

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE BEAUFORT COUNTY COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CARMEN MULLEN, PRESIDING JUDGE

CASE NO. 2015-CP-07-00597

MILDRED ANNE KINGHORN AS TRUSTEE
FOR THE MILDRED ANNE KINGHORN
TRUST, DATED APRIL 28, 2004,

Respondent,

-versus-

GEORGE C. SAKAKINI,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN ISSUING FORM 4 ORDERS WHICH FAILED TO INCLUDE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW?
- II. DID THE TRIAL COURT ERR IN ISSUING A VAGUE ORDER IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS?
- III. DID, TO THE EXTENT *ARGUENDO* THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERR IN CONSTRUNING IT RIPE FOR ENFORCEMENT.
 - A. Was it Reversible Error for the Trial Court to Improperly Construe the Alleged Settlement by Ignoring Specific Language Bargained for by the Parties?
 - B. Did the Trial Court's Construction of the Settlement Create a Manifest Absurdity which was Error?
 - C. Did the Trial Court's Construction of the Alleged Settlement Render Performance Impossible and was therefore Error?
- IV. DID, TO THE EXTENT *ARGUENDO* THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT THE TRIAL COURT ERR IN GRANTING SPECIFIC PERFORMANCE AS RESPONDENT, WHO BORE THE BURDEN OF PROOF, FAILED TO MEET HER BURDEN?
 - A. Did the Trial Court Err in Finding the Alleged Settlement Ripe for Enforcement when Respondent Failed to Present Competent Evidence Supporting the Conclusion that the Alleged Settlement's Express Contingencies had been Satisfied?
 - B. Did the Trial Court Err when it Ruled for Respondent when the only Evidence offered by Respondent was Impermissible Hearsay?
 - C. Did the Trial Court Err by Accepting Hearsay and Non-Existent Evidence, and Refusing Competent Evidence?
- V. DID THE TRIAL COURT ERR IN DENYING APPELLANT DUE PROCESS WHEN IT DISMISSED THE ACTION WITHOUT CONSIDERING HIS MOTION FOR DISCOVERY AND A HEARING ON THE QUESTION OF CONTRACT OR NO CONTRACT?

STATEMENT OF THE CASE

On February 5, 2016, mediation was held in Beaufort, South Carolina, presided over by Mitchell Griffith, Esquire. At 6:30 pm a settlement was reached between the parties, Kinghorn and Sakakini. This settlement was thereafter reduced to writing and signed by the two litigants and their lawyers. Thereafter the Agreement was enrolled in the Office of the Clerk of Court.

The following day, February 6, 2016, the Defendant's companion, Clea Efthimiades, attempted to destroy Plaintiff's security cameras with a laser. (Respondent's Affidavit of March 3, 2016.). On February 16, 2016 the Defendant confronted the agreed-upon surveyor, David Gasque, and told him not to perform the new survey agreed-to on February 5, 2016. (Respondent's Affidavit of March 3, 2016.)

On February 17, 2016, Defendant Sakakini emailed the HOA saying, "**I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT**" (Appellant's email to Lashea Dubois on February 17, 2016, Item 3 in Record on Appeal.)

More importantly, Appellant's email said that he consulted with another lawyer who worked for Chase Bank who told him, "George does not have the legal authority to enter any agreement that waives or modifies Picket Fences HOA rules, without express consent from the HOA. That was not done. Likewise, George does not have legal authority to waive or modify easements that run with the land, without the express consent of the lien holder, Bank of America. This was not done both Bank of America and Picket Fences are necessary parties to the litigation."

On February 23, 2016, Appellant Sakakini emailed the HOA saying, "I still need your lawyers to opine on the legality of the Settlement Agreement I signed and sent to the HOA. My concerns remain that I signed a document I believe is **void ab initio**"

Convinced that Appellant Sakakini was not going to abide by the terms of the February 5, 2016, Settlement Agreement; that Appellant was going to continue his efforts to derail the Agreement; Respondent filed her Motion asking the Court to enforce the terms of the Settlement Agreement on February 19, 2016.

