, but when they did not receive a response, decided to file a "Settlement Agreement Revocation" (R. 54-58,62) because they understood the mediation to be "non-binding." No performance of the alleged mediation agreement had taken place prior to this revocation.

On December 1, 2008, Ms. Price discussed the matter with Mr. Becker who indicated that he would file a motion to compel enforcement of the settlement if the Prices did not follow through. On December 2, 2008, the Prices filed a motion for leave to file an amended complaint. Mr. Becker also e-mailed the Prices a proposed Stipulation of Dismissal and Settlement Agreement and Release (R. 62, 76) Ms. Price responded on December 3, 2008 that the wording of the settlement was not consistent with the intent of the parties at the mediation and contrary to their interest, but she was "willing to consider further negotiations or another proposal."

In April 2009, the parties resumed e-mail correspondence concerning settling the matter and continuing a pending hearing. (R. 34-35) On April 28, 2009, Mr. Becker sent Ms. Price a revised Settlement Agreement, which was closer to a meeting of the minds and essential elements of both parties (R. 79). This revision still failed to include all the Prices' essential terms, as agreed to by the Defendant. Ms. Price noted the required changes to this agreement to insure those essential terms negotiated and still not included would be incorporated into

the agreement. When defendant did not send a new agreement, Ms. Price attempted a "compromise" between the parties, and drafted a new agreement. Defendant rejected this agreement.

A hearing was held on Investor's motion for specific performance on July 27, 2009. By order dated December 10, 2009 and filed December 14, 2009, the Honorable Kristi Lea Harrington entered an order compelling specific performance of the settlement agreement (R. 2). Judge Harrington also denied the Prices motion to alter or amend the order on December 31, 2009 (R. 8).

ARGUMENT

- I. **THE TRIAL COURT ERRED IN FINDING THAT THE PARTIES HAD A FINAL, ENFORCEABLE, DISPOSITIVE AGREEMENT WHEN THE UNDISPUTED EVIDENCE SHOWS THAT THERE WAS NEVER A "MEETING OF THE MINDS" AS TO ALL THE ESSENTIAL TERMS OF AN AGREEMENT, THE PARTIES CONTEMPLATED ADDITIONAL DOCUMENTS WOULD BE NEGOTIATED AND SIGNED AND THE PARTIES CONTINUED TO NEGOTIATE.**

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. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). Since mutual assent to essential terms is necessary to the existence of a contract, there can be no contract so long as, in the contemplation of the parties, something remained to be done to establish contractual relations. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975) (there was no contract for a construction project where the parties had not agreed on a concrete plan defining the project in detail.) Thus, there can be no contract where the parties never completed their

negotiations as to essential terms. *W.E. Gilbert & Associates v. South Carolina Nat. Bank*, 285 S.C. 421, 330 S.E.2d 307 (Ct. App. 1985) (various documents did not prove an agreement to the essential terms of a contract for construction management services, as these three documents merely indicated that the bank and the company were negotiating.)

In this case, the parties clearly contemplated something remained to be done. In the transcript from the hearing, Ms. Price states, "We were able to understand that there would be another agreement coming." (R. 68, line 16-18) On page 25 of the transcript (R. 69), Ms. Price states, "...we thought we were signing a document that was the beginning of another document and the new document would, in fact have those terms that were essential, and we would have a meeting of the minds that we saw an agreement, on to the next step of a contract." The court recognized this understanding in the following exchange with Investor's counsel, Mr. Becker:

MR. BECKER: My point there being, Your Honor, that they —it was—it's clear to them, from reading it, what they were signing and what they were agreeing to.

THE COURT: And let's be clear to you, Mr. Becker. I'm assuming that it was not clear. It's still not clear to Mrs. Price and Mr. Price, because he keeps referring to some sort of additional paperwork that you are going to be sending, and stipulations that you are going to enter into.

(Transcript from hearing, pg. 27. (R. 70))

Indeed, Mr. Becker did send an additional document entitled "Settlement Agreement and Release" on December 1, 2008 (Exhibit C to Plaintiff's Memorandum in Opposition) (R. 76); however, this agreement contained terms that were not acceptable to the Prices including releasing parties and claims the

Prices had not agreed to release and omitting terms which the Prices understood were part of the agreement including the issuance of a new title policy, the guarantee that DOT would issue an encroachment permit, and the reimbursement for mediation fees; therefore, the Prices rejected this proposed agreement.

Mr. Becker did send a revised draft in April 2009 (R. 79), but the parties could not agree on this draft. No final settlement agreement containing all the essential terms was ever signed.

An examination of the e-mail correspondence between the parties (R. 34-35) establishes that the agreement specifically enforced by the court was not the final settlement agreement of the parties.

Emily Farr, Esquire (Investors' other counsel) states in an e-mail, on April 22, 2009, "We are very close to being able to confirm whether or not we will be able to settle with you under the terms you discussed previously with Jamie Becker." (*emphasis added.*) Likewise, Jamie Becker states on the same date,

Ms. Price: I am optimistic that we can agree on all the terms you and I last discussed. We are only waiting on a call from Steve Brown. I think it makes eminent good sense to delay in the hearing in light of how close we are to finally settling this case on mutually agreeable terms. That will save both of us the time and effort (and dare I say the agony!) of appearing in court again. (R. 35)

Since there was never a meeting of the minds on all the essential terms of the settlement, since the parties contemplated executing a more definitive agreement that was never executed and since the parties continued to negotiate, it was error for the court to enforce the mediation settlement agreement as being the final agreement of the parties to end this litigation.

