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. Case No. 2016-001278

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

v.

George Sakakini, — Appellant.

RECORD ON APPEAL

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

C. Scott Graber
605 Carteret Street
Beaufort, South Carolina 29902
(843) 524 8204
Attorney for Respondent

INDEX

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015CP0700597

Mildred Anne Kinghorn
PLAINTIFF(S)

George C. Sakakini
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's motion to enforce the settlement, heard by this Court on March 30, 2016, is hereby granted.

2016 APR 22 PM 1:05
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2142
Judge Code

4-18-16
Date

SCRCP Form 4C (03/2013)

000001

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of April, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of April, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

C. Scott Graber 605 Carteret Street Beaufort, SC 29902

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gregory M. Galvin PO Box 887 Bluffton, SC 29910

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT STAFF

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015CP0700597

Mildred Anne Kinghorn

PLAINTIFF(S)

2016 MAY 23 AM 10:57

George C. Sakakini

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Defendant's Motion for Reconsideration is hereby denied without a hearing. Defendant's Motion for Limited Discovery is therefore rendered moot.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2142
Judge Code

5/24/16
Date

SCRCP Form 4C (03/2013)

000003

For Clerk of Court Office Use Only

This judgment was entered on the 25 day of May, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 26 day of May, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

C. Scott Graber 605 Carteret Street Beaufort, SC 29902

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Melissa Heard
Judicial Clerk

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

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

Plaintiff,

-versus-

GEORGE C. SAKAKINI,

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-07- 00597

2015 MAR -3 P 2:03

CONSENT ORDER

THIS MATTER CAME BEFORE ME, as a result of a Motion filed by C. Scott Graber, attorney for Plaintiff, and consented-to b y Greg Galvin, attorney for Defendant.

For good cause shown the case titled Mildred Anne Kinghorn as Trustee for the Mildred Anne Kinghorn Trust dated April 28, 2004 v. George C. Sakakini, having case #2015-CP-07-00597 is restored to the Court of Common Pleas for the Fourteenth Judicial Circuit.

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.

IT IS SO ORDERED

Carmen Mullen
Resident Judge for the 14th Judicial Circuit

I SO MOVE

C. Scott Graber, Attorney for Plaintiff

I CONSENT

Gregory Galvin, Attorney for Defendant

000005

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION N0 2015-CP-07- 00597

☑ MILDRED ANNE KINGHORN AS TRUSTEE FORTHE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004,
Plaintiffs,
vs.

☐ GEORGE C. SAKAKINI,
Defendants.

MOTION INFORMATION FORM AND COVER SHEET

check box above indicating submitting party

name, S.C. Bar no. and address of Plaintiff's attorney	name, S.C. Bar no. and address of Defendant's attorney
C. Scott Graber S.C. Bar No. 2193 605 Carteret Street Beaufort, SC 29902 telephone: 843-524-8204: 843-524-2354 e-mail: scgraber@islc.net	Gregory Galvin, Esquire Galvin Law Group Post Office Box 887 Bluffton, SC 29910

FILED
2016 FEB 22 PM 4:21
BEAUFORT COUNTY, S.C.

☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information
Nature of Motion: Motion to Enforce Settlement Agreement dated 2/5/2016
Estimate Time Needed: 30 minutes Court Reporter Needed: YES / NO

SECTION II: Motion Type
☑ Written motion attached.
☐ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant Date submitted 2/22/16

SECTION III: Motion Fee
☑ PAID - AMOUNT: $25.00
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status
- ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed Order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter:_____
- ☐ Other:

JUDGE'S SECTION
☐ Motion fee to be paid upon filing attached order.
☐ Other

JUDGE
CODE: Date:

CLERK'S VERIFICATION
Collected by: _____
(print name)
DATE FILED
☐ MOTION FEE COLLECTED:
☐ CONTESTED - AMOUNT DUE:

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004, Plaintiff, -versus- GEORGE C. SAKAKINI, Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2015-CP-07- 00597 NOTICE OF MOTION AND MOTION TO ENFORCE SETTLEMENT BETWEEN PLAINTIFF AND DEFENDANT DATED 2/5/2016

TO: GREG GALVIN, ESQUIRE ATTORNEY FOR DEFENDANT

PLEASE TAKE NOTICE that Plaintiff, by and through its attorney C., Scott Graber, will move before the Honorable Carmen Mullen, Resident Judge for the Fourteenth judicial Circuit, in her Chambers in the Beaufort County Courthouse; or the Honorable Marvin Dukes; or whomever is appointed to hear Motions in Beaufort County; ten (10) days after service of this Notice of Motion and Motion, for 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.

This Motion is based upon the attached Affidavit; Alternative Dispute Resolution Rules; Rule 43(k) of the South Carolina Rules of Civil Procedure and a Memorandum of Authorities that shall be prepared and filed with the Court.

Respectfully Submitted,

C. Scott Graber, Esquire
605 Carteret Street
Beaufort, SC 29902
843-524-8204

February 22, 2016
Beaufort, South Carolina

000007

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT)	CASE NO.: 2015-CP-07-597
MILDRED ANN KINGHORN AS)	
TRUSTEE FOR THE MILDRED)	
ANN KINGHORN TRUST, dated)	
28 April 2004,)	
)	
Plaintiff,)	MEMORANDUM IN OPPOSITION TO
)	PLAINTIFF'S MOTION TO COMPEL
vs.)	SETTLEMENT
)	
GEORGE C. SAKAKINI,)	
)	
Defendant.)	
)	

TO: C. SCOTT GRABER, ESQUIRE, Attorney for the Plaintiff

COMES NOW YOUR DEFENDANT, and would respectfully submit to this Honorable Court, based on the law and facts are argued and set forth herein, that at this time, the Plaintiff's motion is not ripe for adjudication as Plaintiff has failed to meet an express condition precedent for enforcement as set forth in the agreement.

FACTS

Plaintiff and Defendant are neighbors within the same subdivision. (See generally parties' pleadings. See also Affidavit of George Sakakini, M.D.)

Plaintiff and Defendant entered into a dispute over the lot line between their respected properties and this suit was filed in regard to that topic. (See generally parties' pleadings. See also Affidavit of George Sakakini, M.D.)

Plaintiff and Defendant held mediation pursuant to court rules and a contingent settlement was reached. (See Settlement at Exhibit A to Affidavit of George Sakakini, M.D. See

also Affidavit of Mildred Kinghorn, para 5, on file with this Honorable Court and incorporated herein by reference.)

Both Plaintiff's and Defendant's properties are covered by certain covenants and restrictions set forth in the Beaufort County Register of Deeds at Deeds at Book No.: 1262 at Page No.: 553.

The Defendant granted a mortgage to Bank of America on his property, which is attached Exhibit 2 to the accompanying affidavit of George Sakakini.

Because Plaintiff has failed to seek approval from Bank of America, a necessary party for approval as demonstrated herein, (1) Defendant is separately moving this Honorable Court for leave to name Bank of America as a party to this action (S.C.R.E. 201, Adjudicative Fact before the Court in this Case File) and (2) Defendant is not entitled to enforce the settlement at this time.

DISCUSSION

The Plaintiff's motion not only presupposes an enforceable contract in the settlement agreement, it further presupposes that the settlement agreement is ripe for enforcement. However, in this case, such presuppositions are the compass coordinates toward the road to perdition.

A settlement agreement is fundamentally nothing more than a contract between the parties. *Patricia Grand Hotel v. Macguire Ent.*, 372 S.C. 634, 643 S.E.2d 692 (Ct. App., 2007). "[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." *Id.* 643 S.E.2d at 698. Therefore, for the moment, the court and the parties may indulge in Plaintiff's

presupposition that there is a valid and enforceable agreement between the parties to be enforced (subject to the counterargument below). The established canons and maxims of contractual construction shall be applicable to the Court's adjudication of the request.

A settlement which is contingent in nature must see the contingency met before it can be enforced. See e.g. *H. C. Shackelford v. Walpole*, 259 S.C. 611, 193 S.E.2d 541 (1972). The observance of the contingency is a condition precedent to enforcement. *Id.* The settlement which Plaintiff seeks to enforce is contingent, and its contingencies have not been met. Plaintiff's motion is not ripe at this time, and Plaintiff is not entitled to enforcement of the judgment at this time, notwithstanding the fact that Defendant is ready willing and able to comply with his legal obligations should such contingency bet met in the future.

"Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App.2004). See also *Heins v. Heins,* 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App. 2001). In the event of an unambiguous contract, it is the language of the contract and the language of the contract alone, without any outside reference, which controls the construction. *Id.*

In this case, the Settlement itself predicates its enforceability upon "approval by the governing board 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.**" (Settlement Agreement, page 2, para. 4, Exhibit to Affidavit of Plaintiff). By the express language of the Settlement which Plaintiff seeks to have enforced, the agreement is "contingent,"[1] and the contingency that must be met is that there be approval by any authority necessary to approve (1)

[1] See Settlement agreement at para 4, "[t]he entire agreement shall be contingent... ."

the Plaintiff building a fence along the lot line between the parties' properties;[2] and (2) Defendant extinguishing "all rights to any easements that may exist north of the new property line."[3] The new property line is defined by the Settlement as being one additional foot of land granted by Plaintiff to Defendant over the platted property line as heretofore alleged by Plaintiff. (Settlement Agreement, page 1, para. 1).

As the Plaintiff has sought to compel enforcement of the Agreement, before granting such motion to the Plaintiff, this Honorable Court must examine the sufficiency of the Plaintiff's prayer to determine whether or not the contingency, upon which the agreement is expressly predicated, has been met. In this case, as a matter of discrete law it has not. That is certainly not to say that it will not be at some point in time, but as of the date of the Plaintiff's motion, and to the knowledge of the undersigned, as of the date of this memorandum, it has not been met.

Defendant has a mortgage on his property which abuts Plaintiff's property. The mortgagee is Bank of America NA.[4] At the time of the mortgage of the Defendant's property to Bank of America, the subdivision in which both the Plaintiff's and Defendant's respective properties lie have certain covenants and restrictions which are recorded at the Beaufort County Register of Deeds.[5]

The covenants and restrictions state that there is an automatic easement between the properties of the subdivision, which naturally includes the Plaintiff's and Defendant's adjoining properties of lots 43 and 44. Bank of America took a mortgage based on all easements of record, which includes the recorded easement contained in the covenants and restrictions. The easement

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[2] Settlement Agreement, page 2, para. 2.
[3] Settlement Agreement, page 2, para. 3.
[4] S.C.R.E. 201 the Court may take judicial notice of the recorded mortgage. It, and its content, are exempted from the hearsay rule under S.C.R.E. 803(8), (14) & (15). No further authentication is required as the instrument is self-authenticating under S.C.R.E. 902(8). C.f. South Carolina Code, Annotated § 12-24-110. See also Affidavit of Defendant.
[5] *Id.*

favored Defendant or created a dominant estate in Defendant's fee and a servient estate in Plaintiff's. The easement rights of the dominant estate were included in the fee mortgage taken by Bank of America.

The relevant covenants and restrictions create, among others, two easements. They are clearly appurtenant, but ultimately it matters not whether they are appurtenant or not. The first easement states:

> 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.

The second easement contained in the Covenants and Restrictions states:

> 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.

Bank of America, as mortgagee, took a mortgage which encompassed these particular easements; and thus, Bank of America has a legally protected right in these easements as a lienholder. It is axiomatic in South Carolina that a fee owner may not grant a portion or all of a fee; or encumber or charge a portion of a fee; or grant the rights in or appurtenant to a fee without the express consent of any lienholder of record thereto. In summary, Bank of America is a necessary party to this action for a complete and final adjudication under SCRCP 19. As a result, Bank of America is an "**other appropriate authority that [must] be required to approve the above items 1, 2, & 3.**" (Settlement Agreement, page 2, para. 4)(Paraphrased and Emphasis Added).

Under the law, BoA is a necessary party for approval. Under the unambiguous language of the agreement, that parties knew very well that there may be other parties whose consent was necessary to effect the terms of the agreement. That is why they added the language to "Picket Fences POA or Board of Review" "**or any other appropriate authority that may be required to approve the above items 1, 2, & 3.**" By the plain language of the settlement which Plaintiff would now try to repudiate, the listing of the Picket Fences POA or Board of Review as well as using the disjunctive "or" other authority, shows without the slightest hint of ambiguity that the parties, including the Plaintiff contemplated that there may be other authorities whose requirement may be necessary to carry out the parties intent.

Most assuredly, under the law, the consent of a mortgage holder of record is absolutely necessary to extinguish a lien on the mortgaged property. 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 to approve items 1 through 3 of the settlement. If their approval

is not had, then Defendant is under no contractual or other obligation to execute **any portion of the settlement**.

AN AMBIGUOUS AGREEMENT WOULD STILL BE CONSTRUED IN FAVOR OF DEFENDANT

In the event that there is ambiguity in a contract, the Court must then resort to ascertaining the parties' intent by the use of standard and accepted canons and maxims of contractual construction. "[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Carolina Ceramics, Inc. v. Carolina Pipeline Co.,* 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968). Defendant would argue that the agreement is not ambiguous by this definition. The parties anticipated that they would need approval of "the Picket Fences POA or Board of Review" and that they may very well be other "appropriate authorit[ies]" whose approval would be necessary and that is the end of the matter. However, even if the provision were ambiguous, the agreement would still be construed in favor of Defendant.

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 surplussage is favored over a construction that reduces portions of the language to meaningless surplussage. 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).

If the Court accepts the Plaintiff's argument that the parties only intended the POA to approve the settlement and that POA approval, and that alone, satisfies the contingency of the contract, then the Court must also reduce the following language to surplussage - "or any other appropriate authority that may be required to approve the above items 1, 2, & 3." In other words,

if the Picket Fences POA or Board of Review were the only authority necessary to approve the settlement, then it was wholly arbitrary and superfluous of the parties to add language about approval authorities who were not the Picket Fences POA or Board of Review. Yet they did so, and the only conclusion that the Court can reach, without considering impermissible materials and extraneous matter which would involve a trial on the agreement, is that the parties did anticipate that other parties may be necessary for approval of the agreement. As a matter of law, Bank of America has a mortgage interest in the easements that are to be extinguished and is a party whose consent is mandatory to extinguish the easements. Therefore, even if the provision were ambiguous, it must still be resolved in favor of Defendant.

In regard to ambiguity, the Court should also consider whether to adopt an interpretation that would, from its inception, give rise to third party liability to one or both of the parties to the settlement. If Plaintiff's construction is accurate, then Defendant knowingly gave away Bank of America's rights which he could not do, the mere attempt of which could throw him into foreclosure. Such a reading would create an absurdity, and a construction that creates an absurdity is not favored. See e.g. *Livingston v. Union Cent. Life Ins. Co. Of Cincinnati,* 120 S.C. 93, 112 S.E. 547 (1922).

Lastly, the Court should consider that a construction of the agreement which does not include the consent of BoA frustrates the stated purpose of the agreement. The Agreement states that their intent was to "extinguish all rights to any easements that may exist north of the property line... ." As shown above, Defendant cannot, as a matter of law, extinguish the mortgagee's rights in the easements without the mortgagee's permission. Thus, it naturally follows that Defendant alone could not, at the time of the execution of the agreement,

unilaterally comply with that provision. Therefore, the only construction which would allow for the complete extinguishment of the easements in question is that proffered by Defendant.

PLAINTIFF CANNOT OFFER EVIDENCE TO ALTER THE AGREEMENT

Plaintiff may seek to enter evidence outside of the language of the contract itself to argue that the parties did not intend for the provision referenced above to apply to the easements in question; and therefore BoA is not a party whose consent is necessary. Of course this clearly negates the well-established principle that a mortgage lien holder has a right in the easements of the mortgaged fee which cannot be alienated without the consent of the lienholder. It also negates the fact that the plain language of the settlement states that Defendant is not obligated to execute until all necessary parties have consented. It is possible, if not probable, that Plaintiff may attempt to offer discussions and negotiations from mediation and / or other settlement negotiations to alter the express terms of the agreement.

The first consideration that the Court must take into account is that extraneous evidence is wholly inadmissible in a case such as this where the contract is unambiguous and the Court can give effect to the language used by the parties. *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 363 S.E.2d 235 (Ct. App., 1987). In the event that a contract is ambiguous, in general, extrinsic or parol evidence may be entered to explain, but not alter the terms of the contract. However, such is the general rule, and the general rule must give way to specific rules. See e.g. *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). The rules regarding mediation trump any right to introduce extrinsic evidence.