The Motion was heard by the Honorable Carmen Mullen on March 30, 2016 wherein Appellant now argued there was no meeting of the minds on February 5, 2016; that Bank of America was a necessary party; that the matter was not ripe for adjudication by the Court because of various unresolved contingencies (See Appellant's Brief in Opposition to Motion and the Transcript of the Hearing on March 30, 2016.)

On March 18, 2016 Judge Mullen granted Respondent's Motion by way of a Form 4 Judgment that was thereafter enrolled in the Court of Common Pleas on April 22, 2016.

On April 28, 2016, Appellant filed his Motion for Reconsideration. In his Brief Appellant again argued that there were unresolved contingencies; there was no meeting of the minds, and there was no contract between the parties as required by applicable Case Law.

On May 25, 2016 the Honorable Carmen Mullen denied Appellant's Motion for Reconsideration and Appellant thereafter appealed to the South Carolina Court of Appeals.

DISCUSSION

I. THE TRIAL COURT ERRED IN ISSUING FORM 4 ORDERS WHICH FAILED TO INCLUDE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

South Carolina Rule 52(a) says "in all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon Findings of Fact and Conclusions of Law are unnecessary on decisions of Motions under Rules 12 or 15 or any other Motion except as provided in Rule 41(b)."

Rule 52(a) says no findings are required under Rule 12 (Motions to Dismiss); and Rule 56 (Summary Judgment); or "any other Motion except as provided in Rule 41(b)". We are left with the plain language that says no findings of fact are required for "any other Motion" except Motions dealing with involuntary dismissal.

Appellant's Brief appears to recite the Federal Rules of Civil Procedure rather than the South Carolina Rules of Civil Procedure. Appellant cites "SCRCP 52(3)" which appears to be Federal Rule 52(a)(3) which says:

(3) For a Motion. The Court is not required to state findings or conclusions when ruling on a Motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other Motion.

Then Appellant goes to "SCRCP 52(1)" which appears to be Federal Rule 52(a)(1) wherein he uses this federal language to elevate the instant Motion to "an action tried in facts without a jury". In short, Appellant characterizes or indentifies Federal Rule as the South Carolina Rule. The South Carolina Court of Appeals utilizes the South Carolina Rules of Civil Procedure not the Federal Rules of Civil Procedure.

The proper rule in this case is SCRCP 52; not 52(a)(3) or 52(a) (1) of the Federal Rules. SCRCP 52 says that

Findings of Fact and Conclusions of Law are unnecessary on decisions of Motions under Rule 12 or 56 or "any other Motion" Except as provided in Rule 41(b).

II. THE TRIAL COURT ERRED IN ISSUING A VAGUE ORDER IN VIOLATION OF DUE PROCESS PROTECTIONS OF THE SC AND US CONSTITUTIONS.

Appellant argues that the Order is vague and that it is well-settled that "a person may not be compelled to obey an ambiguous Order". Further, Appellant complains the Motion does not give him "fair warning".

The Motion sought to enforce the Settlement Agreement entered into on February 5, 2016. The Appellant signed the original Agreement at the end of the mediation, as did his Counsel, but now (apparently) he finds the document he signed vague and ambiguous.

This argument necessarily takes us to the actual words of the Agreement. The first proviso says Plaintiff will convey a one foot wide strip of land (to George Sakakini) and this new boundary will be platted by David Gasque. The Settlement Agreement recites the relocation of the boundary line (between the parties) to a point one (1) foot North of the existing line. (Item 1 of the Settlement Agreement). It requires that Appellant give Respondent a deed to any and all property to the North of that newly established boundary line (Item 2 of the Settlement Agreement) It requires that Appellant pay David Gasque (the surveyor) for platting and marking the new boundary line between the respective litigants.