Indeed, it appears the court focused more on whether or not the

agreement could be "voided" than on whether or not the Defendant established the existence of a final, enforceable agreement. The court failed to recognize that the required elements for a contract to be enforceable must first meet the three elements, as outlined in the order (page 4):

"To compel specific performance on a contract, a court must find that the following three elements exist: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287, 291 (2000).

There is no clear evidence of a valid agreement – no meeting of the minds between the parties of all essential and material terms; there was no execution of terms of the agreement, or mutual assent of the Prices, and Defendant did not perform his part as outlined in the mediated settlement agreement.

II. RULE 43(K) SCRPC CLEARLY AND UNAMBIGUOUSLY REQUIRES THE AGREEMENT TO BE ENTERED INTO THE RECORD TO BE BINDING ON THE PARTIES.

Even if the mediation settlement agreement was enforceable as being the final agreement between the parties (which it was not) then it still was not enforceable by the court because it was never entered into the record prior to its being revoked by the Prices. The mediation settlement agreement could have ONLY become an enforceable, final agreement, and recognized as such by the court, if the document had been entered into the record. The Prices exercised

their right to revoke the agreement before it became enforceable (R. 72).

Rule 43(k) SCRCP provides as follows:

(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.¹ Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP (*emphasis added*.)

"Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). Because of this intent, the rule should not be construed to be limited to attorneys, but should also apply to agreements between *Pro Se* parties and attorneys. Indeed, the facts of this case illustrate the necessity of the rule.

Under Rule 43(k), for an agreement to be enforceable by the court (when not made in open court on the record), it must be signed and *entered in the record*. In this case, that has not been done and the Prices timely repudiated the agreement; therefore, it should not be enforced by this court.

This case is analogous to *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006). In that case, just like this case, the parties entered into a mediated settlement agreement, but it was never entered into the record. Indeed, in *Buckley* it appears that the parties partially carried the agreement into effect with the husband paying the wife \$5,000 after the mediation and then \$1,500 per month. Despite this, the South Carolina Supreme Court refused to enforce the mediated settlement agreement because it was not entered into the record. The

¹ The Rule was amended effective April 29, 2009 to add "or reduced to writing and signed by the parties and their counsel". This amendment does not apply to this case other than to highlight that a mere signed agreement is not enforceable under the prior Rule 43(k) SCRCP.

court noted that it did not matter whether or not the agreement was in writing, admitted or carried into effect if it did not comply with Rule 43(k) SCRPC. See *Also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.)

This court should amend its order and find that the agreement is not enforceable pursuant to Rule 43(k) because it was never entered into the record before being rescinded by the Prices.

CONCLUSION

For the reasons set forth herein, this court should reverse the order of Berkeley County Circuit Court Judge Kristi Lea Harrington granting the Defendant specific performance and remand the case to the Berkeley County Circuit Court for further proceedings.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

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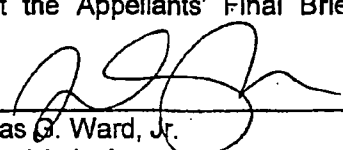
v.

Investors Title Insurance
Company,

Respondent.

**CERTIFICATE OF COUNSEL
PURSUANT TO RULE 211(b) SCACR**

The undersigned certifies that the Appellants' Final Brief is in compliance with Rule 211(b) SCACR.



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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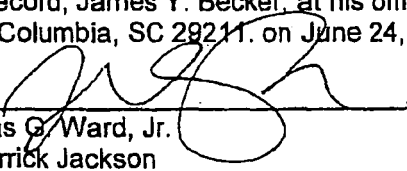
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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appellants, Certificate of Counsel and Proof of Service by depositing a copy of them in the United States Mail, postage prepaid addressed to its attorney of record, James Y. Becker, at his office Haynsworth Sinkler & Boyd, P.O. Box 11889, Columbia, SC 29211. on June 24, 2010.


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Investors Title Insurance Company

Appellants

Ronald E. Prosser and Diane E. B. Prosser

Case No. 2007-CP-08-0458

Kristi Lea Harrington, Circuit Court Judge

Court of common pleas

APPEAL FROM BERKELEY COUNTY

30 Court of Appeals

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In the Court of Appeals

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The Appellants, Ronald and Diana Price (the "Prices"), hereby offer the following argument in reply to the Respondents' Brief.

I. RESPONDENT IGNORES THAT THE DOCUMENT THE PRICES SIGNED AT MEDIATION DID NOT CONTAIN ALL THE MATERIAL TERMS OF THE CONTRACT.

The Respondent argues that the one-page document signed by the Prices at the mediation (R. 78) was a final, binding contract; however, the Respondent ignores the fact that this agreement did not include *all* the essential terms of the parties agreement, as is shown by the terms of Respondent's subsequent settlement agreement of December 2008. There was never a "meeting of the minds" as to all the essential terms of an agreement. The parties contemplated additional documents would be negotiated and signed; and the parties continued to negotiate. If the mediation agreement clearly defined all essential terms, Respondents would not have subsequently drafted another settlement agreement

See Argument I, Appellants' Initial Brief.

