THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ABBEVILLE AND GREENWOOD COUNTIES
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002729

Vince Coates, Respondent,

v.

Dorothy Renee Simchon, Appellant.

AND

Bay Island Sportswear, Inc., Sam Simchon, Individually,
Appellants,

v.

Vince Coates, Individually, Xcentric Ventures, LLC, Edward Magedson and John or Jane Doe 1-7 and XYZ Company X-Z, Defendants,

Of whom Vince Coates, Individually, is the Respondent.

FINAL REPLY BRIEF OF APPELLANTS

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The Appellants respectfully submit the following Reply Brief.

ARGUMENT

In his brief, Respondent Vince Coates makes no attempt to address the material terms which, according to the lower court's enforcement order, were missing from the parties' settlement agreement. Instead, the Respondent introduces still more uncertainty by reversing himself on past interpretations of the parties' agreement.

I. PERFORMANCE OF THE SETTLEMENT

Respondent Coates says he stands ready to perform the terms of settlement, which he claims are unambiguous. Yet at the outset of his brief, he announces that he is ready to "sign a letter" requesting that his derogatory comments be blocked. (*Brief of Respondent* at 3). The parties mentioned no such letter in their statements before the lower court. They agreed to a "consent dismissal of the Abbeville case," which would "also request that any search carrier would block or remove" Coates' defamatory statements. (R. p. 115, lines 17-22). A letter is not a consent dismissal. A consent dismissal can and often does take the form of an order. *See* Rule 41(a), SCRCP. The Respondent, however, now declares that "the agreement did not contemplate any order by the court." (*Brief of Respondent* at p. 5).

Judge Griffith seems to have viewed the matter otherwise, in that he referred to the full details of settlement being "incorporated in the order." (R. p. 10). The Respondent's former counsel had this to say: "I expected, at that point, we'd have two short orders dismissing the two cases with prejudice, a standard mutual release, both sides denied responsibility and liability, and the one extra term about agreeing to request that the Ripoff Report be removed will be included in those short orders." (R. p. 123,

lines 8-14). Now, on appeal, we learn that no such order was ever contemplated and that signing a letter is all the Respondent need do.

The Respondent does add that he is "willing to sign a consent order," apparently out of a desire to be helpful. His past actions, however, have not been so magnanimous. In response to the lower court's enforcement order, Respondent's former counsel submitted a proposed supplemental order purporting to direct "the internet entity Ripoff Report" to remove Coates' disparaging remarks. (R. p. 147). "Ripoff Report" is a loose reference to "ripoffreport.com," a website maintained by XCentric Ventures, LLC ("XCentric"). XCentric was named as a defendant in the Abbeville Case but was dismissed on jurisdictional grounds. (*See* R. p. 21). As noted above, the parties agreed on a consent dismissal requesting "*any search engine carrier*" to remove or block Coates' defamatory statements. Coates, however, substituted the non-entity "Ripoff Report" for the previously agreed "any search engine carrier." Mr. Simchon and Bay Island Sportswear were forced to file a motion to amend the lower court's original supplemental order while Coates sat silently by. Whatever he may now say, the Respondent has not been willing to sign a consent order, at least not one in keeping with the parties' statements on the record; instead, he submitted a proposed order which attempted to scale back what was stated in court.

Nor, frankly, has Mr. Coates stood ready to sign the letter he now proposes. As previously stated, the Respondent was invited to prepare an order which, in his view, complied with the parties' prior agreement. (*See* R. p. 68). If the Respondent thought a letter was the proper vehicle, he should have drafted one rather than ignore opposing counsel's communications.

The Respondent's discussion of his required performance under the settlement agreement also misstates the record. In arguing that the Appellants were mistaken about Coates' willingness to admit that the ripoffreport.com statements were defamatory, the Respondent claims the trial judge "found," based on statements by Respondent's former counsel, that the issue "never, ever came up." (*Respondent's Brief* at p. 4). The lower court found nothing of the sort. At the hearing on the Respondent's enforcement motion, Appellants' counsel gave the following detailed account of the parties' settlement discussions:

> During the course of those negotiations, my recollection is we came to an agreement on the money. The money was not the issue. The issue was, will Mr. Coates consent to a finding of defamation so that these things can be removed? Mr. Henry initially said, no, left the courtroom, went back and spoke to his client again, came back and said, We have a deal. That was just outside the door of your chambers. We went into your chambers, said, We've got this thing settled. You asked, Do you want to put it on the record?

(R. p. 127, line 20 to R. p. 128, line 5).

These discussions were not recorded and the Respondent's former counsel has refused to acknowledge them. But the trial court did not, as the Respondent tries to suggest, accept the version of events put forward by Respondent's former counsel. The trial court concluded that it was "impossible for the court to determine what the parties intended of the other party in providing 'consent' or 'assistance' to the other." (R. p. 10).