In the event that Plaintiff attempts to introduce **any** evidence of **any** discussions between **any** party at mediation, the Defendant objects and points out to the Court (1) that a decision in

favor of Plaintiff based on any such evidence is reversible error; and (2) that the introduction of any such evidence, in and of itself is a breach of the mediation by the party making such introduction. (See mediation agreement attached hereto which expressly forbids the same)

South Carolina Rule of Evidence 408 clearly states that not only is evidence of a compromise inadmissible, [e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Furthermore, Rule 8(a) of the South Carolina Rules of Arbitration clearly state that

> 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... .[6]

Even of those rules were not enough, common law, absent rule supports Defendants' position. "The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or otherwise vary a written contract applies not merely to the letter of the written contract, *but also to its legal effect." Buckeye Cotton Oil Co v. Cheraw Ginning Co*, 142 S.C. 247, 140 S.E. 581 (1927) (Emphasis in the original).

More importantly, the parties signed a mediation agreement which was a prerequisite of the agreement Plaintiff seeks to have enforced. The mediation agreement expressly precludes the entry of any information in these proceedings from the mediation. Thus, regardless of how you approach the general rule on extrinsic evidence, Plaintiff is limited to introducing evidence of what she thought she was signing and what she intended the agreement to be. However, as is demonstrated below, such may very well be the basis for an inescapable conclusion that there was and is no agreement at all.

[6] What Plaintiff may propose does not fall into any enumerated exception to Rule 8(a).

IS THERE A VALID SETTLEMENT AGREEMENT

While it is true that Plaintiff cannot introduce evidence from the mediation, even if she did, the relevant question is limited to (1) what was in her mind and (2) what was in the mind of the Defendant at the time the purported agreement was signed. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct.App.2007). Thus, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roof,* 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986).

Therefore, if there is a valid settlement agreement, Plaintiff and Defendant must, at the time of its execution, have understood the same thing about the contingencies involved. Plaintiff's contention about who may have discussed what during mediation, and who may have thought what during mediation or any other time is irrelevant. What is pertinent is what the parties, and only the parties, thought at the time of the execution of the document.

Plaintiff says she believed that the only contingency was that the Picket Fences POA or Board of Review approve the agreement, which is not supported by the additional language the parties used. On the other hand, the Defendant says that he thought that the agreement included not only BoA as a mortgage holder, but also anyone else who may rise with an interest that could affect him or the settlement. Of course his position is bolstered by the proposition that approval was necessary from "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.**"

As stated above, this leads to a construction that only supports Defendant regardless of whether the agreement is ambiguous or not. However, an ironic, but nevertheless inevitable

third conclusion can be reached by the Court – both parties are telling the truth. Plaintiff thought the provision meant one thing and the Defendant thought it meant another. Under the circumstances, the parties never had a meeting of the minds and a settlement agreement never arose.

Of course one only gets to this conclusion if extraneous evidence is erroneously considered, but if it is considered, the only rational conclusion is that despite the legitimate best efforts of all parties to the mediation, it failed to produce a meeting of the minds or yield an enforceable settlement.

CONCLUSION

For the forgoing reasons, the Court is left with one of two conclusions, either the agreement is not enforceable because a contingency has not arisen, or the agreement is not enforceable because there is no agreement because there was no meeting of the minds. Regardless the Plaintiff's motion must be denied and the Defendant should be awarded legal fees and costs of the action.

RESPECTFULLY SUBMITTED

M. Richardson Hyman, Jr.
PO Box 127
Charleston, South Carolina 29402
843 416 1047

Co-Counsel for the Defendant

Charleston, South Carolina

22 March 2016

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004, Plaintiff, -versus- GEORGE C. SAKAKINI, Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2015-CP-07- 00597 BRIEF SUPPORITNG MOTION TO ENFORCE MOTION

THE FACTS

Defendant Sakakini and Plaintiff Kinghorn reached an Agreement on February 5, 2016 which involved the (1) adjustment of the property line between Lots 43 and 44; (2) the placement of a fence atop that adjusted line; and (3) Defendant's execution of a quitclaim deed abandoning a maintenance easement that extended five (5) feet into the Kinghorn yard.

This settlement was reached after a year-long lawsuit therein the Defendant alleged that he owned ten (10) feet of Defendant's twenty (20) foot wide side yard. Defendant based his claim on several acts of adverse possession, for the most part being the mowing of Dr. Kinghorn's grass and the placement of plants and landscaping stones in Dr. Kinghorn's side yard.

Now Defendant Sakakini seeks to overturn the Settlement Agreement, repudiating his promise to sign a quitclaim deed and "abandon" the five (5') foot wide easement that runs into Plaintiff's side yard.

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But prior to this particular repudiation, and immediately after the mediation, Defendant's companion, Clea Efthimiades, utilizing an illegal laser device, attempted to destroy Plaintiff's security cameras. When Plaintiff's attorney called Defendant's attorney notifying him of these efforts, Defendant agreed to stop this activity.

Thereafter on February 16, 2016, he stopped the surveyor (David Gasque) from performing the agreed-to survey. Thereafter, Defendant telephoned Picket Fences HOA repudiating the agreement. Then on or about February 18, 2016, Defendant told his lawyer that he would honor the agreement.

On February 29, 2016, Defendant Sakakini reversed himself again by sending a seven (7) page letter to members of the Architectural Review Board saying (1) the new survey was in accurate; (2) the living fence would bisect existing mulch beds; (3) that there would be no access for pest control operators; (4) that Judge Dukes' Order failed to take into account what happens in his garden; (5) that he had "faithfully maintained the disputed area" for ten (10) years; (6) that his sewer line would be inaccessible for repair. It is important to understand that on February 29, 2016 Dr. Sakakini did not mention an issue with his lender, Bank of America.

Notwithstanding this letter detailing the problems, the HOA approved the various contingencies that were contained in Paragraphs 1-3 of the Settlement Agreement. (See Mildred Kinghorn's Supplementary Affidavit attached hereto.)

Now, Defendant Sakakini makes a different complaint. Defendant now argues that Bank of America has "legally protected rights" in the maintenance easement and the "owner may not grant a portion or all of the fee" without making Bank of America a party. Furthermore, Defendant argues that the approvals required under the Settlement Agreement, namely approval by "Picket Fences POA or Board of Review or any other appropriate authority that maybe

required to approve the above items 1, 2 and 3" clearly and necessarily refer to Bank of America.

Defendant would have the Court believe that he was mistaken about one particular item in the Settlement Agreement. However, his actions show that he was unhappy with the surveyor who was chosen to survey the new boundary. He was unhappy with proposed location of the new fence. He was unhappy with a previous Order (by Judge Dukes) describing the ten (10') foot wide disputed area. He was upset that a portion of his sewer line was located on his neighbor's property. He was unhappy that Plaintiff had installed security cameras on the corners of her house calling them "Peeping Tom" cameras.

Now, Defendant has decided his best opportunity to over-turn the agreement is to say that is was everyone's understanding, everyone's intent, that he get approval from the Bank of America before the Agreement would go into effect. Notwithstanding Rule 8 of the ADR Rules, which requires confidentiality, Defendant says (See Page 11 of Defendant's Brief) the following;

"On the other hand, the Defendant says that he thought that the agreement included not only BoA as a mortgagee holder, but also anyone else who may rise with an interest that could affect settlement."

Defendant then bolsters his "thoughts" on the matter with Paragraph 4 of the Settlement Agreement which says

"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 maybe required to approve the above items 1, 2 and 3.

Now that Defendant Sakakini has gotten his "thoughts" in play, Defendant says;

"the listing of the Picket Fences POA of Board of Review as well as using the disjunctive "or" other authority, shows without the slightest hint of ambiguity that the parties including the Plaintiff contemplated that there may be other authorities whose requirement may be necessary to carry out the parties intent."

RULE 8

Rule 8(a) of the ADR rules says communications during a mediation settlement conference shall be confidential. Rule 8 says that neither the parties nor their lawyers, can later introduce "any oral or written communications" having occurred in a mediation proceeding.

However, Defendant has effectively injected his intent, his thoughts, his belief that he had to go to BoA before executing a "deed conveying any and all rights to the property North of the new property line".

Because of Rule 8, Plaintiff (and everyone else in the room that day) is now foreclosed from stating or repeating what words were spoken about the easement. Neither can the mediator, Mitch Griffith, comment on what was said about the easement. And, of course, Greg Galvin, has been released and is not required to be at the hearing on March 30, 2016. Defendant Sakakini has effectively testified about what was said, or what was not said, and has gotten content and communication from the Mediation in play.

Defendant effectively testifies when he says; "parties knew very well that there may be other parties whose comment was necessary . . . ."

Defendant effectively testifies when he 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 . . ."

Defendant effectively testifies when he says:

"On the other hand, the Defendant thought that the Agreement included not only BOA as the mortgage holder . . . ."

Defendant effectively puts the content and communication of the mediation in play when he says;

"Plaintiff says she believed that the only contingency was that of Picket Fences POA or Board of Review approve the Agreement."