It is interesting that Appellant has never claimed vagueness, ambiguity or confusion prior to this appeal. It is instructive that Appellant, in his emails of February 17, 2016 and February 23, 2016, does not complain about vagueness, or ambiguity or the inability to understand the Settlement Agreement.

Rather Appellant says to (Lashea Dubois, Picket Fences HOA) that "**I did not have legal authority to sign it**" because he needed express consent of the HOA". Further, he says that he needed the "**express consent of the lien holder**". (See Appellant's e-mail to LaShea Dubois on February 17, 2016.)

Likewise on February 23, 2016, Appellant says to the HOA that, "**I still need your lawyers to opine on the legality of that Settlement Agreement I signed and sent to the HOA**".

Significantly, the Appellant does not say he was confused; or did not understand a particular provision of the Settlement Agreement at Mediation. But after the Mediation was over Appellant admits he went to another lawyer who told him that both the Bank of America and Picket Fences needed to be parties. Thus, when he came to the Motion Hearing on March 30, 2016, Appellant's primary argument was that Bank of America needed to be a party and needed to approve the extinguishment of the maintenance easement. But it is important that this allegation--and any alleged confusion--arose after the Mediation and came with the acknowledgement that;

"If I could re-live one day of my life, it would be 5 Feb 2015. I cannot begin to adequately express my profound regret by signing that document." (Email from George Sakakini to Lashea Dubois dated February 17, 2016.)

This is not confusion. This is learning after the Mediation, that one has an argument that may relieve one from the bargain he made on February 5, 2016. This is regret, not confusion.

III. TO THE EXTENT, *ARGUENDO*, THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERRED IN CONSTRUING IT RIPE FOR ENFORCEMENT.

A. THE TRIAL COURT IMPROPERLY CONSTITUTED THE ALLEGED SETTLEMENT BY IGNORING SPECIFIC LANGUAGE BARGAINED FOR BY THE PARTIES WHICH WAS REVERSIBLE ERROR.

Appellant argues that the Trial Court committed reversible error by "ignoring specific language bargained by the parties". Appellant says the specific language ignored was "or any other appropriate authority that may be required to approve items 1, 2 and 3." Appellant says these words meant, as far as he was concerned, approval by the Bank of America. Appellant presented an affidavit on March 30, 2016, that said "I suspected that there may be third parties

whose consent was necessary, and whom we have been overlooking at the mediation". (Appellant's Affidavit dated March 30, 2016)

By saying "and whom we have been overlooking at the mediation". Appellant tells the Court, in violation of Rule 8, that the various parties did not discuss the role, if any, that Bank of America played in the Settlement.

Appellant wants the Settlement Agreement to be a "contract" as is described in Patricia Grand Hotel v. Macquire Enterprises, 372 S.C. 634 (app 2007). However the Patricia Grand agreement was consummated in open court with a colloquy between the Court and both counsel as to the details of that agreement. There is, in Patricia Grand, a transcript to examine in terms of whether, and if, there was a meeting of the minds.

In the instant case the discussions between Counsel, the Mediator, and the individual parties cannot be revealed pursuant Rule 8 (a) Confidentiality, which says, in part;

(a) Confidentiality. Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

- (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
- (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
- (3) Proposals made or views expressed by the mediator;
- (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
- (5) All records, reports or other documents created solely for use in the mediation.

(b) Limited Exceptions to Confidentiality. This rule does not prohibit:

- (1) Disclosures as may be stipulated by all parties;
- (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

- (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;
- (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and
- (5) Any disclosures required by law or a professional code of ethics.

Notwithstanding the prohibitions in Rule 8, Appellant tells the HOA (on February 17, 2016) that he had not eaten breakfast and "I do not think I was in the proper state of mind". Then, in his Brief, Appellant says "the parties knew very well that there may be other parties whose consent was necessary . . . ". Then Appellant says; "Bank of America is precisely the type of 'other authority' apart from the Picket Fences POA or Board of Review that the parties anticipated would be necessary"

Appellant injects his thoughts and his conclusions about what everyone else was thinking on February 5, 2016. But, in fact, he can't tell the Court what he was thinking, what others were thinking, and expect that these "thoughts" will be used by the Court to see whether or not we have a "contract" in play.