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. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). Since mutual assent to essential terms is necessary to the existence of a contract, there can be no contract so long as, in the contemplation of the parties, something remained to be done to establish contractual relations. In *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975) (there was no contract for a construction project where the parties had not agreed on a concrete plan defining the project in detail.) Thus, there can be no contract where the parties never completed

their negotiations as to essential terms. *W.E. Gilbert & Associates v. South Carolina Nat. Bank*, 285 S.C. 421, 330 S.E.2d 307 (Ct. App. 1985) (various documents did not prove an agreement to the essential terms of a contract for construction management services, as these three documents merely indicated that the bank and the company were negotiating.)

As set forth in more detail in Appellants' Initial Brief, (Argument I) there was never a "meeting of the minds" as to *all* the essential terms of an agreement, the parties contemplated additional documents would be negotiated and signed and the parties continued to negotiate, as shown by yet another Respondent settlement agreement, in April 2009 (R. 79). This court should find that the document signed at the mediation was not a final, binding contract which could be enforced.

II. AN EXECUTORY CONTRACT CAN BE RESCINDED PRIOR TO PERFORMANCE BY THE PARTIES.

The Respondents argue that Appellants fail to recognize the distinction between an executory, but binding contract and a non-binding contract which fails to include *all* the essential terms agreed upon by the parties. The Appellants assert the opposite is true as the Respondents fail to acknowledge that the one-page settlement agreement executed at the mediation failed to include *all* the essential terms agreed upon by the parties and is not a binding contract. See previous Reply argument, and Appellant's Initial Brief, Argument I.

Even if the one-page settlement agreement could be considered an executory contract, it could be revoked prior to performance by either party. In *McManus vs. Little*, 251 S.C. 490, 163 S.E.2d 613 (1968) the court noted as follows:

An executory accord is an agreement embodying a promise to accept at some future time a stipulated performance in satisfaction of a present claim or obligation and a corresponding promise to render such performance in satisfaction of such claim or obligation. When the executory contract is fully performed, as agreed, there is an accord and satisfaction and the previous existing claim is discharged. The original liability is not discharged by an executory accord, and, as long as the accord is executory, it is revocable at will by either party. To amount to a bar, the accord must be fully performed.

In this case, a mere five days after the agreement was signed by the parties, it was revoked by the Appellants prior to any performance by either party. (R. 72-75)

The Respondents argue that allowing revocation of an executory agreement which has not been performed would make settlement unreasonably difficult and not promote the public interest in the voluntary settlement of litigation. The Appellants assert the public interest is best served when pro se parties are not forced to accept a settlement which does not include all the terms which they bargained for in the mediation. Indeed, in consumer law, consumers are often given the right of rescission to protect against agreements signed under stressful circumstances. For example, homeowners who refinance are given a three day right of rescission as are consumers who sign contracts resulting from home solicitation sales.

If this court should find the agreement signed at mediation was binding, it should also find it was merely executory and subject to revocation prior to performance by either party. Further, the court should find such revocation to be in the public interest, not against it.

III. THE AMENDMENT TO RULE 43(K) SCRPC IS NOT RETROACTIVE AND THEREFORE THE AGREEMENT IS NOT ENFORCEABLE BECAUSE IT WAS NEVER ENTERED IN THE RECORD.

The Respondents argue that the April 29, 2009 amendment to Rule 43(k) SCRPC¹ applies retroactively. The Respondents must take this position because if the amendment does not apply retroactively, then the agreement is not enforceable because it was not entered in the record². See Appellant's Brief, Argument II; *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006)(mediated settlement agreement not enforceable when not entered in record); *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.) In this case, as in *Farnsworth*, the mediated document, if enforceable, which is denied, was revoked by Appellants prior to Respondents filing a motion to compel enforcement of the agreement.

As the Respondents note in their brief, the rules of construction used to interpret statutes, also apply to the South Carolina Rules of Civil Procedure. Respondents' Brief, pg. 10, citing *Maxwell vs. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). In the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. *Hercules, Inc. v. S. C. Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980). "No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt..." *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 at 125 (1978).

¹ This amendment provided that an agreement signed by the parties and their counsel could be enforceable regardless of whether it was entered in the record.

² The mediated settlement agreement is dated November 20, 2008.

"... the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt." *Id. emphasis added.*

In this case, the amendment to Rule 43(k) SCRPC was passed under the authority of Article V, Section 4A of the South Carolina Constitution which provides as follows:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. (1985 Act No. 8.)

Emphasis added. By order dated April 29, 2009, the South Carolina Supreme Court noted as follows concerning the amendment to Rule 43 submitted to the General Assembly:

By order dated January 29, 2009 (copy attached), this Court adopted an amendment to the South Carolina Rules of Civil Procedure and this amendment was submitted to the General Assembly pursuant to Article V, §4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, this amendment is effective immediately. (*Emphasis added.*)

Nowhere in the January 29, 2009 Supreme Court order adopting the amendment, or in the text of the amendment itself, or in any General Assembly response or lack thereof, or in the order noting the amendment is effective is there any evidence of an intent that the amendment to the rule should be applied retroactively. If the South Carolina Supreme Court had intended for this amendment to apply retroactively, it could have easily done so by expressing this intent in the proposed

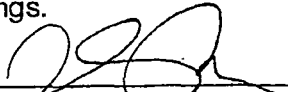
amendment submitted to the General Assembly or, perhaps, in the order noting the amendment was effective. That the court chose not to do so should be persuasive to this court.