Defendant frames the issue, reveals the beliefs of everyone who was in the room that day. Yet, paradoxically, there is no mention of Bank of America in his letter to the HOA on February 29, 2016 when he catalogued his complaints to the HOA.

DEFENDANT SAKAKINI SAYS PLAINTIFF KINGHORN CANNOT NOW COMMENT ON THE CONTENT OF THE MEDIATION

In the last part of his brief, Defendant Sakakini says "Plaintiff may seek to enter evidence outside the language of the contract to argue that the parties did not intend for the provision referenced above to apply to the easements in question."

Defendant then reminds the Court that Plaintiff cannot introduce any evidence of any discussions between any party at mediation. He cites Rule 8(a) and repeats the part of the Rule for the Court's edification.

> 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 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 . . . .

What Defendant has done here is to tell the Court that Bank of America's approval was intended to be gotten by Defendant Sakakini, but reminds the Court it cannot consider any

testimony to the contrary. Defendant says that he can tell the Court what was intended, but Dr. Kinghorn cannot.

DR. SAKAKINI'S LETTER OF FEBRUARY 29, 2016

It is clear from Dr. Sakakini's letter of February 29, 2016, that he believes the Settlement Agreement is not valid for reasons that had nothing to do with the Bank of America.

Defendant Sakakini complained about the fence in front of his house; the sewer line; the Gasque boundary; about access by pest control people, about Judge Dukes' Order, about security cameras and other items including the legal ability of the "two lawyers" involved.

Not once does he mention the Bank of America. Nowhere in his catalogue of problems does he say that he is required to get approval from the Bank of America before signing the quitclaim deed. None of his complaints include his ability or inability to get approval from Bank of America.

The letter of February 29, 2016, reveals that Dr. Sakakini is unhappy with his decision to sign on February 5, 2016. He is not unhappy that Bank of America is not a party, he is unhappy about the Agreement in its totality. It is clear that he left the Mediation on February 5, 2016 and then had second thoughts.

The Rule regarding second thoughts is clear. If you sign a Settlement Agreement; and your lawyer also signs; then you are bound. 2009 amendment to Rule 43(k); also see page 373, South Carolina Civil Procedure , Third Edition, James F Flanagan. In the past, it was necessary to file the mediation with the Court. That is no longer required. Cheap–O's Truck Stop v. Cloyd, 350 SC 596, 567 SE2nd 514 (Ctr. App 2002).

CONCLUSION

Dr. Sakakini's has attempted to inject his beliefs, and everyone's intent, into these proceedings. Yet, Dr.Sakakini will not allow the introduction of any competing words. He will not allow the Mediator to repeat what was said. Nor will he make his own lawyer available. He intends to control the narrative about what happened on February 5, 2016.

The amendment to Rule 439k) anticipates that people will have second thoughts about what they have done. The 2009 amendment was written to prevent the remorse that usually flows to both parties after they compromise and agree to something less than what they think they are entitled to get.

Plaintiff would ask this Court to enforce the agreement reached between the parties on February 5, 2016.

RESPECTFULLY SUBMITTED,

C. Scott Graber
Attorney for Plaintiff
605 Carteret Street
Beaufort, SC 29902
843-524-8204

Beaufort, South Carolina
March 29, 2016

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT CASE NO.: 2015-CP-07-597
MILDRED ANN KINGHORN AS TRUSTEE FOR THE MILDRED ANN KINGHORN TRUST, dated 28 April 2004, Plaintiff, vs. GEORGE C. SAKAKINI, Defendant.	NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SPECIAL DISCOVERY AND TO SET A SCHEDULING ORDER

NOTICE OF MOTION

TO: C. SCOTT GRABER, ESQUIRE, Attorney for the Plaintiff

YOU WILL PLEASE TAKE NOTICE that the Defendant shall move this Honorable Court, above-styled, on the tenth day hereafter, at the Beaufort County Courthouse located at 102 Ribaut Road, Beaufort, South Carolina 29902, at 10:00 o'clock a.m., or at such time and place as may be convenient to the Court and counsel, for an order regarding special discovery on the issue of contract or no contract and a scheduling order on the issue of contract or no contract regarding the purported settlement of the parties.

MOTION

COMES NOW YOUR DEFENDANT, by and through his attorney of record, and does respectfully move this Honorable Court for an order (1) granting limited discovery to the parties for the purpose of determining whether there was a meeting of the minds as to a settlement in mediation, and (2) to establish a scheduling order thereon and to bring the matter before the court so as to be decided in conjunction with the other outstanding motion, and (3) upon adjudication

of the matter, declaring the settlement not to have been reached by failure of a meeting of the minds.

MEMORANDUM IN SUPPORT OF MOTION

PROCEDURAL BACKGROUND AND STATEMENT

Pursuant to the standing order of the Supreme Court, the above-styled parties mediated the case. Both parties left the mediation assuming that a settlement had been reached between them. In fact, Plaintiff brought a motion to enforce the settlement, which has been argued before the Court but the adjudication of which is still pending. Up until the time of Plaintiff's argument to the Court in furtherance of said motion, Defendant either presumed or assumed the existence of a valid agreement between the parties, the mere construction of which was in question. However, it was the argument at the hearing made by Plaintiff which makes it rather clear that underlying root of the problem is not one of construction, but of a failure of the parties to have had a valid meeting of the minds at mediation.

DISCUSSION

A settlement agreement is fundamentally nothing more than a contract between the parties. See *Patricia Grand Hotel v. Macguire Ent.*, 372 S.C. 634, 643 S.E.2d 692 (Ct. App. 2007). Like all contracts a settlement agreement between litigants arises when there has been an offer, acceptance, meeting of the minds consideration. *Id.* See also *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983). (A Court "does not have the power to impose, in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds.") Moreover, in South Carolina, the rule of law does not permit a contract to arise when only "most" of the material provisions are agreed upon by the parties. The law expressly holds that "in order to have a valid and enforceable contract, there must be a meeting of the minds between

the parties with regard to *all* essential and material terms of the agreement." *Patricia Grand Hotel*, 643 S.E.2d 694. (Emphasis in the original) Accord *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) & *Hughes v. Edwards*, 220 S.E.2d 231, 265 S.C. 529 (1975).

To say that the parties have had some issues with the Settlement is an understatement. The author of this pleading, who was not a party to the mediation, had significant difficulty understanding the Plaintiff's position given the plain language of the instrument. At the hearing, Plaintiff's counsel spent a significant amount of time correctly noting that he could not reveal statements from the mediation, but that Defendant's construction of the settlement was wrong despite that inability. As one reads through the transcript of the hearing, it becomes almost inevitable that the parties did not reach a meeting of the minds as to who the contingent approval authorities were, and who they were not, for the three items enumerated in provision 4 of the alleged settlement. Plaintiff's counsel made much about what was said at mediation. Firstly, as addressed before and below, such statements are barred by multiple rules. However, and equally more importantly, such statements are not relevant to what the parties thought. The reason that transcripts are maintained in a courtroom is that almost every person in the courtroom will leave recalling a slightly different version of what transpired. What is at issue is not what was said in mediation, but what the parties subjectively thought when they executed the agreement. It was only at the hearing that Plaintiff made it clear that she had a different intent when she executed the settlement than did the Defendant.

It is clear that the parties both thought at some point that there was a legitimate contractual binding. Even when the motion to compel was brought, the parties presupposed that there was a contract. Plaintiff's initial filing indicated that he was concerned with the Defendant backing out, which the Defendant was not doing. (The Court will note that the position of the

Defendant prior to the hearing and at the hearing was that the agreement was not ripe for adjudication, and not that there was a basis for voiding it.) The Plaintiff also noted in the letter to the court which accompanied the filing of the motion some issue about the HOA Board changing hands and wanting to expedite the matter because of that. Again, there was no hint to Defendant that Plaintiff challenged the contingency provisions of Article 4.

In fact, at no time prior to the hearing did Plaintiff assert the claim that the agreement was never contingent on anything but the approval of the "governing board of the Picket Fences POA or Board of Review." That specific argument was revealed at the hearing for the first time.

Counsel for Plaintiff stated that

> Dr. Sakakini has put into play events that occurred in the mediation on the 5th. He said that it was in that everybody there, everybody at the mediation, who was there, knew that the Bank of America was now a player, and that he had to go to Bank of America. And if I could he repeatedly says -- defendant -- he says the parties knew very well that there may be other parties whose comment was necessary; Bank of America is precisely the type of other authority, apart from Picket Fences and the Board of Review, that the parties anticipated. (Oral Argument of Counsel, Transcript, p. 13, lines 11-21.)

