

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullin, Circuit Court Judge

Case No. 2016-001278

RECEIVED

FEB 07 2017

SC Court of Appeals

Mildred Ann Kinghorn as
Trustee for the Mildred Ann
Kinghorn Trust, dated 28
April 2004

Respondent,

v.

George Sakakini,

Appellant.

BRIEF OF APPELLANT

M. Richardson Hyman, Jr.
Post Office Box 127
Charleston, South Carolina 29402
(843) 416 1047
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Facts	2
Arguments	
I. THE TRIAL COURT ERRED IN ISSUING FORM 4 ORDERS WHICH FAILED TO INCLUDE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	6
II. THE TRIAL COURT ERRED IN ISSUING A VAGUE ORDER IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.	
III. TO THE EXTENT, <i>ARGUENDO</i> , THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERRED IN CONSTRUING IT RIPE FOR ENFORCEMENT.	
A. The Trial Court Improperly Construed the Alleged Settlement by Ignoring Specific Language Bargained for by the Parties which was Reversible Error.....	13
B. The Trial Court's Construction of the Settlement Creates a Manifest Absurdity which was Error.....	17
C. The Trial Court's Construction of the Alleged Settlement Rendered Performance Impossible and was Error.....	18
IV. TO THE EXTENT, <i>ARGUENDO</i> , THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERRED GRANTING SPECIFIC PERFORMANCE AS RESPONDENT, WHO BORE THE BURDEN OF PROOF, FAILED TO MEET HER BURDEN.....	18
A. The Trial Court Erred 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.....	20

B.	The Trial Court Erred when it Ruled for Respondent when the only Evidence offered by Respondent was Impermissible Hearsay.....	24
C.	The Trial Court Erred by Accepting Hearsay and Non-Existent Evidence, and Refusing Competent Evidence.....	26
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 OR NO CONTRACT.....	28
	Conclusion	30

TABLE OF AUTHORITIES

CASES

<i>American Fed. Bank v. Kateman</i> , 335 S.C. 273, 516 S.E.2d 1 (Ct.App.1999).....	9
<i>Bowen v. Lee Process Systems Co.</i> , 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000).....	6, 8, 9, 11
<i>County of Greenville v. Mann</i> , 556 S.E.2d 383, 347 S.C. 427 (2001).....	9
<i>Harris-Jenkins v. Nissan Car Mart, Inc.</i> , 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001).....	7
<i>H. C. Shackelford v. Walpole</i> , 259 S.C. 611, 193 S.E.2d 541 (1972).....	12
<i>In Re Shaun R.</i> , 188 Cal.App.4th 1129, 116 Cal.Rptr.3d 84, 10 Cal. Daily Op. Serv. 12, 658 (Cal. App.,2011).....	9, 10
<i>In re Sheena K.</i> , 40 Cal.4th at p. 890, 55 Cal.Rptr.3d 716, 153 P.3d 282 (2007).....	9
<i>In re Vora</i> , 354 S.C. 590, 582 S.E.2d 413 (2003).....	28, 29
<i>Jones v. Bates</i> , 241 S.C. 189, 127 S.E.2d 618 (1962).....	18
<i>Landmark Frederick v. Heim</i> , 493 S.W. 2d 343 (Mo.App. S.D. 1997).....	7, 8
<i>Livingston v. Union Cent. Life Ins. Co. Of Cincinnati</i> , 120 S.C. 93, 112 S.E. 547 (1922).....	17
<i>McKeen v. St. Louis County</i> , 964 S.W.2d 470 (Mo.App.E.D., 1998).....	7
<i>Pathway Financial V. Schade</i> , 793 S.W.2d 464 (Mo. App. 1990).....	7
<i>Patricia Grand Hotel v. Macguire Ent.</i> , 372 S.C. 634, 643 S.E.2d 692, 698 (Ct. App., 2007).....	11, 18, 27
<i>Pee Dee Stores, Inc., v. Doyle</i> , 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2008).....	7
<i>Pennington v. Pennington</i> , 89 S.C. 277, 71 S.E. 825 (1911).....	19
<i>People v. Bostic</i> , 10 Misc 3d 775, 807 N.Y.S.2d 280, 2005 NY Slip Op 25510 (N.Y. Dist. Ct., 2005).....	9
<i>Savannah Bank & Trust Co. of Savannah v. Shuman</i> , 250 S.C. 344, 157 S.E.2d 864 (1967).....	13
<i>State v. Burroughs</i> , 328 S.C. 489, 492 S.E.2d 408 (Ct. App., 1997).....	24
<i>Wates v. Fairfield Forest Prod.S Co Inc</i> , 210 S.C. 319, 42 S.E.2d 529 (1947).....	13

<i>Welchel v. Boyter</i> , 260 S.C. 418, 196 S.E.2d 496, 498 (1973).....	9
<i>Woodson v. DLI Props, LLC</i> , 406 S.C. 517, 735 S.E.2d 428 (2014).....	6

RULES

SCRCP 12.....	6
SCRCP 56.....	6
SCRCP 52(1).....	6, 7, 8
SCRCP 52(3).....	6, 8
SCRE 801(d)(2).....	11, 24, 25
SCRE 802.....	27

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 CONSTRUING 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 10 March 2015, Respondent filed this action against Appellant over a boundary dispute between the parties' properties. The matter was submitted to mediation, and ostensibly a settlement was reached at mediation. The alleged settlement was contingent. On 22 February 2016, the Respondent filed a motion to compel the alleged settlement. A hearing was held on the matter. Subsequent to the hearing, and based on information which came out at the hearing, Appellant moved the court for a full evidentiary hearing on the question of whether there was a meeting of the minds and an actual settlement. The court ignored the motion, and ruled by Form 4 Order for the Respondent. A timely motion for reconsideration was filed, and the trial court again ignored the outstanding motion, upheld its earlier order, and dismissed the action. Appellant appealed.

FACTS

Appellant and Respondent are neighbors within the same subdivision.

Both Appellant's and Respondent's properties are covered by certain covenants and restrictions which are recorded and set forth in the Beaufort County Register of Deeds at Deeds at Book No.: 1262, at Page No.: 553. (R. (App'x.), p. 114, pp. 116-145.)

Among these covenants and restrictions, the following easements are created, to wit:

Section 7.6 Easement Across Adjacent Residential Lot.