This, then, is the essential distinction between Patricia Grand and the instant case. The Patricia Grand Court knew exactly what the parties said; it had a chance to ask questions about the agreement reached; and it recorded the answers in the transcript. In the instant case there can be no record, and there can be no "testimony" about what Appellant was thinking on February 5, 2016, or what Respondent was thinking. The Court was limited to what took place after Mediation on February 5, 2016.

But we know what Appellant was thinking after Mediation. After Mediation we have a series of emails, statements and admissions that culminate in the statement.

"I DO NOT WANT THE HOA TO APPROVE THE SETTLEMENT."

This simple, declaration sentence when taken with **"If I could relive one day of my life, it would be 05 Feb 2016. I cannot begin to adequately express my profound regret of signing that document. I am hoping the HOA will give me a second chance in this matter."**

It is these words, "profound regret" and "second chance" that the Court must examine and weigh. "Regret" suggests a mistake on the part of Appellant; and "second chance" underscores the concept of a mistake by Appellant.

While Patricia Grand could take the exact words of counsel (as to the agreement) and apply them to concepts like "plain meaning of the words the parties used at the time of the hearing."; and "it appears the parties had a meeting of the minds "; this Court doesn't have the ability to see what was said by either Counsel, or by the parties themselves, or by the Mediator, Mitch Griffith. It can't consider those words or what Appellant believed other people were thinking during the day-long mediation on February 5, 2016.

After the Mediation, and after discussing the matter with a lawyer from Chase Bank, the Appellant decided that Bank of America needed to be a party and, further, needed to approve the extinguishment of the maintenance easement. "but according to another attorney that I have consulted (he worked for Chase Bank), I did not have the legal authority to sign it. This is a direct quote from his email likewise George Sakakini does not have the legal authority to waive or modify easements that run with the land without the express consent of the lien holder, Bank of America."

The fact that this revelation, from another attorney, came after the Mediation, means that this was not a proviso that was "bargained for" by the parties at the Mediation on February 5, 2016. It was a proviso that is now, after the fact, being used by Appellant to attack the Court's enforcement of the Settlement Agreement. The claim that the Court ignored "bargained for"

language is simply wrong. It was a concept developed after the Mediation on February 5, 2016. It was a concept, among many, that the Appellant has now conjured-up in an effort to find some "reversible error" somewhere.

B. THE TRIAL COURT'S CONSTRUCTION OF THE SETTLEMENT CREATES A MANIFEST ABSURDITY WHICH WAS ERROR.

Appellant argues that failure, by the Court, to 'shoehorn' the Bank of America into the approval process is an absurdity "which is unambiguously manifest. . . . and that constructions that result in an absurdity are not favored under South Carolina law." As mentioned above, Appellant fails to mention that this "absurdity" became manifested after the Mediation on February 5, 2016.

Appellant does not mention that this "absurdity" was first communicated to LaShea DuBois on February 17, 2016 in an effort to prevent approval of the various contingencies. Or that this absurdity was part of a larger plan to derail the approval process.

As mentioned above, Appellant fails to say that this absurdity only became manifest after Appellant had sought an opinion from 'another lawyer' who worked for Chase Bank. Appellant fails to mention that this absurdity came after Appellant's companion disabled (with a laser) Respondent's security camera on February 6, 2016; and stopped the surveyor from making a survey of the new line on February 16, 2016.

Appellant fails to mention that (on February 17, 2016) he wrote to LaShea DuBoise saying;

I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.

When one looks at the totality of Appellant's behavior after February 5, 2016, his "absurdity argument" is overwhelmed by Appellants concerted, single-minded effort to find some reason to stop the process of approval.

Respondent's Motion was to stop Appellant's efforts; and to get the approvals (again) underway. Realizing he might be guilty of obstruction of the approval process Appellant sent another email to the HOA on February 23, 2016 which said, in part,

"In no way am I trying to repudiate the signed settlement."