The Respondents argue, without any evidence of statutory intent, that the amendment should be applied retroactively because it's "procedural" in nature; however, this exception to the presumption against retroactive application does not apply when the statute or rule creates a new remedy. *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 at 125 (1978). In this case, the amendment does create a new remedy, an enforceable agreement that does not have to be entered in the record to be enforceable; therefore, even if the amendment is procedural, which is denied, then the exception to the presumption against retroactive application does not apply because the amendment creates a new remedy.

This court should find that the amendment to Rule 43(k) SCRPC does not apply retroactively because there is no evidence of a clear intent to apply the amendment retroactively sufficient to overcome the strong presumption against retroactive application. Moreover, this court should find that the amendment is not procedural in nature and if it is, then it does not fall within the exception because it creates a new remedy. Finally, since this amendment is not retroactive and the mediation settlement agreement was not entered in the record as required by Rule 43(k) in effect at the time of the agreement, then the agreement should not have been enforced. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.)

CONCLUSION

For the reasons set forth herein and in Appellants' Brief, this court should reverse the order of the trial court compelling specific performance of the agreement and remand to the trial court for further proceedings.



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Date: 6-23, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUN 24 2010

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B.
Price,

Appellant,

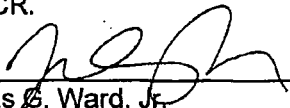
v.

Investors Title Insurance
Company,

Respondent.

**CERTIFICATE OF COUNSEL
PURSUANT TO RULE 211(b) SCACR**

The undersigned certifies that the Final Reply Brief of the Appellants
is in compliance with Rule 211(b) SCACR.


Tobias S. Ward, Jr.
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Attorney for Appellant

June 24, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 24 2010

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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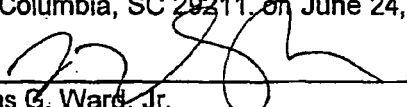
v.

Investors Title Insurance
Company,

Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Final Reply Brief of Appellants, Certificate of Counsel and Proof of Service by depositing a copy of them in the United States Mail, postage prepaid addressed to its attorney of record, James Y. Becker, at his office Haynsworth Sinkler & Boyd, P.O. Box 11889, Columbia, SC 29211, on June 24, 2010.


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Attorney for Appellant

COPY

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ronald E. Price and Diana R.B.
Price,

Appellants,

v.

Investors Title Insurance
Company,

Respondent.

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2011-UP-359
Submitted April 1, 2011 – Filed June 30, 2011

REVERSED AND REMANDED

Tobias G. Ward, Jr. and J. Derrick Jackson, both of
Columbia, for Appellants.

James Y. Becker and Emily H. Farr, both of
Columbia, for Respondent.

PER CURIAM: Ronald and Diana Price (the Prices) appeal from the trial court's order granting Investors Title Insurance Company's (Investors) motion for specific performance and to enforce a settlement agreement. We reverse and remand.¹

FACTS

In 2003, the Prices purchased a tract of land in Eagle Harbor Subdivision in Berkeley County. Investors issued a title insurance policy covering the property. After closing, the Prices discovered alleged defects they contended were covered under the policy. The Prices filed this action against Investors seeking coverage. Having relieved prior counsel, the Prices represented themselves and agreed to mediation.

The case was mediated on November 20, 2008, and the parties signed a settlement agreement. The agreement stated Investors would pay the Prices \$12,500, and it further provided:

2. Counsel for the Defendants shall prepare a Release and Consent Order of Dismissal of the above action, which shall be executed by the Plaintiffs

3. The terms of this Settlement Agreement shall satisfy the requirements of the South Carolina Rules of Civil Procedure regarding a stipulation for settlement and conclusion of the above Case, and in the absence of a Consent Order as referenced above, may be entered into record by any Party to this action to conclude this Case, with prejudice as to all claims which were or could have been asserted therein.

The following week, the Prices revoked the agreement by facsimile to the mediator, copying counsel for Investors. The Prices allegedly expected to receive further documentation, in the form of a "Consent Order," which would include additional terms. The Prices contended they discussed the

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

matter with Investors' counsel shortly after sending their revocation. Investors' counsel sent a revised "Settlement Agreement and Release." The Prices did not believe the revised agreement was consistent with the parties' negotiated terms. In December 2008, Investors filed a "Motion for Specific Performance and to Enforce Mediation Agreement."

Several months later, the parties again negotiated, with Investors' counsel emailing the Prices, stating: "We are very close to being able to confirm whether or not we will be able to settle with you under the terms you discussed previously . . . ," and "Ms. Price: I am optimistic that we can agree on all the terms you and I last discussed." Investors' counsel sent a second revised "Settlement Agreement and Release." The Prices argued this revision also failed to include the new terms, and the Prices allegedly sent another agreement, which Investors rejected.