The proximity of the Homesites to the Lot line necessitates the entry into adjacent Lots by Property Owners for the purpose of maintaining their own Homesites and landscaping. By Acceptance of a Deed, each Owner of a Lot (for purposes of this Section 7.6, "Servient Lot") grants the adjacent Property Owner whose Homesite runs within five feet of the Lot's common boundary line (for purposes Of this Section 7.6. "Dominant Lot"), a maintenance easement which shall run parallel to and five feet inside of the Lot's common boundary lines. This maintenance easement is to permit the maintenance and repair of the Homesite and landscaping on the Dominant Lot, and to permit reasonable water runoff and general drainage for the Dominant Lot, but for no other purpose. Therefore, this five foot deep maintenance easement shall extend in length only along the

distance of the Homesite plus five additional feet on each end of the Homesite, and this maintenance easement shall not extend along the entire distance of the common boundary line. All use of this easement shall be in a reasonable manner and at reasonable hours. Any dispute regarding the exercise of such easement rights shall be settled by decision of the Declarant, its successors and assigns. Any damage caused to the Servient Lot or Homesite thereon by use of this easement by the Owner of the Dominant Lot, shall be repaired or replaced at the expense of the Owner of the Dominant Lot.

and

Section 7.7 Easements for Eaves Landscaping and other Projections.

Due to the proximity of the Homesites to the Lot lines the eaves and other similar projections of some Homesites or garages may encroach upon adjacent lots. Therefore, the Declarant hereby reserves for purpose of this Section 7.7, The "Servient ; lot", by Acceptance of a Deed, grants to the Owner of each adjacent Lot (for purposes of this Section 7.7., the "Dominant Lot" a perpetual easement over such portions of each Servient Lot as is necessary to accommodate the eaves, landscaping and other similar projections as originally constructed by the Declarant to permit the existence of such encroachments. The easement granted hereby, however shall not intrude more than three feet into any Servient Lot. In the event of destruction of the Homesite on the Dominant Lot, the easement granted hereby shall permit the eaves and other similar projections of any replacement Homesite constructed on the Dominant lot in Accordance with this Declaration to encroach upon the adjacent Servient Lot to the same extent as the Homesite originally constructed on the Dominant Lot by the Declarant. (R. (App'x.), p. 145.)

Appellant and Respondent entered into a dispute over the lot line between their respective properties, and this suit was filed in regard to that matter. (R. p. 100-102).

Appellant and Respondent held mediation pursuant to court rules, and a contingent settlement was believed to have been reached, though subsequent events have cast doubt as to whether or not the parties actually had a meeting of the minds. (*Id.*)

The alleged settlement requires Appellant to "extinguish" the above two easements, and any other easements which his property, as the dominant estate, may have over the Respondent's property. It also required Appellant to prepare and deliver a deed to Respondent conveying fee to all property north of a new property line. (*Id.*, at Para. 3.) The alleged settlement also requires Respondent to convey a one foot wide strip to Appellant pursuant to a prepared plat. (*Id.*, at

Para. 1.) The alleged settlement also requires Respondent to build a fence on the new lot line.

(*Id.*, at Para. 2.)

The alleged settlement is wholly contingent and expressly states that:

The entire agreement is contingent and subject to approval by the governing boards of the Picket Fences POA or Board of Review or any other appropriate authority that may be required to approve the above items 1, 2 & 3. (*Id.*, at Para. 4.)

Prior to the initiation of this action, the Appellant granted a mortgage to Bank of America on his property which is attached as Exhibit 2 to his affidavit. (R. (App'x), p. 114, and exhibits thereto pp. 116-145.)

After the mediation, the Court dismissed the action on 12 February 2016 by Form 4 Order.

On 22 February 2016, during the time that the case was dismissed, the Respondent filed a motion to enforce the settlement allegedly reached during the mediation. (R. p. 6-7.)

At the time Respondent filed her motion to enforce the settlement, by her own admission, none of the contingencies predicate to enforcement of the settlement had been satisfied. (R. 104, Paras. 7-12.)

On 3 March 2016, the Respondent moved to restore the case to the docket. On that same date, a consent order was entered restoring the case to the active roster. (R. p. 5.)

A hearing was scheduled on the Motion to Enforce which was filed subsequent to the case being dismissed, and prior to it being restored to the docket.

At the hearing of the Respondent's motion to enforce the settlement, argument of counsel for the Respondent appeared to suggest that the parties may legitimately have failed to have had a meeting of the minds. (See generally transcript (R. pp. 68-97) in which counsel argued that the understanding had by Appellant at the time of the execution, as to which he testified in his

affidavit, was not the understanding had by Respondent or her counsel at the time of the execution.)

None of the pleadings or three affidavits submitted by Respondent prior to the hearing suggested that there was a question of whether there was a meeting of the minds in regard to the alleged settlement.

None of the affidavits before the Court demonstrated that all of the contingencies predicate for settlement had been satisfied; and to the contrary, one of the affidavits affirmatively demonstrated that not all of the contingencies had been satisfied, to wit, Bank of America (as mortgagee) approval of the settlement, and HOA approval of the fence placement. (R. (App'x.), p. 148, Para. 10, and p. 115, Para. 8.)

As to the other contingencies, Respondent testified by affidavit, proffering hearsay testimony to which a timely objection was made, that the HOA's attorney had opined that the HOA could approve the settlement, but failed to testify that the HOA ever did actually approve the settlement. (R. p. 110, Para 7.) Respondent never submitted testimony that any authority, much less the HOA ever approved the fence placement.

Prior to the trial court ruling on the Respondent's motion to enforce the settlement, Appellant moved the court for limited discovery on the question of whether there was a meeting of the minds, based on Respondent's arguments at the hearing on matter, and also for a hearing on the issue of contract / no contract, or in this instance, settlement / no settlement, and to hold the ruling on Respondent's motion to enforce in abeyance. (See R. p. 27-36.) The trial court ignored this motion, and issued its form order on Respondent's motion to enforce with no findings of fact or analysis of the case or the law, ultimately granting the Respondent's motion. The order stated that it did not terminate the case. (R. p. 1)

Appellant timely moved for reconsideration, again asking the trial court to address the Appellant's outstanding motion. (See R. p. 37-48.) The trial court, without hearing on the motion, summarily dismissed the motion for reconsideration. This dismissal stated that it did terminate the action. The trial court noted briefly in the order that the dismissal mooted the Appellant's motion, which again was never heard or considered by the trial court. (See R. p. 3) The Appellant appealed.

DISCUSSION

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

The trial court entered two Form 4 orders. (R. pp. 1-4.) Neither order contains any findings of fact. Neither order contains any conclusions of law. This Honorable Court, in the case of *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App., 2000) explained in very rational detail the dangers and pitfalls of such empty Form 4 orders. In *Bowen*, the issue dealt expressly with summary judgments. *Bowen* was overruled in *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014) because of express language in SCRCP 52 relating to summary judgment motions, which states that “[t]he court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56” SCRCP 52(3). The same provision goes on to say that it is not necessary for a trial court to state findings or conclusions for “any other motion” unless the “**rules provide otherwise...**” *Id.* (Emphasis added). What was before the trial court in this case was a **motion** to compel settlement. Therefore, it would initially appear to be excluded from any requirement for specific findings of fact or conclusions of law because it was a **motion**.