Of course that is a distortion of the Defendant's position which shall be quickly clarified. As the only thing necessary for a binding agreement to have arisen between the Plaintiff and Defendant at mediation was a meeting of the minds between the two of them, what anyone but the Plaintiff and Dr. Sakakini thought was and is wholly irrelevant.

At the oral argument on the enforcement, the Defendant's position was that it was the language of the agreement itself which was the wholly relevant inquiry and not what everyone thought. This is tremendously ironic as Defendant warned Plaintiff in his memorandum in opposition that going outside of a strict language construction could raise the specter or whether or not there was a meeting of the minds. (Demonstrating Plaintiff's mischaracterization as to his intent). Yet ignoring the admonition, it was Plaintiff's argument at hearing that placed the

parties' subjective mental understandings in question in regard to the settlement agreement. It was thus Plaintiff, who being warned of the danger of such in writing (again parenthetically negating the proposition that it was Defendant's intent to tank the agreement at that time) who proceeded to push the court to look past the plain language of the contract and to illustrate in argument that Dr. Sakakini's interpretation differed violently from his and his client's interpretation. At that moment, the issue of contract or no contract was placed before the court.

The alleged settlement involved the redistribution of property lines, installation of fences, and required the Defendant to extinguish all easements. Defendant clearly states that when he signed the agreement he did not know whose approval would ultimately be necessary to make everything the proposed settlement legal. It could involve his lender, it could involve city or county zoning or other ordinances. From his standpoint, the agreement was to be contingent upon whoever's approval was necessary to effect the agreement, and if that involved Bank of America, the City or County of Beaufort or anyone else, that was the way it would have to be. (See affidavit of George Sakakini filed on 30 March 2016 and incorporated herein by reference). However, the language supports that he anticipated that it would be possible that the approval of others besides the "governing board of the Picket Fences POA or Board of Review" **could,** not necessarily would, but could be necessary. After what all characterized as a marathon mediation, the possibility of the oversight of an approval authority was a material possibility. Which parenthetically explains the inclusion of the language "or any other appropriate authority that may be required to approve the above items 1, 2, & 3." (Settlement Agreement, page 2, para. 4, Exhibit to Affidavit of Plaintiff filed in response to Plaintiff's Motion to Compel Settlement, incorporated by reference herein.).

As counsel for the Plaintiff noted, this is a tricky issue because a myriad of rules preclude the introduction of statements made by the parties at mediation. South Carolina Rule of Evidence 408 clearly states that not only is evidence of a compromise inadmissible, [e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Furthermore, Rule 8(a) of the South Carolina Rules of Arbitration clearly state that

> 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... .[1]

While these rules establish a *per se* bar on admitting evidence as to **communications** made during mediation, they **do not** preclude the parties from testifying as to **what their intent was** when they entered into an agreement.

Despite mischaracterizations made about Defendant at the previous hearing, which were demonstrated to be wholly outside of the boundaries of accuracy by even the Plaintiff's own affidavits and evidence, as well as documents submitted by the Defendant, Dr. Sakakini was more than prepared to go through with the agreement, when what he perceived as a contingency was met, despite the fact that he admits serious "buyer's remorse" over the agreement. Yes, he did tell the surveyor to stop work as Plaintiff stated. Of course what was not told to the court was that he did so because he did not want to pay for the survey if approvals were not given by the requisite authorities.[2] Yes, it did appear that Dr. Sakakini was trying to stop the HOA from acting, until he sent a second email telling them that that was not the case and that he would go

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[1] What Plaintiff may propose does not fall into any enumerated exception to Rule 8(a).
[2] See affidavit of George Sakakini filed on 30 March 2016 and incorporated herein by reference. The Court will also note that Dr. Sakakini was not obligated to get a survey until the contingencies were met.

ahead with the settlement.[3] More importantly, that email which everyone mistook him implying that he was demanding the HOA stop work, which was done shortly after the mediation, shows that he thought that BoA approval was necessary at that time, long before the characterizations of Plaintiff as to when he first raised the issue.[4] Moreover, he had contacted BoA after the mediation and paid for them to do a survey which they said they would require before signing off on the agreement at all. Thus, it is quite clear, that independent evidence demonstrates that right after the mediation, and long before Plaintiff's motion to compel, Dr. Sakakini saw BoA approval as an "other appropriate authority that may be required to approve the above items 1, 2, & 3." Subjectively, that is what was in his mind, and the evidence clearly shows this to be the case.

On the opposite, Dr. Kinghorn has put evidence into the equation which fails to contradict what Dr. Sakakini states was in his mind, but rather demonstrates that at the time of the execution of the proposed settlement, she had a difference mental impression as to what the parties were binding themselves.

Statements made by agents in the scope of agency are admissible against the principals. *Hunter v. Hyder*, 236 S.C. 378, 114 S.E.2d 493 (1960). It is beyond clear that an attorney at law is an agent for his client in litigation. See e.g. *Hecht v. Freisleben*, 5 S.E. 475, 28 S.C. 181 (1888); *Fed. Land Bank Of D.C. v. Ledford*, 194 S.C. 347, 9 S.E.2d 804 (1940); *Shelton v. Bressant*, 312 S.C. 183, 439 S.E.2d 833 (1993); *Shuler v. Crook*, 290 S.C. 538, 351 S.E.2d 862 (1986); *Koutsogiannis v. BB & T*, 616 S.E.2d 425, 365 S.C. 145 (2005). What was said by counsel demonstrates that what Dr. Sakakini thought, was not what Plaintiff thought – and that is all that is at issue here. Was there a meeting of the minds? According to the Plaintiff – no.

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[3] *Id.*

[4] Even as of 17 Feb Dr. Sakakini had put it in writing to third parties that BoA was a necessary approver. See attachment to *id.*

> Dr. Sakakini has come in, and he has said, hey, let me tell you what we all meant. Let me tell you, for example, if I can quote him here, Bank of America is precisely the type of authority, apart from Picket Fences, that the parties anticipated. On the other hand, defendant thought the agreement included not only B.O.A. as the mortgage holder -- in other words, he is communicating to this court, in violation of Rule 8, what was said, what took place in the mediation. (Oral Argument of Counsel, Transcript, p. 14, lines 19-25.)

Obviously, Plaintiff was thinking something other when she entered into the agreement. Her attorney and agent continued arguing (binding her under SCRE 810(d)(2):

> Your Honor, patently unfair. Patently wrong. He's told the Court what was in my mind, what was in his mind, what was in the mind of all the parties. And then, he steps back, and he says, oh, by the way, you can't -- we're not going to let you -- we're not going to let you -- you can't talk; you can't come in and talk. So, I cannot tell you, even though I was in that room, and did the negotiation. I can't tell you what happened, with reference to Bank of America. But I can tell the Court -- I can tell the Court that this mediation went on for hours, and for hours we dealt with this. But he has effectively boxed me in, and said, okay, okay, we talked about this, and it was understood, and everybody knew Bank of America – Bank of America had to sign off; but by the way, Court, you can't get a response from anybody else. So, he's put us in a box. He's put us in a terrible box. I mean, you know, I can't come in here, and I can't comment on it. **The only thing I can tell you was, I was there. I was there the entire time, and I know what those words mean. I know precisely what they mean, but I cannot, as an officer of the Court, violate Rule 8, as Dr. Sakakini has.** (Oral Argument of Counsel, Transcript, p. 15, lines 12-25, p. 16, lines 1-9.) (Emphasis added)

Counsel mistakenly infers that the Rules bar him from having his client say what she thought when she entered the agreement; when all the rules bar is revealing **statements or comments** from mediation. However, what is patently clear from counsel's statement that the Plaintiff and her agent understood something very different from Dr. Sakakini. He does not say what it is, but he certainly makes it clear that they did not enter into the agreement with the understanding proferred by the Defendant.

If the parties misunderstood a contingency which would be a condition precedent to the enforcement of the agreement, there would not be a meeting of the minds and there would not be any agreement at all. Plaintiff's counsel has fundamentally argued that the parties were not only

on two separate pages, but were in two separate playbooks in the formation of this agreement.

It is every bit as likely that the parties are having such a difficult time getting this matter resolved because their expectations were different *ab ibnitio*. Regardless, ultimately, this issue has been placed squarely on the table by Plaintiff in her oral arguments to the court. Discovery on the issue is necessary so that the court can make a determination on the issue of contract or no contract as it cannot enforce the agreement now before it with its existence being called into question. The Defendant's position is that the parties should not be required to conduct full discovery (depositions) on the main issues of the case at this point until the court determines the non-existence of a contract. Absent an order from this court, if the parties were only to give limited inquiry, they would lose their ability to depose fully under SCRCP 30(a)(2). Likewise, there is an motion outstanding which presupposes a contract when the very arguments made a hearing to enforce it overwhelmingly suggest the absence of a contract. Defendant would assert that a scheduling order bringing this matter before the court and deciding it in conjunction with the outstanding motion may yield beneficial economies for the parties and judicial economy for the court.