On July 27, 2009, the trial court heard arguments on Investors' motion to enforce the settlement agreement. The Prices hired counsel, who filed a Notice of Appearance in October 2009. The court granted Investors' motion and dismissed the Prices' complaint in an order filed December 14, 2009. The court denied the Prices' motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

At issue in this case is the interpretation of Rule 43(k), SCRCP. The interpretation of a rule or statute is reviewed de novo. Limehouse v. Hulsey, Op. No. 4805 (S.C. Ct. App. filed June 2, 2011) (Shearouse Adv. Sh. No. 18 at 26, 37); see Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court).

LAW/ANALYSIS

I. Rule 43(k), SCRCF

At the time this settlement agreement was signed, Rule 43(k) provided in relevant part: "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." Rule 43(k), SCRCF (amended effective April 29, 2009).² "To be enforceable, settlement agreements must either be entered into the court's record or acknowledged in open court and placed upon the record." Motley v. Williams, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007). A party can comply with this version of Rule 43(k) in three ways: (1) a written stipulation signed and entered into the court record; (2) a consent order signed and entered into the court record; or (3) a settlement agreement announced in open court and noted upon the record. Lisa J. Hinchey, Court Strictly Construes Rule 43(k) to Settlement Agreements, 48 S.C. L. Rev. 15, 19 (1996).

The Prices first argue the trial court erred in not revoking the agreement under Rule 43(k) because the Prices were not represented by counsel at the time of the mediation, and the rule only applies to agreements between counsel. We agree.

² The rule was amended effective April 29, 2009, adding at the end of the sentence quoted: "or reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCF. This settlement agreement was signed November 20, 2008. Thus, the former version of Rule 43(k) applies. See Hercules Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (stating the general rule is that statutes are to be construed prospectively rather than retroactively, absent an express provision or a clear legislative intent to the contrary); Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct. App. 2000) (applying the general rule of prospective and retroactive application of statutory law changes by analogy to amendments of rules of civil procedure).

In Ashfort Corp. v. Palmetto Construction Group, Inc., 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995), the parties advised the circuit court the case had been settled. The court dismissed the case. Id. A dispute arose regarding the terms of the settlement, and the circuit court reinstated the case, denying a motion to compel settlement. Id. On appeal to the supreme court, the court, sua sponte, "raised the Rule 43(k) issue." Hincer, supra, at 16. The supreme court affirmed, finding Rule 43(k) applied even though the settlement agreement was between respondent and appellants' insurer, and was merely confirmed by the parties' counsel. Ashfort Corp., 318 S.C. at 495, 458 S.E.2d at 535. The court opined:

To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one. The intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered.

Id.

Several years later, in Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006), the supreme court applied the rule to bar the enforcement of a settlement agreement that was signed by the parties. In Buckley, Husband and Wife engaged in mediation and signed an agreement. Id. at 320, 635 S.E.2d at 77. The supreme court concluded: "[b]ecause the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRPC, plainly provides that the agreement is unenforceable." Id. at 322, 635 S.E.2d at 78. Although not explicitly discussing the application of Rule 43(k) to agreements signed by the parties rather than their attorneys, Buckley indicates that where the parties signed the agreement, Rule 43(k) applies. Relying on Ashfort and Buckley, we find Rule 43(k) applies to the settlement agreement entered into by the Prices and Investors' counsel.

The Prices next argue the trial court erred in finding the settlement agreement was "a binding agreement between the parties that cannot be revoked or voided by a party" We agree.

In Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 636-38, 627 S.E.2d 724, 725-26 (2006), the supreme court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement prior to the agreement meeting the requirements of Rule 43(k). Farnsworth, through a letter by her attorney, offered to release Davis from all liability in a breach of contract and negligence cause of action. Id. at 636, 627 S.E.2d at 725. Davis' attorney accepted the offer by signing the letter. Id. Soon thereafter, Farnsworth rescinded the agreement. Id. Davis moved to compel Farnsworth to comply with the agreement. Id. In reversing the trial court's order granting the motion, the supreme court stated: "Rule 43(k) provides that '[n]o agreement . . . shall be binding unless' one of the three conditions listed [in the Rule] is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." Id. at 637, 627 S.E.2d at 725 (quoting Rule 43(k), SCRCP).

In this case, the parties signed the settlement agreement on November 20, 2008. The Prices revoked their agreement on November 26, 2008. Investors filed its motion to compel settlement on December 5, 2008. Under Farnsworth, we find the settlement agreement was revoked. Thus, the trial court erred in granting Investors' motion for specific performance of the settlement agreement.

II. Enforceability of the Agreement – Meeting of the Minds

The Prices argue the trial court erred in finding the parties had an enforceable agreement when there was evidence the parties never had a "meeting of the minds" as to the essential terms of the agreement. We decline to address this issue. See Bailey v. S.C. Dep't of Health & Env'tl. Control, 388 S.C. 1, 8, 693 S.E.2d 426, 430 (Ct. App. 2010) (stating that an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, the order granting Investors' motion to compel settlement is reversed, and this case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

HUFF, SHORT and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

RECEIVED
JUL 13 2011
SC Court of Appeals

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

PETITION FOR REHEARING

Respondent, Investors Title Insurance Company ("Investors Title"), petitions the Court for a rehearing of its Opinion No. 2011-UP-359, filed June 30, 2011, reversing an order of the trial court that granted the motion of Investors Title to enforce a written settlement agreement executed at the conclusion of a mediated settlement conference.