However, in this instance, the “rules provide otherwise.” SCRCP 52(1) states that

In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

When one considers the nature of the motion before the court, it becomes manifest that it is “an action tried on facts without a jury... ;” and as such, under SCRCP 52(1), the court must have presented findings of fact and conclusions of law which it did not.

While South Carolina has not specifically dissected the cause of action, its sister courts have. Citing *Pathway Financial v. Schade*, 793 S.W.2d 464, 469 (Mo.App.1990), the Missouri Court of Appeals noted that “[a]lthough there is no rule defining the process for enforcing an agreement settling a pending case, one court-approved procedural device is a motion to enforce settlement.” *McKean v. St. Louis County*, 964 S.W.2d 470, 471 (Mo. App. E.D., 1998). “A motion to compel settlement, in effect, adds to a pending action a collateral action for specific performance of the settlement agreement.” *Landmark Frederick v. Heim*, 943 S.W.2d 343, 347 (Mo.App. S.D.1997). Therefore, while the motion filed by Respondent may nominally have been a motion, it is *de facto* a collateral cause of action which must be “tried upon the facts.”

Under South Carolina jurisprudence, settlement agreements are viewed as contracts. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App., 2001). Thus, the “enforcement of the terms of a settlement agreement is a matter of contract law.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 672 S.E.2d 799, 802, (Ct. App., 2008). Therefore, in an action to compel a settlement, whether it is called by the name of a motion or otherwise, a party seeking compulsion adds “a collateral action for specific performance”¹ of the settlement agreement. This collateral action must be enforced in accordance with South Carolina

¹ *Landmark Frederick*, 943 S.W.2d at 347.

contract law. Under South Carolina contract law, the trial court was required to have the Respondent prove her case, which meant to establish at a minimum that there was a contract, or a valid meeting of the minds which was supported by full fair and valuable consideration; and that the agreement was ripe for execution at that time and without unsatisfied contingencies. This contract action is a “collateral **action**” which the trial court “tried on the facts without a jury...”² As a result, it unambiguously falls under the mandate of SCRCP 52(1) which requires detailed findings of fact and conclusions of law, and not under SCRCP 52(3) which generally exempts motions. This is particularly so in light of the fact that subsection 3 only exempts motions which are not covered by other parts of the Rules. This motion, because of its *oyer et terminer* nature, is clearly covered by subsection 1.

Although *Bowen* was overruled in regard to summary judgments, it is still applicable to non-summary judgment motions otherwise excluded from SCRCP 52(3) by virtue of SCRCP 52(1). The *Bowen* Court quite correctly reasoned that

an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function. *Bowen*, 342 S.C. at 235-36, 536 S.E.2d at 87-88.

The trial court's Form 4 orders completely fail to provide this Honorable Court with facts and accompanying legal analysis sufficient to permit meaningful appellate review. Accordingly, the Court should remand the deficient orders to the trial court for action in accordance with SCRCP 52(1) as set forth in *Bowen* and elsewhere in the law of this State.

² SCRCP 52(1).

II. THE TRIAL COURT ERRED IN ISSUING A VAGUE ORDER IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

The Fourteenth Amendment of the United States Constitution prevents any state, including a court of any state, from taking a person's life, liberty or property without due process of law. This same protection is included in § 3 of Article I of the South Carolina Constitution. While the well-known due process doctrine of vagueness is generally applicable to statutes or legislative enactments, it is equally applicable to the orders of a court. See generally, *In re Shaun R.*, 188 Cal.App. 1129, 116 Cal.Rptr.3d 84, 10 Cal. Daily Op. Serv. 12, 658 (Cal. App., 2011). See 4th also, *People v. Bostic*, 10 Misc 3d 775, 807 N.Y.S.2d 280, 2005 NY Slip Op 25510 (N.Y. Dist. Ct., 2005) (Clearly demonstrates that an order of a court is subject to due process and that vagueness violates the same.) “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’” *In re Sheena K.*, 40 Cal.4th at p. 890, 55 Cal.Rptr.3d 716, 153 P.3d 282 (2007). In South Carolina it is well-settled that a person may not be compelled to obey an ambiguous order. See generally *Welchel v. Boyter*, 260 S.C. 418, 196 S.E.2d 496, 498 (1973); *American Fed. Bank v. Kateman*, 335 S.C. 273, 516 S.E.2d 1 (Ct.App.1999); and *County of Greenville v. Mann*, 556 S.E.2d 383, 347 S.C. 427 (2001). (These cases focus on vague orders being enforced through contempt, but establish the premise that due process precludes enforcement of vague orders.)

“The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’... protections that are embodied in the due process clauses of the federal and California Constitutions.” *In re Shaun R.*, 188 Cal.App. 1129, 116 Cal.Rptr.3d 84, 10 Cal. Daily Op. Serv. 12, 658. To the extent that the trial court issued an order enforcing the alleged settlement, the trial court was under a duty to

specifically direct the Appellant as to what he should do, or what he should refrain from doing. However, in this case, the only thing that the order states is that “Plaintiff’s motion to enforce the settlement, heard by this Court on March 30, 2016, is hereby granted.” Merely saying that the court was granting the motion is simply not enough to satisfy the mandates of due process under the circumstances. If the trial court is compelling the Appellant to do something, the Appellant is entitled to be specifically instructed as to what he should or should not do as his failure to comply would leave him subject to contempt of court.

The defective order cannot be salvaged by looking outside of it to the motion itself to supply the conduct Appellant is expected to perform or refrain from performing. The only thing the motion seeks is an “Order enforcing the settlement reached February 5, 2016, and further, awarding Plaintiff Attorney’s Fees; and other costs associated with the enforcement of the settlement reached on February 5, 2016.” (See R. p. 6-7.) The motion does not specifically request any specific course of action to be performed or to be restrained. There was a lot of talk about quitclaims in her affidavits and at the hearing. Of course the settlement itself does not mention the word “quitclaim.” Is Appellant to give a quitclaim under the order in question? The motion asked for attorneys’ fees. The order granted the Respondent’s motion. Did it grant attorneys’ fees, and if so, how much? The motion also requested costs. Did the trial court’s order include such an award? None of these questions can be ascertained by examining the order. It is facially ambiguous and vague.

Due process of law mandates that in a specific performance case, and specific performance of the alleged settlement is what was being sought by the Respondent, if the court awards specific performance, the court must let the party charged with such performance know precisely what he or she is to do. However, the order in this case is clearly vague and ambiguous

and does not in any way, shape or form specify what the court is mandating Appellant to perform or refrain from doing. As such, the order is violative of the South Carolina and United States constitutional due process clauses, and must be vacated.