Notwithstanding this last disclaimer - **In no way am I trying to repudiate the signed settlement**—his actions speak otherwise. And these actions brought on the Motion.

The Court apparently looked at Appellant's behavior and decided to discount the Appellant's argument that it was always intended that Bank of America be a party and be a part of the approval process.

Finally, the Court may have considered the Consent Order filed on March 3, 2016, wherein the case was restored to the docket. That Order was signed by Greg Galvin, Esquire, who then represented the Appellant. It said, in part,

"Furthermore this case shall not be tried until the parties herein fail to secure the approvals of the settlement provisions from the appropriate governing body of Picket Fences S/D, as detailed in the Settlement Agreement attached hereto." (Consent Order of March 3, 2016.)

It is important to know that this Consent Order, signed by Greg Galvin, a month before the hearing on March 30, 2016, acknowledges the "appropriate governing body" was "Picket Fences S/D". It is important to see that Bank of America was not mentioned in that Order signed by Greg Galvin, Attorney for George Sakakini. It is therefore not absurd that on February 5, 2016, that the Bank of America was not contemplated as being a part of the approval process.

C. THE TRIAL COURT'S CONSTRUCTION OF THE ALLEGED SETTLEMENT RENDERED PERFORMANCE IMPOSSIBLE.

Part of the relief that Respondent sought (on February 19, 2016 when she filed her Motion) was the stopping of Appellant's efforts to prevent or delay the approval by the HOA.

Appellant—in this finding of error—again argues that the Agreement was not 'ripe' and so the Court was premature in addressing this issue. Appellant again argues that the Court could not act until all of the approvals were secured by Respondent. But as late as on February 23, 2016 Appellant was telling the HOA that the Settlement was *void ab initio*.

Appellant essentially argues that as long as the approvals were not secured—and as long as he could delay or stop the approval process—Respondent was without a remedy. Respondent, according to this reasoning, could only watch while Appellant wrote his emails, physically blocked the surveyor and (his companion) attempted to disable her surveillance cameras.

Appellant's after-the-Mediation search for some reason to scuttle the Settlement Agreement now returns to the Bank of America and the 'impossibility' of performance by Appellant. But if one looks the covenants, specifically Section 7.6, one discovers that the easement in question only comes into play when the 'homesite' is within five (5) feet of the boundary line. If there are more than five (5) feet then there is no easement. Rather than discuss the distance between the house and the new boundary, Appellant's Counsel says,

"We cannot convey that mortgagor's recorded rights away without their consent. Now this is standard dirt law 101."

Appellant's Memorandum does not discuss the distance between his 'homesite' and the new boundary line. Nor does Appellant discuss what overtures or discussion the he may have had with the Bank of America. Rather, he tells the Court,

"We have, as Dr. Sakakini has told you in his affidavit, we have worked with the Bank of America." (Transcript of Hearing, Page 23, lines 5-6)

When the Court inquired that work was going, Counsel says,

"They said they need an appraisal , and he needed to pay for it. He sent a check. The check had cleared, and they set up an appointment for Tuesday for him." (Transcript of Hearing, Page 23, lines 16, 17)

After this exchange with the Court there is nothing further from Appellant. This colloquy happened on March 30, 2016 and the Court made its ruling on April 18, 2016. Almost three weeks passed during which time Appellant could have advised the Court how his performance was impossible - that Bank of America was simply unwilling to give up their easement rights for any amount of money. After the Court's Ruling, Appellant filed his Motion for Reconsideration. In this regard Appellant makes various arguments to the Court regarding its decision enforcing the Settlement Agreement. However, there is no mention of the Appellant's efforts with regard to the Bank of America. Appellant reiterates that the Bank's approval is essential, but he says nothing about his appraisal, his efforts, or the position taken by Bank of America.