INTRODUCTION

This Court reversed the order of the trial court solely on the grounds that the settlement agreement did not comply with Rule 43(k), SCRCp, as Rule 43(k) existed when the settlement agreement was executed. As Investors Title pointed out in its brief, however, by the time that the trial court heard the motion to enforce the settlement agreement, Rule 43(k) had been amended to permit enforcement of a settlement

agreement if "reduced to writing and signed by the parties and their counsel." The settlement agreement involved in this case was entered into after a four-hour mediation session, in which a qualified member of the South Carolina Bar selected by the Appellants served as the mediator. The settlement agreement included all material terms and was signed by each of the parties and their counsel.¹

Investors Title argued that Rule 43(k) as amended should govern the settlement agreement in this case. In so arguing, Investors Title relied on settled law to the effect that procedural statutes and rules are applied retroactively. This Court addressed the issue of retroactive application only in a footnote and did not explain why an amendment to a procedural rule like Rule 43(k) should be denied retroactive application.

ARGUMENT

Investors Title respectfully submits that this Court erred by failing to apply the amendment to Rule 43(k) retroactively. The Court failed to distinguish the Supreme Court decision on which Investors Title relied, and the Court cited and relied on two other decisions that do not support the holding of the Court but instead support the position of Investors Title.

As Investors Title argued in its brief, "When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings." *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992) (holding that a statute was procedural and should be applied retroactively), *cert. denied*, 508 U.S. 915 (1993, *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 352 n.5, 520 S.E.2d 614, 616 n.5 (1999)). This Court did not distinguish *State v. Davis*, and it did not

¹ Although the Appellants were appearing *pro se* at the time of the mediation, they have been represented by three different attorneys during the course of this litigation.

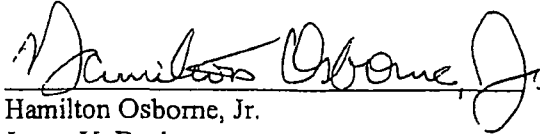
explain why Rule 43(k) did not qualify for the retroactive application generally accorded to other procedural rules and statutes.

Instead, in the footnote stating that the earlier version of Rule 43(k) should apply, this Court cited and relied upon *Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 262 S.E.2d 45 (1980), and *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000), but those cases expressly state that “remedial or procedural statutes are generally held to operate retrospectively.” *Hercules*, 274 S.C. at 143, 262 S.E.2d at 48; *Graham*, 339 S.C. at 124, 528 S.E.2d at 82. They thus do not support the conclusion for which this Court cited them.

Furthermore, the holdings of *Hercules* and *Graham* support the position of Investors Title. *Hercules* held that a statute that had the effect of tolling the general three-year statute of limitations on tax assessments was entitled to retroactive application because it was remedial in nature. *Graham* held that Rule 40(j), SCRCF, was entitled to retroactive application because it was procedural in nature. *Graham* in particular thus compels the conclusion that the amendment to Rule 43(k) should have been applied retroactively in this case. Thus, this Court erroneously relied on both *Hercules* and *Graham* in reversing the trial court's order enforcing the settlement agreement, because both authorities compel the opposite result.

CONCLUSION

For the foregoing reasons, this Court should vacate its opinion reversing the order of the trial court and render another opinion affirming the order.



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Emily H. Farr

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Attorneys for Respondent

July 12, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

PROOF OF SERVICE

I certify that I caused a copy of the Petition for Rehearing to be served on the following individual by depositing a copy of the same in the United States mail, first class, postage prepaid and addressed as follows:

Tobias G. Ward, Jr., Esq.
Todd & Ward, PC
PO Box 1549
Columbia, SC 29202-1549

This 13th day of July, 2011.

Charlotte D. Ariail

Charlotte D. Ariail, Legal Secretary
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Attorneys for Respondent

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JUL 13 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
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Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B.
Price,

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v.

Investors Title Insurance
Company,

Respondent.

**RETURN TO RESPONDENT'S
PETITION FOR REHEARING**

Appellant, Ronald E. Price and Diana R.B. Price ("Prices") by way of return to Respondent, Investors Title Insurance Co.'s ("Investor Title") Petition for a Rehearing, responds as follows:

- I. **IT'S IRRELEVANT WHETHER OR NOT RULE 43(K) CAN BE APPLIED RETROACTIVELY SINCE THE PRICES EFFECTIVELY REVOKED THE AGREEMENT PRIOR TO THE ENACTMENT OF THE AMENDMENT.**

Investors Title argues this court erred by not holding that Rule 43(k) as amended applied to the settlement agreement signed between the parties after the mediation. They argue that the amendment to Rule 43(k) should be applied retroactively to apply to agreements executed prior to the date of the amendment. However, Investors Title ignores that this court held that Prices revoked their agreement on November 26, 2008;

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since the amendment to Rule 43(k) was not enacted until April 29, 2009, then when it was enacted, there was nothing to enforce, even if applied retroactively. This court should deny Investors Title petition as being without merit.