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

It will be demonstrated, *infra*, that there is real question, which was raised without notice by Respondent at the hearing on the matter, that there was not a meeting of the minds and possibly no settlement was reached. That matter was never fully addressed as the trial court refused to even consider Appellant's request to address the matter. However, assuming, *arguendo*, that there was a valid settlement agreement, the trial court erred in construing it ripe for enforcement.

There can be no question that the agreement was wholly contingent. It says so on its face. (R. p. 101, Para. 4.) It is a party admission against the Respondent under SCRE 801(d)(2). (R. p. 104, Para. 8 where she admits the agreement is "tentative," etc.) The parties dispute what the contingencies are. However, under South Carolina law, when an agreement is contingent, it is axiomatic that the contingency must be satisfied before it can be enforced. See e.g. *H. C. Shackelford v. Walpole*, 259 S.C. 611, 193 S.E.2d 541 (1972). A settlement agreement is fundamentally nothing more than a contract between the parties. "[T]he circuit court's role in determining the actual terms of the settlement agreement between the parties is similar to the court's role in interpreting the terms of a contract. In interpreting contracts, the court should ascertain and give legal effect to the parties' intentions." *Patricia Grand Hotel v. Macguire Ent.*, 372 S.C. 634, 643 S.E.2d 692, 698 (Ct. App., 2007).

The contingency in the alleged "contract" in this case expressly states in whole:

The entire agreement is contingent and subject to approval by the governing boards of the Picket Fences POA or Board of Review or any other appropriate authority that may be required to approve the above items 1, 2 & 3. (R. p. 104, Para. 4.)(Emphasis added).

Not only is there a contingency to the agreement, by its express terms “[t]he **entire** agreement is contingent” *Id.* The “above items 1, 2 & 3” referenced in that provision are respectively: that (1) the Respondent was to grant a one foot wide strip of land to the Appellant; (2) the Respondent would build a fence along the new property line in accordance with the HOA covenants, restrictions and guidelines; and, (3) the Appellant would “extinguish” an easement on the north side of the property line and would quitclaim the area north of the new property line. The contingency is that all of these actions would be approved by certain authorities. Until all necessary approvals for all three conditions have been given, no party was or is obligated to perform any part or portion of the alleged settlement by its own terms.³

The difference of minds in this case between Respondent and Appellant is whose approval is needed to satisfy the contingency. The Respondent asserts that it is only the “governing boards of the Picket Fences POA or Board of Review... .” The Appellant asserts that the provision is much broader, and that by its express terms, there may be an “other appropriate authority that may be required to approve the above items 1, 2 & 3.”

As *Bowman* has shown, it is difficult for an Appellant to demonstrate error when a trial court fails to give the parties and the reviewing court a recitation of the facts on which it relied, and an analysis of those facts with the law it determined to be applicable. However, in this case, the Appellant can demonstrate: (1) that there was no evidence before the trial court which would support the trial court’s conclusion, and (2) can further demonstrate to this Honorable Court that from the **admissible** evidence presented to the trial court, this Court should determine that the

³³ “**The entire agreement** is contingent” (R. p. 104, Para. 4.)(Emphasis added)

trial court erred, and that the alleged settlement agreement is not ripe for enforcement assuming, *arguendo*, that it is a binding agreement at all.

A. The Trial Court Improperly Construed the Alleged Settlement by Ignoring Specific Language Bargained for by the Parties which was Reversible Error.

The Respondent has taken the position that from the inception of the agreement, the only authorities necessary to approve the three contingencies in paragraph 4 are the Picket Fences POA or Board of Review. The trial court apparently agreed, despite as demonstrated, *infra*, that there was no competent or admissible evidence before the trial court to establish that even the Picket Fences POA or Board of Review had approved **all three** contingent conditions of the settlement. However, to reach that conclusion, the trial court had to completely ignore and reject an entire independent clause from the single sentence which constituted paragraph 4 of the alleged agreement. This improper construction changed the meaning of the bargain of the parties, and is reversible error.

The Respondent's position, and the trial court's ruling, is negated by both common sense and the express language of the alleged agreement. If the POA or Board of Review were the **only** authorities necessary to approve the three elements of the settlement, then it begs the question of why the parties included the language "or **any other** appropriate authority that may be required to approve the above items 1, 2 & 3." (R. p. 104, Para. 4.)(Emphasis added). This intentionally-included language is completely superfluous and unnecessary under Respondent's construction. Moreover, if the POA or Board of Review were the only authorities the parties contemplated approval from, this intentionally-included language was mere surplussage from the inception of the agreement.

However, it is an axiomatic principle of contractual, statutory and testamentary construction that a construction which gives effect to all of the language of an instrument or statute, and does not reduce any language to mere surplusage, is favored over a construction that reduces portions of the contractual language to meaningless surplusage. See .e.g. *Wates v. Fairfield Forest Prod.S Co Inc*, 210 S.C. 319, 42 S.E.2d 529 (1947). See also, *Savannah Bank & Trust Co. of Savannah v. Shuman*, 250 S.C. 344, 157 S.E.2d 864 (1967).

Appellant, on the other hand, argues that the language has practical and apparent meaning under the circumstances, and at the same time gives application and effect to **all** of the language set forth in the alleged settlement. If the Court presumes, as it should, that the parties intentionally included the language in question for a reason, the reason becomes clear. The parties had been in a protracted mediation. As Appellant testified to the trial court in his affidavit:

When I executed the settlement, I did not know what parties would be necessary to legally make the terms come into being. I suspected that there may be third parties whose consent was necessary, and whom we have been overlooking at the mediation. I agreed to the settlement contingent upon any party's consent necessary to approve its terms. Since then, I have been told by three attorneys that to "extinguish the liens" in question, the consent of the mortgage holder is necessary and that I cannot unilaterally do so. ((R. (App'x.), pp. 147-148, para 9).

At the hearing, Respondent was precluded from introducing the negotiations or portions thereof from the mediation. However, nothing prevented the Respondent from testifying **as to what she subjectively understood the provision meant at the time she executed the document.**⁴ She was only precluded from offering statements taken from the mediation. Although she submitted three affidavits, the Respondent presented no testimony contradicting the Appellant's assertion in his affidavit, which she could have done.

⁴ As will be demonstrated, *infra*, this silence likely stems from the realization which apparently came to all parties at the hearing that there may not have been a meeting of the minds at the mediation in that one party anticipated one thing and the other another altogether.

Parol evidence is inadmissible to alter the terms of a contract, but it is admissible to explain it. Respondent gave no testimony on the matter leaving the trial court with one, and only one, explanation of what the phrase “or any other appropriate authority that may be required to approve the above items 1, 2 & 3,” means. Yet the court disregarded the explanation, and also disregarded over a third of the language in the sentence as being mere surplusage. This in turn disregarded the only reading which gives credence to **all** of the language in the sentence, and which makes sense under the circumstances.