The Respondent takes further liberties with the record by claiming that there has been "no factual presentation either at the time of settlement nor in the hearing below, what is the actual requirement of search engines." One need look no further than Dorothy Simchon's return to the Respondent's settlement enforcement motion to find the policies of Bing and Google relating to the removal of defamatory or otherwise

objectionable content. (R. p. 73-86). Mrs. Simchon's counsel specifically referred to these documents at the June 4, 2014 motion hearing. (R. p. 130, lines 2-4). Respondent's counsel did not object to the lower court's consideration of these documents.[1] The lower court had the policies of two search engines before it on June 4, 2014, and acknowledged in its order that internet search engine providers require a court order before defamatory or other objectionable content will be removed. (R. p. 10).

II. ENFORCEMENT OF THE SETTLEMENT

With respect to whether the settlement of these cases should be enforced at all, the Respondent repeatedly insists that the trial court "found" the parties' settlement agreement to be unambiguous. This argument might have some appeal if ambiguity were a question of fact. The existence of ambiguity, however, is a question of law. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009); *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009). This Court takes its own view of whether the parties' agreement was ambiguous.

Conspicuously absent from the Respondent's brief is any attempt to deal with the missing terms of the settlement. As previously pointed out, the lower court found that "pertinent details" of the settlement agreement were omitted "to protect the clients," and that these missing details "were to be incorporated in the order" (here referring to the dismissal order which the Respondent now says no one contemplated). These omissions were understandable; aspects of the settlement were supposed to be confidential and the courtroom was full of jurors, attorneys and court personnel. But the omissions made it impossible for the lower court to determine the parties' intentions. It makes no sense to

[1] At most, the Respondent objected to certain correspondence between counsel, which was also attached to Mrs. Simchon's return. But he also stated to Judge Griffith that he would "leave it to you to consider what you want." (R. p. 129, lines 11-22).

enforce a settlement in which the intentions of the parties with respect to material terms cannot be discerned. The Respondent simply ignores this difficulty.

III. MOOTNESS OF DISMISSAL ISSUE

The Respondent makes no serious effort to defend the lower court's addition of the requirement that Mr. Simchon and Bay Island Sportswear dismiss their defamation case with prejudice. The Respondent claims that the "discussion" between the parties shows a clear intent for such dismissals, without bothering to identify whatever testimony supports this contention. Similarly, the Respondent states that "the record" supports the trial judge's decision, without citing anything in the record. The Respondent's brief essentially concedes that the lower court had no basis for inserting dismissal terms which the parties failed to mention in their supposedly unambiguous, comprehensive description of the settlement.

The Respondent's only real argument on this issue is that it is moot because another defamation action would necessarily be barred by the statute of limitations. In *Taub v. McClatchy Newspapers, Inc.*, 504 F. Supp. 74 (D.S.C. 2007), Judge Sol Blatt, Jr., interpreted this Court's opinion in *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004) as favoring adoption of the "continuing publication" rule under which the tort of libel takes place each time defamatory material is circulated. *See* 504 F. Supp. 2d at 79. Under this view, a separate publication occurs each time an internet user accesses the Respondent's defamatory statements on RipoffReport.com. The dismissal issue is therefore not moot, as the Respondent suggests.

CONCLUSION

The Respondent's brief is proof that the parties did not reach a complete or comprehensive understanding as to how their disputes were to be resolved. The

Respondent's former counsel expected a "short order," albeit one which he limited to a single internet entity versus the search engine carriers previously discussed. The Respondent's appellate counsel disagrees that any order was contemplated, and proclaims that his client stands ready to sign a letter. The Respondent's own lawyers cannot agree on a settlement which, according to the Respondent, is perfectly plain and unambiguous.

This much is plain: the announcement on February 3, 2014, was *not* a complete or comprehensive statement of the parties' intentions with regard to settlement. As the lower court noted, it remained for counsel to discuss all of the pertinent details and incorporate them in an order (not a letter). That never happened because the Respondent decided he would do nothing more than what was specifically stated on February 3, 2014--less if he could. Frankly, the Respondent's brief adds weight to the argument against enforcing the parties' purported agreement, since the Respondent's own attorneys seem to differ on its exact terms. But if the agreement is to be enforced at all, it should be enforced with regard to one of its essential purposes, namely that Appellants Sam Simchon and Bay Island Sportwear, Inc. receive some relief from Coates' derogatory statements..

For the reasons set forth above and those previously argued, the Appellants repeat their request for the relief described in their main brief.

October 9, 2015

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellants on Vince Coates, by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2015, addressed to his attorney of record, C. Rauch Wise, 305 Main Street, Greenwood, SC 29646.

October 9, 2015

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