II. THE AMENDMENT TO RULE 43(K) SCRPC IS NOT RETROACTIVE AND THEREFORE THE AGREEMENT IS NOT ENFORCEABLE BECAUSE IT WAS NEVER ENTERED IN THE RECORD.

The Prices note that this argument was fully briefed in their Reply Brief (Reply Argument III); it is reproduced herein for the convenience of the court:

The Respondents argue that the April 29, 2009 amendment to Rule 43(k) SCRPC¹ applies retroactively. The Respondents must take this position because if the amendment does not apply retroactively, then the agreement is not enforceable because it was not entered in the record². See Appellant's Brief, Argument II; *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006)(mediated settlement agreement not enforceable when not entered in record); *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.) In this case, as in *Farnsworth*, the mediated document, if enforceable, which is denied, was revoked by Appellants prior to Respondents filing a motion to compel enforcement of the agreement.

As the Respondents note in their brief, the rules of construction used to interpret statutes, also apply to the South Carolina Rules of Civil Procedure. Respondents' Brief, pg. 10, citing *Maxwell vs. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). In the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. *Hercules, Inc. v. S. C. Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980). "No statute will be applied retroactively

¹ This amendment provided that an agreement signed by the parties and their counsel could be enforceable regardless of whether it was entered in the record.

unless that result is so clearly compelled as to leave no room for reasonable doubt..."

Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 at 125 (1978).

"... the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt." *Id. emphasis added.*

In this case, the amendment to Rule 43(k) SCRCP was passed under the authority of Article V, Section 4A of the South Carolina Constitution which provides as follows:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. (1985 Act No. 8.)

Emphasis added. By order dated April 29, 2009, the South Carolina Supreme Court noted as follows concerning the amendment to Rule 43 submitted to the General Assembly:

By order dated January 29, 2009 (copy attached), this Court adopted an amendment to the South Carolina Rules of Civil Procedure and this amendment was submitted to the General Assembly pursuant to Article V, §4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, this amendment is effective immediately. (*Emphasis added.*)

Nowhere in the January 29, 2009 Supreme Court order adopting the amendment, or in the text of the amendment itself, or in any General Assembly response or lack thereof, or in the order noting the amendment is effective is there any evidence of an intent that the amendment to the rule should be applied retroactively. If the South Carolina Supreme Court had intended for this amendment to apply retroactively, it could have easily done so by expressing this intent in the proposed amendment submitted to the General Assembly or, perhaps, in the order noting the amendment was

² The mediated settlement agreement is dated November 20, 2008.

effective. That the court chose not to do so should be persuasive to this court.

The Respondents argue, without any evidence of statutory intent, that the amendment should be applied retroactively because it's "procedural" in nature; however, this exception to the presumption against retroactive application does not apply when the statute or rule creates a new remedy. *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 at 125 (1978). In this case, the amendment does create a new remedy, an enforceable agreement that does not have to be entered in the record to be enforceable; therefore, even if the amendment is procedural, which is denied, then the exception to the presumption against retroactive application does not apply because the amendment creates a new remedy.

This court correctly held the amendment to Rule 43(k) SCRPC does not apply retroactively because there is no evidence of a clear intent to apply the amendment retroactively sufficient to overcome the strong presumption against retroactive application. Moreover, the amendment is not procedural in nature and if it is, then it does not fall within the exception because it creates a new remedy. Finally, since this amendment is not retroactive and the mediation settlement agreement was not entered in the record as required by Rule 43(k) in effect at the time of the agreement, then the agreement should not have been enforced. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006)(refusing to enforce settlement agreement that was rescinded prior to being entered into the record.)

III. INVESTORS TITLE MISAPPLIES GRAHAM³ TO THE FACTS OF THIS CASE.

In *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000) the court held that the amendment to Rule 40 SCRPC adding Rule 40 (j) should be applied to a case which was filed before its enactment. However, the court did not apply the amendment retroactively to an event or facts occurring before its enactment,

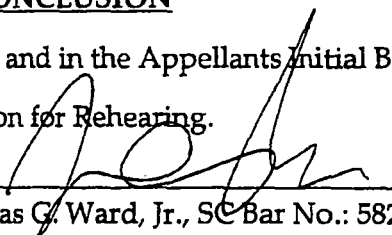
³ *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000).

but held that consistent with Rule 86 SCRPC⁴, the amendment adding Rule 40(j) should apply to further proceedings in a case then pending. Thus, the court held that the trial court correctly held that Graham should have filed a motion to restore within the one year time limit added by Rule 40(j), even though the case was filed prior to the enactment of Rule 40(j).

Properly applying *Graham* and Rule 86 to this case, if the settlement agreement had been executed after the enactment of the amendment to Rule 43(k), the amendment to Rule 43(k) would apply even though the case was filed prior to its enactment. In other words, applying the rule *retroactively* means applying it to a case filed before its enactment, not to facts and events which occurred before its enactment.

CONCLUSION

For the reasons set forth herein, and in the Appellants Initial Brief and Reply Brief, this court should deny the Petition for Rehearing.



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July 19, 2011

⁴ Rule 86 provides, "They govern all proceedings in civil actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B.
Price,

Appellant,

v.