The parties had an exhausting mediation session. They reached a general accord but one that could not be approved by them alone. They needed, at a minimum, the approval of the HOA for purposes of altering property lines and abandoning easements contained in the covenants. However, that did not mean that there were no other authorities necessary to accomplish what they wanted. Suppose there was a county ordinance affecting lot size which would control, and of which the parties had no knowledge at the mediation? Surely the approval of the County would be necessary to accomplish their goal would it not? It is obvious that the parties wanted to make the agreement contingent upon approval of any person or entity necessary to conclusively effect all three provisions to prevent a third party interloper coming in at a later date and wrecking the deal.

In this case, under the **undisputed** facts, Bank of America was such a third party. Bank of America had a mortgage on the Appellant’s property. (R. (App’x), p. 114, Paras. 3 & 4 and pp. 122-144.) The *habendum* of the mortgage instrument clearly mortgages not only the fee, but any “easements and appurtenances.” The easement which Appellant is required to extinguish is unquestionably an appurtenant easement. As a result, Appellant **cannot unilaterally** extinguish the easement which was previously mortgaged to Bank of America. It can certainly be done

with Bank of America's consent, but a quitclaim of the easement which has a mortgage attached to it without such consent does not effectively **extinguish** the easement. It would still remain in favor of Bank of America even if Appellant were to quitclaim it.

This distinction is important for the Court seize. The terms of the alleged settlement do not require Appellant to "quitclaim" the deed as Respondent casually asserts. In fact, the alleged settlement does not contain the term quitclaim. On the contrary, it goes past quitclaiming or deeding the easements, it mandates that the Appellant "**extinguish**" the easements. The trial court has ignored the contingency of Bank of America's approval, but at the same time, ostensibly ordered Appellant to extinguish the easement by granting Respondent's motion to enforce the settlement. Because Bank of America has not consented, the easement **cannot be extinguished** by quitclaim, deed or otherwise unilaterally by Appellant. A proper reading under the circumstances demonstrates that all of the language in the alleged settlement should have been given effect. If it had, it would be very clear that Bank of America is another party necessary to effect the extinguishment of the easement, and because Bank of America's approval was not in hand, the trial court erred dramatically in concluding the alleged settlement was ripe for enforcement. Such error prejudicially perverted the intent of the parties, and must be reversed.

B. The Trial Court's Construction of the Settlement Creates a Manifest Absurdity which was Error.

Not only does the trial court's construction reduce bargained-for language to mere surplussage, its construction creates a manifest absurdity. The stated goal of the parties in the alleged settlement was to "extinguish the easement." Again assuming for the moment, *arguendo*, a meeting of the minds, the parties' stated goal can only be construed to mean that the parties wanted the easements in question to completely go away – to be eradicated – to no longer

exist. If the goal were to extinguish the easement in question, and if Bank of America's approval is necessary under the law to accomplish such an "extinguishment," it is absurd to read the provision as not envisioning Bank of America as an "other appropriate authority that may be required to approve the above items 1, 2 & 3." Constructions which result in an absurdity are not favored under South Carolina law. See e.g. *Livingston v. Union Cent. Life Ins. Co. Of Cincinnati*, 120 S.C. 93, 112 S.E. 547 (1922). Again, this absurdity becomes unambiguously manifest when one looks at precisely what the alleged settlement requires Appellant to do. Appellant is not merely required to quitclaim the easement to Respondent. The alleged settlement states that "the Defendants [sic] shall **extinguish all rights to any easements** that may exist to the north of the new property line. ..." (R. p. 101.) (Emphasis added). He can only do this with the approval Bank of America. Therefore, Bank of America is an "other appropriate authority that may be required to approve the above items 1, 2 & 3." Bank of America has not approved. Therefore, the contingency had not been met. Consequently, the trial court erred in ordering the settlement ripe for enforcement, and because the trial court prejudicially perverted the intent of the parties, it should be reversed.

**C. The Trial Court's Construction of the Alleged Settlement
Rendered Performance Impossible and was Error**

Similar to the doctrine of absurdity, the trial court's improper construction raises the applicability of the doctrine of impossibility. If Bank of America is a mortgage holder over the appurtenance of the easement Respondent seeks to have extinguished, then extinguishment cannot be had without Bank of America's approval. If Bank of America's approval has not been had, and it has not, Appellant **cannot** perform his duty to extinguish it under the alleged settlement. In other words, until the mortgagee of this "easement or appurtenance" approves of the settlement, the Appellant's unilateral performance is impossible. "If a party by his contract

charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by an act of God, the law, or other party.” *Jones v. Bates*, 241 S.C. 189, 127 S.E.2d 618 (1962). This situation is quite different from subjective impossibility, as the ability of the parties in this case to legally and effectually extinguish the easement is wholly dependent upon Bank of America, a non-involved third party, without whose consent Appellant cannot perform due to impossibility. Therefore, even if the trial court, *arguendo*, correctly concluded that Bank of America was not a party whose approval was necessary under the **alleged settlement**, it is very clear that the absence of its approval has rendered “extinguishment impossible,” and the trial court should be reversed.

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

Assuming, *arguendo*, that there was some way this Honorable Court could determine that the trial court was correct in construing the alleged settlement ripe for enforcement and that Bank of America’s approval was not necessary, the trial court still erred in concluding that the Respondent demonstrated entitlement to enforcement.

In this case, the Respondent moved the court to enforce an alleged settlement agreement. Enforcements of settlement agreements are adjudicated as contracts in South Carolina for all intents and purposes. *Patricia Grand Hotel*, 372 S.C. at 643, S.E.2d at 698. In a contract action, as the proponent of enforcement, Respondent bore the burden of demonstrating an agreement, its terms, a meeting of the minds and valuable consideration. In addition, because the alleged settlement is expressly contingent, she bore the burden of demonstrating that the contingency had been met. If one examines all of the evidence submitted to the trial court, which consists solely

of the affidavits of the Appellant and Respondent with attachments, one can clearly see that she has failed to establish, by competent proof, the burden that the law placed upon her.

As addressed in detail above, and incorporated herein, the alleged “contract” in this case expressly was contingent. Assuming, *arguendo*, that the express language of the alleged settlement is ignored, and that an irrational result could be applied, and that Bank of America’s approval were not necessary, the Respondent still bore the burden of demonstrating that she had approval from the HOA or Board of Review to: grant a one foot wide strip of land to the Appellant; to build a fence along the new property line in accordance with the HOA covenants, restrictions and guidelines; and, for Appellant to “extinguish” the easement on the north side and deed the area north of the new property line. Respondent failed to introduce any competent evidence upon which the court could underpin its decision.

A. The Trial Court Erred 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.

Assuming Respondent’s construction of whose approval was required, if the contingencies had not been satisfied as of the time the trial court ruled upon the matter, the agreement was not ripe for enforcement. No competent evidence was introduced to establish that approval was given at any time on **all** contingencies predicate to enforcement.