Wherefore, your humble Defendant prays that this Honorable Court establish a ruling regarding limited discovery on the issue of contract or no contract and establish a scheduling order as set forth herein and adjudicating the validity of the settlement.

M. Richardson Hyman, Jr.
PO Box 127
Charleston, South Carolina 29402
843 416 1047

Counsel for the Defendant

Charleston, South Carolina

11 April 2016

I certify that on this 13 day of April, 2016 I served a copy of the foregoing attached documents on the opposing party by placing copies of the same in the United States Post, with sufficient first class postage attached thereto and properly addressed to said party's counsel of record.

_____

I certify in accordance with SCRCP Rule 11 that
___ prior to filing the motion I communicated, orally or in writing, with opposing counsel and have attempted in good faith to resolve the matter contained in the motion
✓ I certify that consultation would serve no useful purpose, or could not be timely held.

_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2015-CP-07-597
MILDRED ANN KINGHORN AS TRUSTEE FOR THE MILDRED ANN KINGHORN TRUST, dated 28 April 2004,	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND / OR FOR COURT TO ALTER OR AMEND JUDGMENT
vs.	)	
GEORGE C. SAKAKINI,	)	
Defendant.	)	

NOTICE OF MOTION

TO: C. SCOTT GRABER, ESQUIRE, Attorney for the Plaintiff

YOU WILL PLEASE TAKE NOTICE that the Defendant shall move this Honorable Court, above-styled, on the tenth day hereafter, at the Beaufort County Courthouse located at 102 Ribaut Road, Beaufort, South Carolina 29902, at 10:00 o'clock a.m., or at such time and place as may be convenient to the Court and counsel, to reconsider and / or alter or amend its order dated 18 April 2016 and filed 22 April 2016 granting Plaintiff's motion for enforcement of settlement agreement.

MOTION

COMES NOW YOUR DEFENDANT, and would respectfully move this Honorable Court, in accordance with the provisions of SCRCP 59, to reconsider and / or alter or amend its order dated 18 April 2016 and filed 22 April 2016 granting Plaintiff's motion for enforcement as follows:

1. There was a dispute over which entities must approve the contingent provisions of the alleged settlement before it became binding. The Plaintiff said it was only the Picket Fences POA or Board of Review that was necessary to approve. The Court sided with Plaintiff. However, even from the Plaintiff's construction that only POA or Board of Review approval was necessary, the Court's grant of the Plaintiff's motion was still improper and should be vacated.

The evidence in the affidavits submitted was in conflict as to whether all of the HOA contingencies had been met either prior to the filing of the motion or during the motion arguments. The Plaintiff argued that the only entity approvals necessary in this case were the approvals of the "governing board of the Picket Fences POA or Board of Review." The approval was needed for the following, among other things: (1) the Plaintiff building a fence along the lot line between the parties' properties;[1] and (2) Defendant extinguishing "all rights to any easements that may exist north of the new property line."[2] The express language of the alleged agreement states that it is wholly contingent upon approval of these things. The Court cannot compel a contingent settlement unless all of the contingencies have been removed.

A. The Plaintiff asserts that the property line adjustment has been approved by the POA. Affidavit of Plaintiff dated 22 March 2016, para. 5. In para. 7 of the same, she further alleges that the line adjustment and a quitclaim deed have been approved by the POA. However, she does not ever state that she had approval from the POA for the fence in question. Keeping in mind that the fence was one of the contingencies, **all of which must be met before the agreement became binding and enforceable**, it was incumbent upon Plaintiff, as the moving party, to demonstrate to the Court her entitlement to enforcement of the alleged settlement. Thus, it was incumbent upon the Plaintiff to demonstrate that the fence was approved by the

[1] Settlement Agreement, page 2, para. 2.
[2] Settlement Agreement, page 2, para. 3.

POA. She did not do so in any of her submissions to the Court. (Oral argument of counsel without supporting evidence is not sufficient. Even if it were, Counsel for Plaintiff made no affirmative representation that the fence had been approved). As Plaintiff failed to demonstrate she was entitled to enforcement at this time, the Order of the Court was improvident and should be rescinded.

B. As noted above, the Plaintiff failed to demonstrate that the fence was approved by the POA. However, the evidence that was actually submitted shows that it was not. Even Plaintiff admits that the approval of the fence by the POA was an express contingency. The Defendant testified in his affidavit that he had inquired the day prior to the hearing and that the fence had **not** been approved by the POA. Because the only competent evidence at the hearing before the Court, which was not contradicted, was that a mandatory contingency had not been met, the grant of the Plaintiff's motion was improvident and should be vacated.

C. To the extent that the Court found any evidence to support the proposition that the fence contingency had been met, the conflicting evidence should have precluded the court from issuing a summary ruling on the affidavits and warranted a full hearing on the matter in which testimony should have been taken and witnesses could have been called. Defendant did not ask for such because it was clear at the time that Plaintiff was not alleging that the fence had been approved and as such, an evidentiary hearing was not necessary. However, if the Court believes that there was evidence submitted by Plaintiff which indicated that the contingency was satisfied, the Court should have held and evidentiary hearing on the matter in light of the conflicting evidence submitted by Defendant.

2. The uncontroverted facts of the case demonstrate that there were certain contingencies that had to occur before the alleged settlement would become executory. Among

these was approval for a fence between the Plaintiff's and Defendant's properties. Also, the Defendant was to extinguish an easement on the Plaintiff's property, which was an easement appurtenant, and the Plaintiff was to deed a certain amount of land to the Defendant. The alleged settlement expressly states that all three contingencies must be approved by "governing board 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.**" (Emphasis added)

The Defendant's property, the dominant estate, is benefitted by an easement over the Defendant's property. The Defendant's property is also encumbered by a mortgage with Bank of America. As mortgagee, Bank of America has acquired a mortgage interest in the property an all rights and appurtenances, including an appurtenant easement.

Under the alleged settlement, Defendant is not, as Plaintiff alleges, required to quitclaim the easement in question. He is required to extinguish it. With Bank of America holding a mortgage over the fee and its appurtenances, including the appurtenant easement, Bank of America's approval or consent is every bit as necessary as the POA Board's to "extinguish" the lease.

Though Plaintiff argued to the contrary, the express language of the alleged settlement demonstrates that there may be parties, in addition to the POA or Board of Review who would have to give consent. If that were not the case, and it were as Plaintiff argues, then the settlement agreement would have simply said approval of the POA or Board of Review. However, they expressly added "**or any other appropriate authority that may be required to approve the above items 1, 2, & 3.**"

Plaintiff never refuted the fact that Bank of America approval was necessary to "extinguish" the easement. Plaintiff merely argued that Bank of America approval was not a

contingency necessary to enforce the agreement. Though it is not clear why the Court ruled how it did, it is clear that the Court agreed that Bank of America consent was not necessary. This was error. The language clearly indicated that consent was necessary from any other authority necessary to accomplish the three contingencies – one of which being the extinguishment of the easement. The Court should vacate its Order and hold that the contingencies of the alleged settlement have not been satisfied and that enforcement is not ripe at this time.

3. To the extent that it was either necessary or proper to take parol or extrinsic evidence on whether Bank of America was a necessary or "other appropriate authority that may be required to approve the above items 1, 2, & 3," the Court had no competent evidence before it on the matter. Plaintiff's 22 March 2016 affidavit makes many legal conclusions but does not reference whether Bank of America was an "other appropriate authority that may be required to approve the above items 1, 2, & 3," nor does her 3 March affidavit. Likewise, her initial affidavit is silent on the matter. In fact the only references that she made to the question of Bank of America was in paragraph which stated that "[o]n February 29th, Mr. Graber told me that he'd learned that Dr. Sakakini was also claiming that the settlement was void because Dr. Sakakini's mortgage lender had not been a party to the settlement." This is her only reference to Bank of America.

A. To the extent that the Court accepted parol evidence or extraneous evidence on the matter, the Defendant submits the same was error because the Plaintiff's only testimony on the matter was multiple hearsay. If the affiant had been a person to whom Dr. Sakakini had been speaking, then it would be excepted uder SCRE 801(d)(2). However, the affiant heard it from her lawyer ... who to paraphrase the 1980's band R.E.O. Speedwagon, "heard from a friend, who heard it from a friend...." It was inadmissile to support any finding of the court.

