

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2013-CP-37-0575

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**RECEIVED**  
AUG 08 2016  
SC Court of Appeals

Duke Energy Carolinas, LLC

Respondent,

v.

Randall S. Hiller and Janet C.  
Hiller,

Appellant.

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FINAL BRIEF OF APPELLANT

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## **STATEMENT OF THE CASE**

This appeal arises from the filing by Respondent of a Notice of Motion and Motion to Enforce Settlement Agreement on April 1, 2015.

A hearing was held before the Honorable R. Lawton McIntosh on May 12, 2015. The Court filed its decision on May 13, 2015 and was received by the Appellant on June 2, 2015. A timely Motion to Reconsider was filed and denied by the Court without hearing by Order dated June 26, 2015 and filed July 2, 2015 and received by Appellant on July 6, 2015.

This appeal timely followed.

### **EXCEPTIONS**

**I. The Court erred in granting Respondent's Motion to Enforce Settlement the error being that the Respondent submitted no evidence at all and the only evidence in the Record is that the settlement agreement was fully and completely complied with.**

**II. The Order is so vague and overbroad that it is not capable of being enforced.**

## ARGUMENTS

**I. The Court erred in granting Respondent's Motion to Enforce Settlement the error being that the Respondent submitted no evidence at all and the only evidence in the Record is that the settlement agreement was fully and completely complied with.**

At the hearing on Respondent's Motion to Enforce Settlement Agreement Respondent presented no witnesses, no testimony and did not seek to admit any documentary evidence supporting its bald allegations.

To the contrary, Appellant, while noting his surprise at the failure of Respondent to produce a witness, was sworn and testified that the settlement agreement has been fully complied with and under the express supervision, authorization and direction of the Respondent.

Arguments by counsel for Respondent do not and cannot qualify as evidence unless made under oath, *South Carolina Rules of Evidence* Rule 603, and upon personal knowledge, *South Carolina Rules of Evidence* Rule 602.

*S.C.R.C.P.* Rule 43(e) requires, "When a motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions." *S.C.R.C.P.* Rule 11(c) requires all affidavits to be sworn to or affirmed before an officer authorized to administer oaths, state that the affiant knows the facts stated to be true of his own knowledge.

The record of the proceeding before the hearing judge is devoid of compliance with any of the aforesaid rules nor was any attempt even made to comply with the production of any evidence or to request to admit into evidence any documents.

Accordingly, the only testimony before the hearing judge was the testimony of the Appellant and it is therefore uncontradicted fact.

There being no evidence that the settlement agreement was not fully and completely complied with by the Appellant the Circuit Judge erred in granting a motion to enforce the settlement agreement.


**II. The Order is so vague and overbroad that it is not capable of being enforced.**

The Order itself is so vague and overbroad as to provide neither party with the necessary guidance to implement the Order. It specifies nothing but the granting of "access" with no finding or direction as to what portion of the agreement was not completed, what remained to be done or who would bear the cost of doing so.

## CONCLUSION

For the reasons set forth hereinabove, the uncontradicted evidence is that the settlement agreement was completed prior to the filing of Respondent's Motion requiring a reversal of the of the trial court or the hearing judge with a remand for entry of an order denying the motion to compel enforcement.

July 26, 2016



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Case No. 2013-CP-37-575

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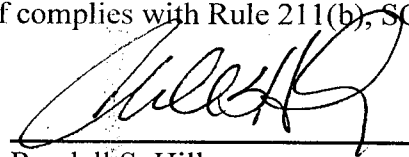
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Hiller,

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CERTIFICATE OF COUNSEL

The undersigned certified that this final brief complies with Rule 211(b), SCACR.

July 26, 2016



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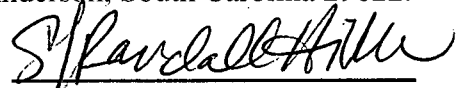
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PROOF OF SERVICE

I certify that I have served the Respondents with Appellant's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on August 4, 2016, addressed to its attorney of record, James W. Logan, Post Office Box 259, Anderson, South Carolina 29622.

August 4, 2016



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