The Respondent had the burden of demonstrating that she was entitled to have the alleged settlement enforced. See *Pennington v. Pennington*, 89 S.C. 277, 71 S.E. 825 (1911).⁵ In this case, at a minimum, the Respondent, was required to demonstrate that the express and

⁵ In *Pennington*, the Court held that the proponent of specific enforcement to convey upon an oral contract required that the proponent demonstrate in court by competent evidence that full payment had been tendered. Full payment in that case was a prerequisite or contingency which must have been met for the law to compel the conveyance. *Pennington* clearly demonstrates that when there is a contingency to an agreement, whether imposed by law or by the parties themselves, that the proponent must demonstrate to the Court that the contingency had been met.

unambiguous contingency of paragraph 4 had been met. The Respondent presented three affidavits to the trial court. What is most concerning is that Respondent's own affidavits demonstrates that none of the contingencies were met at the time she brought the motion to compel which demonstrates bad faith *ab initio*. In one she testified:

7. Presently, Picket Fences governing structure is run and controlled by D. R. Horton, the community's builder. This structure includes their management agency – Gold Crown Management – and their board which regulates and rules on all covenant matters. This board is called the Architectural Review Board (ARB). Presently, this board is comprised of D.R. Horton appointees who are also employees of D.R.Horton.

8. The **tentative** settlement agreement between George Sakakini and myself requires Picket Fences to agree to the following three (3) stipulations: That Dr. Kinghorn may deed a piece of her property to Dr. Sakakini; that the present easement rights Dr. Sakakini has on Dr. Kinghorn's property will cease; and that Dr. Kinghorn is given permission to build a fence along the property boundary. According to the community's covenants, a ruling by the ARB is required on all three (3) of these matters.

9. In April 2016 D.R. Horton will be turning the community over to the homeowners and leaving Picket Fences. Presently, the homeowners have no organization or structure to shoulder the governance of our community except for a transition committee that was formed only a week ago (February 15th).

10. D.R. Horton's ARB typically takes 4-5 weeks to make a ruling on any homeowners requests. D.R. Horton will leave Picket Fences in six weeks.

11. I believe that whatever the new homeowners' governing structure is formed will take a minimum of nine (9) to twelve (12) months before they are ready to review and rule on the three (3) matters having to do with Dr. Sakakini's and my **tentative** settlement.

12. I am, therefore, asking this Court to hear this Motion on an emergency basis so **that the existing governance at Picket Fences can confirm on this settlement.** (R. p. 104.) (All emphasis added).

This is critically important. The Respondent herself admits twice that the agreement is "tentative" and not ripe for execution **because the POA Board had not approved all three contingencies.** Since the Respondent has unambiguously admitted she was not entitled to have the agreement enforced at the time she brought her motion to enforce it, it automatically

raises the issue of bad faith, However, putting that aside, it leaves the question of whether the Respondent submitted competent evidence to demonstrate that she later became entitled to enforcement; i.e. she had acquired approval of all three contingencies from the HOA? The second question relates to whether this court in its *de novo* review should consider the bad faith and unclean hands of Respondent as a bar? The second question will be addressed, *infra*.

In regard to this question, the Respondent submitted a follow-on affidavit to the Court. This affidavit, dated 3 March 2016 states:

3. On February 17, 2016, I received correspondence from Picket Fences HOA, advising me that they had been contacted by Dr. Sakakini who told them he objected to the settlement agreement, and he instructed them not to act on the three matters which Mr. Graber and I had requested they rule on: the fence, the transfer of Kinghorn property, and the extinguishing of easement rights. **Because of Dr. Sakakini's objections, Ms. Dubois at the HOA office told me they would not go forward with any ruling.** (R. p. 109, Para 3. (Underlined emphasis in the original, emboldened emphasis added.)

Thus, all hearsay matters aside for the moment, on 3 March 2016, the Respondent still testified to the trial court that the three **mandatory** contingencies set forth in paragraph 4 of the alleged settlement have **not been satisfied** as of 3 March. Later in the same affidavit, she testified that

7. On February 29th, 2016, both I and Mr. Graber called LaShea Dubois. She concurred that the Picket Fences' lawyer, Mr. Ryan Oates, had advised Picket Fences management that they could proceed with the approval process. (*Id.*, at p. 110, Para 3.)

Again, hearsay issues aside, which will be addressed *infra*, it is quite clear that the attorney advising the HOA that they could act is a far cry from evidence of the HOA actually acting, and it was the latter which was the contingency that must have been met. Therefore, if there were any evidence to support the trial court's conclusion that the alleged settlement was ripe for enforcement, such evidence must have come in the third and final affidavit of Respondent.

In her final 22 March 2016 affidavit, Respondent asserts “Approval for the property line adjustment has come from the Picket Fences Home Owner’s Association.” (R. p. 112, Para 5.)

Then she repeated that

6. On or about February 25, 2016 the attorney representing the Picket Fences HOA, Ryan Oates, wrote a letter to LeShea Dubois, the Community Manager, approving the proposed quitclaim deed from George Sakakini to myself. (R. p. 113, Para 6.)

This Honorable Court must keep in mind that the alleged settlement had **three** contingencies, **all of which** had to have been met before the agreement became enforceable. Respondent alleges that the HOA approved the property line adjustment. Therefore, for purposes of the alleged settlement, to the extent that it was a settlement at all, the trial court had some evidence before it that **one** of the three contingencies had been met.

If her hearsay statement that the Picket Fences lawyer’s letter to the Community manager “approving the proposed quitclaim” is tantamount to “approval by the governing boards of the Picket Fences POA or Board of Review or any other appropriate authority that may be required to approve the above items 1, 2 & 3,” then there is some evidence of that contingency being approved.⁶ However, even if the Court could contort itself to the degree the trial court did to overlook the Respondent’s failure to submit proper evidence, it cannot be overlooked that just as her first two affidavits never addressed the third contingency, her third and final one never mentioned it either. The Respondent never even alluded to the fact that the HOA approved the

⁶ Of course such is for argument’s sake. That element was not proved with competent admissible evidence. The alleged settlement did not require that the lawyer for the HOA approve a quitclaim deed. The alleged settlement required the “the governing boards of the Picket Fences POA or Board of Review or any other appropriate authority” to approve the extinguishment of an easement and a grant. There is no evidence in the case file that the HOA ever took action on the lawyer’s legal opinion. Secondly, even if the attorney did approve of the quitclaim, there is no evidence in the case file to suggest that the HOA ever acceded to the easement being extinguished. It was the Respondent’s duty to demonstrate that the contingencies of the agreement had been satisfied, and she failed to establish that the HOA or other appropriate authority ever approved the extinguishment of the lien.

fence, which was one of three contingencies to have been met, **all of which must have first occurred before the alleged settlement was ripe for enforcement.**

In summary, all Respondent's evidence in support of the motion came in three affidavits. In the first one, she admits that none of the contingencies in Paragraph 4 of the alleged settlement had occurred. In the second hearsay-laden affidavit, she indicates that the HOA had still not approved any of the three contingencies, but claimed it was Appellant's fault. In the final affidavit, she says one contingency has been met, and the POA lawyer advising the POA that the quitclaim deeds was sufficient was close enough for the trial court to disregard the alleged settlement's mandate that the HOA itself actually approve the extinguishment of the easement. She makes no reference whatsoever to the third contingency in any of her affidavits – fence approval. Respondent failed to meet her burden of proof of establishing the removal of all three contingencies, and as a result, there was no evidence before the court which would support: (1) a finding for Respondent; and (2) specific enforcement of an expressly contingent agreement. The trial court committed error and must be reversed.