Assuming that the loss of this easement diminished Bank of America's collateral; then Appellant might have to pay-down his debt to come within the Bank's guidelines. In a 'worst case' scenario Appellant may have had to pay-off the bank and refinance with another bank. But it is absurd to say that a solution to this particular problem has no solution. This is another effort to throw up concepts like 'absurdity' and 'impossibility' hoping that the Court might adopt one or both.

IV: DID, TO THE EXTENT *ARGUENDO* THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERR IN GRANTING SPECIFIC PERFORMANCE AS RESPONDENT, WHO BORE THE BURDEN OF PROOF, FAILED TO MEET HER BURDEN?

A. TRIAL COURT ERRED IN FINDING THE ALLEGED SETTLEMENT RIPE FOR ENFORCEMENT WHEN RESPONDENT FAILED TO PRESENT COMPETENT EVIDENCE SUPPORTING THE CONCLUSION THAT THE ALLEGED SETTLEMENTS EXPRESS CONTINGENCIES HAD BEEN SATISFIED.

Before the Court determines whether or not Respondent met her alleged burden, let's again examine Appellant's conduct after the Mediation on February 5, 2016.

On February 16, 2016, Plaintiff acquired the services of David Gasque, consistent with the terms of the Settlement Agreement; however, Appellant told the surveyor to leave and prevented Respondent from designating the new boundary line. (See Item #4 of Appellant's March 30, 2016 Affidavit.)

On February 17, 2016, Appellant told the HOA that;

I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.

Then, on February 23, 2016, Appellant again emailed the HOA saying the Settlement Agreement was "*void ab initio*".

Notwithstanding his efforts to derail the approval process, Appellant now says that Respondent failed to meet her "burden". Despite Appellant's emails telling the HOA that the argument was "*void ab initio*" and saying "**I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.**", Appellant now says Respondent failed to establish, by competent proof, the "burden" that the law placed upon her.

Appellant argues that Respondent must satisfy each and every contingency before she can file her Motion. In effect, Appellant says that the Court cannot do anything to remedy the situation as long as Appellant's wrongful behavior stops the Respondent from getting her approvals.

Mindful of how his delaying, wrongful behavior might be interpreted by a later court, Appellant says, in Paragraph 5, of his March 30th Affidavit, that the "remaining statements about

me stopping the HOA board, or attempting to do so are simply not true." But the content of his e-mails on February 17 and on February 23 are proof that he was determined to stop the approval process.

At the hearing on March 30, 2016 Appellant focused his efforts on approval of the fence. (See Transcript of Hearing, Page 28, lines 6-7). At the hearing Appellant's Counsel said, "Now keep in mind, as we have just said, she hasn't gotten approval of the fence yet".

Keep in mind that in order to get approval for a fence that would parallel the "new boundary line" the location of the "new boundary" needed to be known; and shown. Remember that Appellant, by his own admission, stopped the surveyor from establishing that new boundary line.

Where a party's repudiation of a contract contributes materially to the non occurrence of a condition precedent, the non-occurrence of the condition is excused. Champion v. Whaley, 331 S.E. 2d 404, 280 S.C. 116 (1984).

In the Champion case, the South Carolina Court of Appeals said that when one party repudiates a contract preventing the other party from satisfying a condition precedent, then the other party's failure to accomplish that condition precedent is excused. It is fundamental that the party that causes the problem cannot then take advantage of his own wrongdoing.

This Court went on to say "it is sufficient for the plaintiff to present evidence that the defendant's prevention substantially contributed to the non occurrence of the condition." In this instance Respondent detailed the various acts of Appellant in her Affidavit of March 7; these acts were corroborate by Appellant's own emails of February 17, 2016 and February 23, 2016.

In Higgins Construction Co. Inc. v. Southern Bell Telephone, 281 S.E. 2d 469, the Supreme Court held that a utility that failed to remove certain utility lines, knowing that the

contractor would rely upon the utility's promise to remove them, was liable for the increased cost and entitled to enforcement of the utility's previous promise.