B. To the extent that the Court accepted parol evidence or extraneous evidence on the matter, it was error, because the plain language indicates that there were other parties besides the POA or Board of Review who may be necessary to approve. The facts clearly indicate that Bank of America is such an authoruity under the circumstances. Therefore, a plain language reading indicates that Bank of America is a necessary approval authority and there was no need to resport to extrinsic or parol evidence to explain what was meant.

C. To the extent that the Court accepted parol evidence or extraneous evidence on the matter, the Defendant submits the same was error because the Plaintiff's only testimony on the matter merely references the issue. It does not address it one way or the other. On the contrary, the clear and unambiguous testimony of Defendant, was that

> 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 may 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.

Nothing was offered to contradict this. While Plaintiff was precluded from talking about what was said at mediation, she was not precluded from proffering testimony, to the extent that it was admissible, as to what she thought the phrase in question meant. She declined to do so. As the only competent evidence on the question was from Defendant, and was not negated or rebutted by the Plaintiff, the Court's conclusion was improvident.

D. To the extent that the Court accepted parol evidence or extraneous evidence on the matter, the Defendant submits the same was error because there was none supporting the Court's decision. It was only Plaintiff's counsel's eloquent arguments that raised the issue, and without credible and admissible evidence to support the counsel's argument, the Court had

nothing on which to base its decision. Therefore, it was error to conclude that the settlement should be enforced and the decision should be vacated.

4. The Order of the court was erroneously reached by failing to apprecite that its construction frustrates the stated purpose of the agreement. The Agreement states that the parties' intent was to "extinguish all rights to any easements that may exist north of the property line... ." As shown at the hearing, and incorporated by reference herein from the memorandum in opposition to Plaintiff's motion, Defendant cannot, as a matter of law, extinguish the mortgagee's rights in the easements without the mortgagee's permission. Thus, it naturally follows that Defendant alone could not, at the time of the execution of the agreement, unilaterally comply with that provision. Therefore, the only construction which would allow for the complete extinguishment of the easements in question is that proffered by Defendant. Such proper construction does not frustrate the parties' agreement and is the proper construction this honorable Court should apply.

5. To the extent that the Court considered affidavit testimony of the Plaintiff, the Court erred in considering unexcepted hearsay within the affidavit testimony, among others in the March Affidavit of Plaintiff in support of motion to compel were paragraphs 2,3,4,5,7, & 8. It was error to consider such unexcepted hearsay over the objection of Defendant.

6. To the extent that the Court considered affidavit testimony of the Plaintiff, it was error to consider Paragraph 1 of the Plaintiff's 3 March Affidavit in support of motion to compel settlement, as it is not relevant and thus is not proper for consideration.

7. The Defendant would respectfully submit that it was error to issue a form 4 order in this case. The parties not only submitted conflicting arguments, but to some extent conflicting evidence in the five affidavits submitted to the Court in regard to the matter. It will be

impossible for a reviewing court to review the factual determinations of the Trial Court without a recitation of the facts actually found by the Trial Court. It will be impossible for a reviewing court to appreciate the conclusions of law reached by the Trial Court without a recitation of the Trial Court's analysis. A form 4 Order fails to make such recitations upon which a meaningful review may be had.

8. In a like manner, the Defendant respectfully asserts that the Order in question is too ambiguous to be enforced. If the Court is going to specifically enforce something upon a party, the Order should clearly state what is being enforced. All this Order states is that the Plaintiff's motion is granted. The only thing the motion states is that Plaintiff sought 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." The Plaintiff does not specifically say what she wants done. There was a lot of talk about quitclaims in her affidavits and at the hearing. Of course the settlement mentions nothing of quitclaims. It is not sufficient for the Court to say that the settlement will be enforced. If the Court is ordering specific performance, the Court must let the party charged with such performance know precisely what he or she is to do. Plaintiff also requested Attorney's Fees (in a grossly misrepresented amount). Did the Court's grant of her motion include such an award? Plaintiff also requested costs. Did the Court's grant of her motion include such an award? The Order is clearly ambiguous and does not specify what the Court expects Defendant to do to be in compliance with the agreement. It does not delineate whether fees and costs have been awarded and should be altered or amended to reflect the same. (Parenthetically, the Defendant notes that in addition to a misrepresentation of the time necessary to do the motion in question, the Plaintiff

has submitted no affidavit in which a detailed itemization of fees has been submitted which would allow the court to review it and make an award of fees).

9. The Court issued its Order dated 18 April 2016 and filed 22 April 2016 granting Plaintiff's motion to compel settlement but noted in the Order that the Order does not terminate the case. This would appear to be error. 1. The parties went to mediation and worked out a settlement according to the Plaintiff. 2. The settlement was to resolve all matters addressed in the litigation and terminate it. 3. However, according to the Plaintiff the settlement was contingent which is why the Plaintiff requested the case be maintained on the docket and not dismissed. 4. Plaintiff represented to the Court that the contingencies of the agreement had been removed. 5. The Defendant then filed a motion for limited discovery and a hearing on the question of contract or no contract in regard to the settlement. 6. Thereafter, the Court issued its order compelling the settlement, which effectively was a summary denial of the Defendant's motion. With the settlement resolving all other matters outstanding, there is no basis for not dismissing the action and it should have been dismissed assuming the rectitude of the Trial Court's Order which Defendant disputes.

10. At the hearing of the Motion in question, from the oral argument of counsel for the Plaintiff, it became apparent that in all likelihood the parties never had a meeting of the mind in regard to the so called settlement. As a result, Defendant filed a motion seeking limited discovery on the matter and seeking the court to then hold a hearing on the question of whether there was a meeting of the mind or not and whether there was a settlement or not. Said motion was filed on 13 April 2016, with a carbon copy that day sent to opposing counsel and the judge who heard the Plaintiff's motion.

The Order of 18 April compelling settlement is predicated upon the premise that that there was a meeting of the minds, and that there was a valid agreement reached, and therefore predetermines that there was a meeting of the minds, and that there was a valid agreement reached. Such predetermination was made in disregard to Defendant's outstanding motion on the matter, without Defendant being heard on the matter, and thus violated the constitutional protections of procedural due process of law guaranteed by the United States and South Carolina Constitutions.

11. On 16 February 2016, the Court dismissed this action improvidently as it turned out. By no later than 24 February 2016, the Plaintiff was aware that the Court dismissed the action, because this is the date of Plaintiff's motion to restore the case to the docket. However, despite the Plaintiff dating the document 24 February, Plaintiff filed it on 3 March. The motion cover sheet had both 3 March and 24 February stamps on it. On 3 March a consent order was filed restoring the case to the docket. Plaintiff filed the motion from which the Order in question emanated on 22 February 2016.

At the time the Plaintiff filed its motion to enforce the agreement, the Court had lost jurisdiction of the case save and except in accordance with SCRCP 59 and or 60. The motion was filed at a time when the Court had no jurisdiction and should have been rejected. An improperly lodged order should not have been heard by the Court.

12. The construction by the Court, which was necessary to reach the conclusion that it did, i.e. that only POA or Board of Review approval is necessary reduces express language of the alleged settlement to surplussage from its inception, to wit: "or any other appropriate authority that may be required to approve the above items 1, 2, & 3." Such a construction is an improper construction and should be vacated.

13. Because Defendant cannot comply with the extinguishment of the easement without Bank of America approval, a construction that Bank of America is not a party whose consent is required is an absurdity. It is an absurdity because the easement may only be extinguished with Bank of America approval.

14. The Defendant incorporates the arguments set forth in his Memorandum in Opposition to the Plaintiff's Motion to Compel by reference herein as fully and completely as if each were set forth herein verbatim.

WHEREFORE your Defendant respectfully has moved this Honorable Court to rescind the aforesaid Order and issue an order denying Plaintiff's motion or to otherwise alter or amend as set forth herein.

RESPECTFULLY SUBMITTED

M. Richardson Hyman, Jr.
PO Box 127
Charleston, South Carolina 29402
843 416 1047

Co-Counsel for the Defendant

Charleston, South Carolina

26 April 2016

000047

I certify that on this 27th day of April, 2016 I served a copy of the foregoing attached documents on the opposing party by placing copies of the same in the United States Post, with sufficient first class postage attached thereto and properly addressed to said party's counsel of record.

I certify that on this 27th day of April 2016 I served a copy of the foregoing attached documents on the trial judge by placing copies of the same in the United States Post, with sufficient first class postage attached thereto and properly addressed to her address of record.