B. The Trial Court Erred when it Ruled for Respondent when the only Evidence offered by Respondent was Impermissible Hearsay.

As demonstrated above, the trial court did not have evidence before it that **all** three contingencies of the alleged settlement had been met at the time it issued its order. Testimony was not taken, and therefore the only documentation or evidence before the Court were the three affidavits of the Respondent. If it is determined somehow, despite the gaping evidentiary void demonstrated above, that some evidence was introduced to support the Respondent's burden of demonstrating entitlement to enforcement, the inquiry shifts from the question of the existence of

such evidence to the quality, nature and admissibility of such evidence. Timely objections were made to the evidence challenged herein.

While the Appellant acknowledges that a statement made by a party opponent is exempted from the definition of hearsay under SCRE 801(d)(2) as an admission by a party opponent, so much of Respondent's testimony alleges that "so and so" told her that the party opponent said "such and such." The party opponent saying "such and such" is not hearsay, but when the affiant is testifying that she did not hear the party opponent say "such and such" but it was reported to her through a non-party, then the matter moves into the question of hearsay within hearsay. It is only admissible if every part is not hearsay or is excepted from the hearsay rule. See *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App., 1997). An example of how rife the Respondent's affidavits are with impermissible hearsay can be found in a couple of the allegations. In her 3 March 2016 affidavit, the Respondent testified as follows:

3. On February 17, 2016, I received correspondence from Picket Fences HOA, advising me that they had been contacted by Dr. Sakakini who told them he objected to the settlement agreement, and he instructed them not to act on the three matters which Mr. Graber and I had requested they rule on: the fence, the transfer of Kinghorn property, and the extinguishing of easement rights. Because of Dr. Sakakini's objections, Ms. Dubois at the HOA office told me they would not go forward with any ruling. (R. p. 109, Para 3.) (Underlined emphasis in the original.)

In this case, the person to whom the party opponent allegedly made the statement was Picket Fences HOA. Had they, and not Respondent, testified as such in the affidavit, there would be no question that the statement was not hearsay. However, Respondent testified about something she heard from the Picket Fences HOA, which was not a party opponent. That statement was not covered by SCRE 801(d)(2). Parenthetically, anything Ms. Dubois told her about going forward

or not going forward is wholly inadmissible hearsay and never was an admission. This is again true in her 22 February 2016 Affidavit at Paragraph 6

6. On or about February 17, 2016 I received an email from Lashea Dubois, Community Manager, Gold Crown Management saying, in part, “the Association is in receipt of a request from the homeowner you were involved with in this agreement that he would like to re-enter negotiations with you and your attorney about this matter. Because of this request I have put a halt to the Association’s involvement until both of you reach an agreement.....” (R. p. 103-104).

While the statement from the “homeowner you were involved with may have been covered by SCRE 801(d)(2), the email from Lashea Dubois, and **all of its content**, was impermissible hearsay.

Similarly she alleged “[o]n February 2016, Dr. Sakakini told David Gasque not to perform the survey that was agreed to in the Settlement agreement... .” The same is found in paragraph 7 of that affidavit

7. On February 29th, 2016, both I and Mr. Graber called LaShea Dubois. She concurred that the Picket Fences’ lawyer, Mr. Ryan Oates, had advised Picket Fences management that they could proceed with the approval process. (R. p. 110, Para 3.)

This has no party admissions in it and is complete hearsay. In the 3 March Affidavit, the Respondent’s allegations 2,⁷ 3,⁸ 4,⁹ 5,¹⁰ 6,¹¹ 7,¹² & 8¹³ are filled with hearsay. Therefore, of this one affidavit seven of the eight allegations were complete and inadmissible hearsay and the

⁷ Respondent testifying as to what party opponent said to Mr. Gasque when she was not present.

⁸ As outlined in the body of the argument.

⁹ Multiple hearsay in which Respondent attempts to testify as to a conversation between her lawyer and Appellant’s lawyer when she was not present.

¹⁰ Respondent attempting to testify about a conversation between Appellant and LaShea Dubois to which she was not a party based solely on Dubois’ statements to her and not a statement she heard from Appellant.

¹¹ Allegation 6 is particularly egregious because the declarant is none other than the Respondent’s own attorney and not a party opponent.

¹² Allegation 7 was outlined in detail in the body of the argument.

¹³ Allegation 8 again demonstrates Respondent attempting to testify as to out of court statement not of a party opponent, but of Ms. Dubois who is not a party, who purports to be representing something that the Appellant said. Of course Respondent was not a party to that conversation and had no first-hand knowledge of the conversation at all.

eighth was not even relevant to the motion issue at hand. If the trial court relied upon this affidavit, the trial court relied wholly upon hearsay and inadmissible hearsay at that. It was not only error, but as this hearsay was the only evidence proffered that the contingencies had been met, it was prejudicial error which must be reversed.

The Respondent's 22 March 2016 affidavit is worse. (R. pp. 112-113.) It only contains one allegation based wholly on inadmissible hearsay – allegation 6. The problem is that other than allegation 5, none of the other allegations even reference the contingencies of the alleged settlement and allegation 5 only references one of the three contingencies. Of course the Court will recollect from above, that the first affidavit saw the Respondent admitting that the contingencies had not been met. In summary, a judgment which was not supported by any competent admissible evidence is an abuse of discretion and is reversible. The trial court had no non-hearsay evidence before it to sustain its conclusion assuming one reaches the far-fetched conclusion that the trial court had **any** evidence before it establishing that approval of **all** contingencies had been had.

C. The Trial Court Erred by Accepting Hearsay and Non-Existent Evidence, and Refusing Competent Evidence.

While it has been demonstrated above that the Respondent failed to meet her burden of demonstrating to the trial court that she was entitled to enforcement of the alleged settlement by competent evidence, it should be noted that the trial court completely disregarded testimony which demonstrated that the three contingencies, as construed even by Respondent, had not been satisfied.