This Court also cited Furman University v. Waller, 124 S.C. 68, 117 S.E. 356(1922) where Defendant Waller made a pledge to Furman of \$10,000.00 and Furman built a new dormitory on the strength of that and other pledges. The Furman Court said the Waller Estate was now estopped from avoiding its pledge and its repudiating its promise.

Champion Higgins and Furman University v. Waller effectively excuse the Respondent from her "burden" of getting all of the necessary approvals, when the Appellant is guilty of behavior that slows down or stops the approval process.

Neither party knows what facts, precisely, this Court based its decision on. However, the Court knew that Appellant had stopped the surveyor; and it knew there were two (2) emails from Appellant, the first saying;

I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.

And the second email saying that the Settlement Agreement was

void ab initio.

B. DID THE TRIAL COURT ERR WHEN IT RULED FOR RESPONDENT WHEN THE ONLY EVIDENCE OFFERED BY RESPONDENT WAS IMPERMISSIBLE HEARSAY.

Appellant again returns to his theory that the Court's confirmation of the Settlement Agreement was impossible because of the three (3) unmet, allegedly unaccomplished contingencies. Appellant takes no responsibility for blocking or delaying those contingencies when he contacted the HOA advising it that they should not proceed (email of 2/17) and, then, advising HOA that the settlement was "***void ab initio***" (email of 2/23). Appellant fails to mention

this "evidence" and says the Court cannot only upon the affidavits of Respondent in its deliberations.

Appellant says the Respondent's reference to an email (on 2/17) from the HOA advising her that they "would not go forward with any ruling" is hearsay. However, Respondent's email (on 2/17) is consistent with Appellant's own email where he says;

"I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT."

Appellant says Respondent's reference to Paragraph 6 (of her 2/22 Affidavit) which again references the HOA's email of 2/17 is "wholly inadmissible hearsay". However, the Court could, in fact, consider Appellant's own email of 2/17 to confirm that George Sakakini **"would like to re-enter negotiations with you and your attorney about this matter"**.

Furthermore, Appellant objects the statement "Dr. Sakakini told David Gasque not to perform the survey". Again, this fact (that Sakakini blocked the survey of Gasque) is confirmed in Respondent's own Affidavit (3/30/16), which says.

"4. In her 22 March affidavit Plaintiff suggests that I stopped David Gasque on the survey. This is true and what she omits is that I halted him only until such time as the contingencies were removed. There was no need for me to make any expenditure of money until the agreement became executor."

The Court had Appellant's emails of February 17, 2016 and February 23, 2016 in front of it. The Court had Appellant's own Affidavits of March 18, 2016 and March 30, 2016 when the hearing was held.

In his March 18, 2016 Affidavit Appellant says;

8. I am informed and believed that the subdivision HOA has, in fact, approved the provisions of the settlement. . . ."

Later, reversing himself he says the approval of the fence has not actually happened. And, at the hearing itself, his Counsel informed the Court that,

"and so, we know that the fence was not referenced. So now we know of another contingency, which we just learned yesterday, has not been approved"

Perhaps the Court remembered that Appellant stopped the surveyor from doing the new survey. Perhaps the Court deduced that not knowing where the new line would be located delayed the application and approval for the fence. Perhaps the Court decided that Appellant could not profit from stopping the surveyor and trying to dissuade the HOA from proceeding with its necessary approvals.

C. TRIAL COURT ERRED BY ACCEPTING HEARSAY AND NON-EXISTENT EVIDENCE, AND REFUSING COMPETENT EVIDENCE?

As previously argued, Champion v. Whaley stands for the proposition that repudiation by one party that "contributes materially" to the non-occurrence of a condition precedent excuses the second party from meeting those conditions precedent. If Champion is the case law in South Carolina, the trial court had a written record of Appellant's wrongful behavior and his repudiation of the Settlement Agreement.

The Court, in fact, had Appellant's two emails as well as Appellant's admission that he had stopped Gasque, the Surveyor, from doing a survey. The trial court had a record of Appellant's activities and it thereby excused the Respondent securing all the approvals by March 30, 2016, when the matter was argued before Judge Carmen Mullen.