Investors Title Insurance
Company,

Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Return to Respondent's Petition for Rehearing, and Proof of Service by depositing a copy of them in the United States Mail, postage prepaid addressed to its attorney of record, James Y. Becker, at his office Haynsworth Sinkler & Boyd, P.O. Box 11889, Columbia, SC 29211 on July 19, 2011.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

Case No. 2007-CP-08-0458

RECEIVED

JUL 26 2011

SC Court of Appeals

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

**RESPONDENT'S REPLY TO APPELLANTS' RETURN TO
RESPONDENT'S PETITION FOR REHEARING**

Respondent, Investors Title Insurance Company ("Investors Title"), submits this reply in response to Appellants' Return to Respondent's Petition for Rehearing.

**I. THE AMENDMENT TO RULE 43(k), SCRCP, MUST BE APPLIED
RETROACTIVELY.**

In response to the argument of Investors Title that the amendment to Rule 43(k), SCRCP, should be applied retroactively, Appellants (the "Prices") have merely copied the argument from their Reply Brief. They do not address the cases on which this Court relied in holding that the amendment was not retroactive, and they thus fail to demonstrate that the reasoning this Court applied was not incorrect.

In the argument that the Prices copied from their Reply Brief, the Prices cite *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 (1978), for the proposition that a procedural or remedial statute will not be applied retroactively if the statute creates a new remedy. The rule applied in *Hyder* is, however, very narrow. It applies only to "a statute that supplies a legal remedy where formally there was none." *Id.* at 88, 245 S.E.2d at 125.

Rule 43(k), SCRCP, existed prior to the amendment on which Investors Title relies and had the effect of barring the enforcement of settlement agreements unless certain conditions were satisfied. The amendment liberalized Rule 43(k) and made it somewhat easier to enforce settlement agreements. The amendment thus did not supply "a legal remedy where formally there was none."

Rule 43(k) is procedural, and the amendment was remedial in nature. The South Carolina Supreme Court "has consistently approved retroactive application of statutes which provide procedural or remedial benefits as opposed to statutes affecting vested or substantial rights." *Goff v. Mills*, 279 S.C. 382, 386, 308 S.E.2d 778, 780 (1983). This Court should accordingly have applied the amendment to Rule 43(k) retroactively.

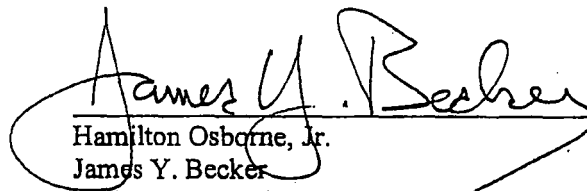
II. APPELLANTS DID NOT HAVE THE RIGHT TO REVOKE THE SETTLEMENT AGREEMENT BECAUSE IT WAS A BINDING CONTRACT.

The Prices further argue that the trial court could not enforce the settlement agreement because the Prices revoked their acceptance of the agreement on November 25, 2008, which was prior to the amendment of Rule 43(k), SCRCP. This Court relied upon *Farnsworth v. Davis Heating & Air Conditioning, Inc.* 367 S.C. 634, 627 S.E.2d 724 (2006) to hold that the Prices could revoke the settlement agreement. The agreement in *Farnsworth* was an agreement among counsel for the parties that was revoked by one

of the parties before counsel for the parties complied with the requirements of Rule 43(k) for entry of the agreement in the court record. The settlement agreement in this case was signed by the Prices and by an authorized representative of Investors Title at the conclusion of a four-hour mediation conference with a qualified mediator selected by the Prices. (Brief of Respondent at 2.) Thus, if the amendment to Rule 43(k), which provides that a settlement agreement is effective when "reduced to writing and signed by the parties and their counsel" applies retroactively, then neither the Rule nor the *Farnsworth* case provide a basis for the Prices to revoke the settlement agreement..

CONCLUSION

For the foregoing reasons, this Court should vacate its opinion reversing the order of the trial court and render another opinion affirming the order.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Krista Lea Harrington, Circuit Court Judge

RECEIVED

JUL 26 2011

SC Court of Appeals

Case No. 2007-CP-08-0458

Ronald E. Price and Diana R.B. Price,

Appellants,

v.

Investors Title Insurance Company,

Respondent.

PROOF OF SERVICE

I certify that I caused a copy of Respondent's Reply to Appellant's Return to Respondent's Petition for Rehearing to be served on the following individual by depositing a copy of the same in the United States mail, first class, postage prepaid and addressed as follows:

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This 26th day of July, 2011.

Charlotte D. Ariail

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The South Carolina Court of Appeals

Ronald E. Price and Diana
R.B. Price,

Appellants,

v.

Investors Title Insurance
Company,

Respondent.

The Honorable Kristi Lea Harrington
Berkeley County
Trial Court Case No. 2007-CP-08-00458

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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. It is, therefore, ordered that the Petition for Rehearing be denied.

Thomas E. Huff Huff, J.

Paul E. Short, Jr. Short, J.

Daniel G. Pieper Pieper, J.

Columbia, South Carolina

cc: Tobias G. Ward, Jr., Esquire
J. Derrick Jackson, Esquire
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Emily H. Farr, Esquire

FILED

August 22, 2011