Separate and apart from the question of whether Bank of America was a party necessary to approve the three contingencies, in rebuttal to the hearsay testimony of Respondent, to which Appellant timely objected, the Appellant testified to the court in his affidavit that the manager of

the HOA informed him that the Respondent did not have HOA approval for the fence as of 29 March 2016.¹⁴ (R. (App'x.), p. 148, para 10.)

The error of the trial court is manifest. It readily accepted inadmissible hearsay over the prohibition in SCRE 802, and unreasonably and prejudicially disregarded competent testimony which was bolstered by the evidence of the case. None of Respondent's three affidavits ever make the assertion that the POA or Board of Review approved the fence. As this matter is being reviewed by this Honorable Court *de novo* as it is a review of an equitable order of specific performance, this Honorable Court may reject the inadmissible evidence offered by the Respondent, and accept the admissible evidence demonstrating that the HOA had not approved the fence, which was one of three approvals that were mandatory under the alleged agreement.

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 SETTLEMENT OR NO SETTLEMENT.

As more fully cited in the Facts, *supra*, the trial court heard the Respondent's motion to compel the alleged settlement. The Respondent raised no question as to the issue of whether there was a meeting of the minds in the motion or in her affidavits. However, when the parties argued their motions, Respondent's argument was very indicative that she and the Appellant had intended two separate and distinct things when they entered into the alleged agreement. Had Respondent made a timely dispute of Appellant's position prior to the hearing of the matter, Appellant would have raised the matter earlier, as it is axiomatic that under South Carolina law, a settlement agreement is subject to the same strictures as a contract, and that a meeting of the minds is absolutely critical. *Patricia Grand Hotel*, 372 S.C. at 643, S.E.2d at 698.

¹⁴ Such testimony is not hearsay inasmuch as it was not offered to prove the truth of the matter asserted, but to rebut the Respondent's proposition that she was entitled to have the agreement enforced at that time.

When for the first time, Respondent raised the specter of a possible failure of a meeting of the minds, Appellant immediately filed a motion to take discovery and hold a hearing on the issue of settlement or no settlement prior to the trial court rendering its decision on the Respondent's motion to compel. Thereafter, without any action on the Appellant's motion, the trial court awarded the relief Respondent sought in the initial order being appealed. When asked to reconsider, the court did not reconsider and dismissed the action stating that its original holding had mooted the motion.

Due process under the South Carolina and United States Constitutions, requires the court to give party litigants procedural due process, and while both the South Carolina and United States Supreme Courts have held that procedural due process is not technical, "at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413 (2003).

On 23 March 2016, the Appellant served Respondent with a copy of his Memorandum in Opposition to Compel. In that Memorandum, he clearly states that the Appellant's position was that Bank of America was a necessary approval authority. (See R. pp. 8-19) Respondent's Motion to Compel Settlement said nothing about the position of Respondent being that the only approval authorities necessary to satisfy the contingency were the Picket Fences POA. In fact, as shown above, her affidavit demonstrates that she was not claiming relief on the basis of the express contingencies having been satisfied, but as a matter of convenience as she wanted one Board of Review to handle it rather than another. (R. p. 104, Paras. 7-12.) Again, Respondent's blatant bad faith aside, in her 3 March 2016 affidavit, Respondent noted (parenthetically again, more inadmissible hearsay) that "[o]n February 29th, Mr. Graber told me that he'd learned that

Dr. Sakakini was claiming that the settlement was void because Dr. Sakakini's mortgage lender had not been a party to the settlement." (R. p. 110, Para. 6.) Other than this, nowhere prior to the hearing on the matter did Respondent give Appellant formal notice that she was challenging his position that Bank of America was a necessary party. Her motion demonstrates that she did not care who was a necessary approval party, including the POA or Board of Review as she openly admitted she did not have their approval at the time she sought to compel the Appellant. Appellant had no due process notice that Respondent was challenging his position that he had served upon her. As soon as the question arose, he filed a motion to be heard on it as the Court was not taking testimony at the hearing of the Respondent's motion to compel.

Because Appellant had no notice that Respondent would claim that the POA and Board of Review were the **only** approval authorities necessary, he did not have notice of a possible failure of a meeting of the minds. Once he was given notice of the challenge, he was entitled to be heard on the matter, and he requested to be heard on the matter.

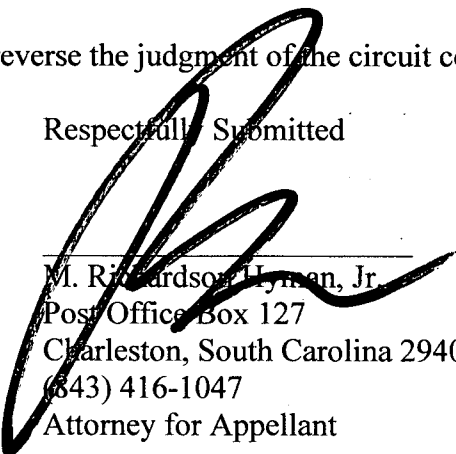
However, the trial court denied Appellant due process on his motion. It was filed prior to any order in the case. The trial court completely ignored the motion and never gave the Appellant the right to introduce evidence on the topic or be heard on the topic, and compelled the settlement without even determining whether there was a meeting of the minds. This violated the last three requirements of *Vora*: "(2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Accordingly, as procedural due process was denied to Appellant, the decision of the trial court should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully Submitted

2 February 2017

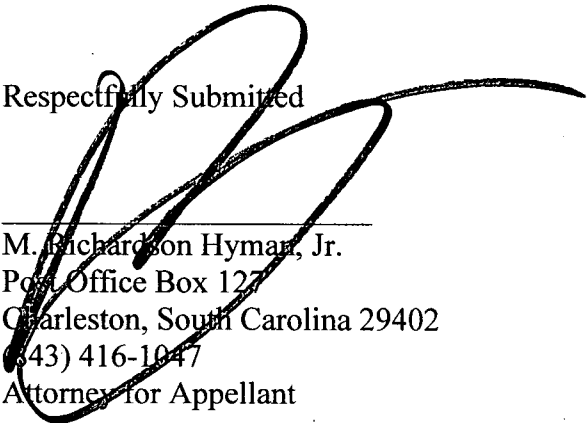


M. Richardson Lynne, Jr.
Post Office Box 127
Charleston, South Carolina 29402
(843) 416-1047
Attorney for Appellant

I certify that my final brief(s) are in compliance with SCRAP 211.

2 February 2017

Respectfully Submitted



M. Richardson Hyman, Jr.
Post Office Box 127
Charleston, South Carolina 29402
(843) 416-1047
Attorney for Appellant

RECEIVED

FEB 07 2017

SC Court of Appeals

RECEIVED

FEB 07 2017

SC Court of Appeals