Simply stated, the trial court had Appellant's wrongful behavior spelled-out in Appellant's own words (See Appellant's emails of February 17 and February 23); and it had Appellant's wrongful behavior spelled-out in his affidavit admitting he prevented the surveyor from establishing the new boundary line. The Court had sufficient, competent evidence of wrongdoing by Appellant even if it did not weigh the contents of either of the two (2) affidavits submitted by Respondent.

V. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT DUE PROCESS BY DISMISSING THE ACTION WITHOUT CONSIDERING HIS MOTION FOR DISCOVERY AND A HEARING ON THE QUESTION OF CONTRACT OF NO CONTRACT.

In his final issue the Appellant argues that he "immediately filed a Motion to take discovery and hold a hearing on the issue of settlement or no settlement" right after the "specter of a possible failure of a meeting of the minds" raised its head at the hearing on March 30, 2016.

Presumably, "discovery" means that counsel would serve interrogatories and take depositions of those who were participants in the Mediation on February 5, 2016. In that manner he and we would discover whether or not there was a "meeting of the minds".

But, of course, that can't be done if one honors the words, and protections of Rule 8 which says, in part, "Communications during a mediation settlement conference shall be confidential to that end the parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding"

Rule 8 says that you can't use any "oral or written communications" or repeat views, suggestions, proposals or admissions.

What then could be revealed by the parties and participants at a subsequent discovery hearing?

Perhaps Appellant wants to get into the record what he "thought" or was thinking at the Mediation; not what he said. Oliver Wendell Holmes said the following about thoughts.

"In the law of contract the use of moral phraseology led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a

contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties' having meant the same thing but on their having said the same thing.[5]"

Oliver Wendell Holmes, Jr., "The Path of the Law" 10 Harvard Law Review 457

The Court, mindful of the notions articulated by Holmes, knew that saying the same words are the keys of figuring-out whether or not there was a meeting of the minds. The trial court knew that Rule 8 would prohibit taking testimony from the Appellant and the Respondent and it properly rejected Appellant's plea for additional 'discovery'.

CONCLUSION

Appellant, with the advice and help of his Counsel, made a bargain on February 5, 2016. Almost immediately he profoundly regretted that bargain. He then embarked on a course of conduct that would make it difficult for that bargain to be realized. His action to stop the approval process are well-documented by his own statements to the HOA.

The essence of the Appellant's argument is there was no meeting of the minds. However, it is clear from Appellant's own words that he developed this theory after consultation with another lawyer who, apparently, told him that the approval of the BOA was essential.

Appellant now tells us he had, on February 5, 2016, suspicion, but it is clear that his 'suspicions' were made manifest after the Mediation and after his discussion with another lawyer.

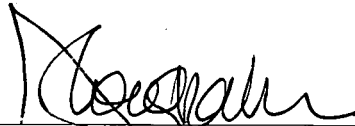
Then we come to Appellant's lengthy argument that the conditions (of approval) did not happen and therefore he should be relieved from his duty to honor the bargain. But, as has been

shown herein, Appellant's determined, single-minded effort to derail the approval process is the very reason that the approvals were delayed.

After any Settlement there is usually remorse. Usually neither side is entirely happy with the compromises he or she has made during the mediation process. And in the case Appellant was clear about his remorse when he said,

If I could re-live one day of my life, it would be 5 Feb 2015. I cannot begin to adequately express my profound regret by signing that document.

RESPECTFULLY SUBMITTED,



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Beaufort, South Carolina
November 24, 2016

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing **Initial**

Brief upon opposing counsel:

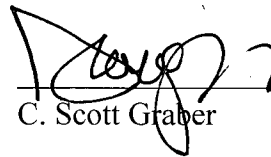
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by placing a copy of same in the United States Mail with sufficient postage affixed thereon.



C. Scott Graber

Beaufort, South Carolina
November 19, 2016