I certify in accordance with SCRCP Rule 11 that
___ prior to filing the motion I communicated, orally or in writing, with opposing counsel and have attempted in good faith to resolve the matter contained in the motion
__X__ I certify that consultation would serve no useful purpose, or could not be timely held.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004, Plaintiff, -versus- GEORGE C. SAKAKINI, Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2015-CP-07- 00597 PLAINTIFF'S RETURN AND BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR AMENDMENT OF JUDGMENT

INTRODUCTION

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. (See Paragraph 1 of Plaintiff'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. (See Paragraph 2 of Plaintiff'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 (See Defendant's email of February 17, 2016, where he used all capitals.)

On February 23, 2016, Defendant 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* . . . .

On or about February 29, 2016 Defendant Sakakini notified the HOA, by letter, of six reasons why the Settlement Agreement was void.

The seven (7) page letter said (1) that the Gasque survey was inaccurate; (2) that Plaintiff's agreed-to fence would bisect his mulch beds; (3) that there would be no access for pest control operators; (4) that Judge Dukes' Order failed to take into account what happens in his garden; (5) that he had "faithfully maintained the disputed area" for ten (10) years; (6) that his sewer line would be inaccessible for repair. Significantly, Defendant Sakakini did not say anything about the approval by Bank of America in his list of problem sent to the HOA on February 29, 2016.

Now, Defendant Sakakini says that Bank of America's approval was on his mind during the mediation on February 5, 2016. It is Plaintiff's position that there was no disagreement about the meaning of Item 4 when those words were written by the mediator, Mitchell Griffith at 6:30 pm on February 5, 2016.

It is Plaintiff's position that Defendant Sakakini's email of February 17, 2016 (to Picket Fences) explains how and when he decided that Bank of America needed to be a party or a participant.

"Not only was I not in the proper state of mind, but according to another attorney that I have consulted (he works for Chase Bank), I did not have the legal authority to sign it. Here is a direct quote from his email: "George does not have the legal authority to enter any agreement that waives or modifies the Picket Fences HOA rules, without the express consent of 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. That was not done. Both Bank of America and Picket

Fences HOA are necessary parties to the litigation. Therefore, the Settlement Agreement is void "ab initio" and the parties can reconvene or proceed to trial."

This email shows that after the mediation, another lawyer (who apparently works for Chase Bank) told Defendant that he did 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. That was not done."

Defendant Sakakini goes on to say in this email;

"Therefore, the Settlement Agreement is void "ab initio" and the parties can reconvene or proceed to trial."

It is Plaintiff's position that Gregory Galvin knew exactly what was meant by Item 4 when he signed a Consent Order on or before March 3, 2016.

"Furthermore this case shall not be tried until 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." (See the Order of the Court filed on March 3, 1016 which is attached hereto.)

It is the Plaintiff's position that after the mediation, Defendant Sakakini decided to repudiate the Settlement Agreement. And after the mediation Defendant Sakakini began searching for any reason to repudiate what he had signed on February 5, 2016.

INTENTIONS OF THE PARTIES

"Where an agreement is clear and capable of legal construction, the Court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Messer v. Messer, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App 2004)

"In the enforcement of an agreement, the Court does not have authority to modify terms that are clear and unambiguous on their face." Ebert v. Ebert 320 S.C 331, 338, 465 S.E2d 121, 125 (Ct. App 1995).

"However, where the language of a settlement agreement is susceptible to more than one interpretation, it is the duty of the Court to ascertain the intentions of the parties." Mattox v. Cassady 289 S.C. 57, 60, 344 S.E. 2d 620, 622 (Ct. App. 1986)

"It is the general rule that parole evidence is admissible to show the true meaning of an ambiguous written contract. Klutts Resort Realty, inc. v. Down 'round Development, 286 S.C. 80, 232 S.E. 2d 20 (1982).

Defendant Sakakini, in his brief supporting this Motion, says;

"To the extent that it was necessary or proper to take parole or extrinsic evidence on whether Bank of America was a necessary or 'other appropriate authority . . . ., the Court had no competent evidence before it on the matter." (See Paragraph 3, Page 5 of Defendant's Brief of April 26, 2016).

Further, on Page 5 of Defendant's Brief he says such parole evidence is "multiple hearsay"; that it was error to consider Plaintiff's affidavits; that it was error to consider Plaintiff's hearsay.

But the Court can consider the Consent Order signed by Judge Mullen, Scott Graber and, significantly the Defendant's lawyer Greg Galvin which says;

"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."

It can consider that (on February 16, 2016), Defendant Sakakini told David Gasque not to perform the survey as was agreed-to in Item 1 of the Settlement Agreement (Defendant has acknowledged he did this.)

The Court can consider Defendant's February 17, 2016, email to Picket Fences HOA wherein he told it not to proceed on its approval process; that "he would like to re-enter

negotiations with you and your attorney". (See Defendant's February 17, 2016 email which is attached to Defendant's Supporting Affidavit.)

The Court can consider Defendant's email of February 23, 2016 wherein he says, in part,

I still need you lawyers to opine on the legality of that settlement agreement that I signed and sent to the HOA. My concern remains that I signed a document that I believe is void ab initio because the HOA's legal interests were not a party to the dispute.

The Court, in its inquiry as to Defendant's intentions, can consider the February 29, 2016, letter from Defendant Sakakini listing six (6) objections to the February 5, 2016 Settlement, to include (1) the new survey was inaccurate; (2) the living fence would bisect existing beds; (3) that there would be no access for pest control operators; (4) the Judge Dukes' Order failed to take into account what happens in his garden; (5) that he had faithfully maintained the disputed area" for ten (10) years; (6) that his sewer line would be inaccessible for repair.

Looking at these the Court concluded that Dr. Sakakini put forth a host of reasons why the Agreement was void. A fair reading of Dr. Sakakini's emails, after the fact, indicates he wanted to escape this Agreement any way he could, for any reason he could allege. And, finally, it is clear Dr. Sakakini formed his notions about the Bank of America after the Mediation on 2/5/16.

PLAINTIFF CANNOT PROCEED BECAUSE SHE DOES NOT HAVE APPROVAL FROM HOA

Defendant argues that this Motion (to Enforce Settlement Agreement) was not ripe on March 30, 2016 because all the contingences had not been approved on March 30, 2016, when Plaintiff argued her Motion. But first let's consider Defendant's behavior prior to March 30, 2016.

1. On March 22, 2016, Plaintiff had acquired a surveyor, David Gasque, consistent with the Settlement Agreement, but Defendant did not let him do the survey. (See Item #4 of Defendant's Affidavit of March 30, 2016.)

2. On February 17, 2016, Defendant had emailed the HOA saying; **I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.** The February 17, 2016 email had its intended effect, the HOA suspended its approval procedure.

3. On February 23, 2016, Defendant wrote to the HOA saying he actually did not want to delay the HOA's approval/disapproval process however "my concern remains that I signed an agreement that I believe is void ab initio because the HOA's legal interests were not a party to the dispute. **"I still need you lawyers to opine on the legality of the Settlement Agreement".**

Notwithstanding Defendant's efforts to derail the approval process, Plaintiff persisted in her efforts to get approvals for the three contingencies. But then, frustrated, by Plaintiff's ploy to bring in the Bank of America, she went to court. It is, therefore, remarkable that Defendant now argues that Plaintiff could not go forward (on Marcy 30, 2016) because she did not have approval for the fence.

One must remember that by March 30, 2016 Defendant's focus was on Bank of America and his allegation that there was no meeting of the minds regarding its participation and approval. But if one examines the transcript of the hearing on March 30, 2016; there is mention of the fence. If one examines Page 28, lines 6-7, Counsel for Defendant says;

"Now keep in mind, as we have just said, she hasn't had approval for the fence yet."

However, it is Plaintiff's position that she did have approval.

Counsel has put the Picket Fences Covenants in play (see Page 5 of Defendant's March 22 Brief) and Section 6.6 of the Picket Fences Covenants says,

"In the event the ARB fails to approve or disapprove in writing any proposed plans or specifications within forty-five days after such plans and specification have been submitted, such plans and specifications shall be deemed to be expressly approved."

Plaintiff applied on February 10-- she would have applied sooner except that Defendant prevented her from getting a revised plat (showing the fence) which was necessary for the application. Notwithstanding Defendant's blocking the surveyor, and stopping the approval process itself, the Plaintiff did get an application filed on February 10, 2106. On March 30, 2016, more than forty-five (45) days had elapsed and the terms of Section 6.6 came into play. Yet, Counsel's told the Court, **"She hasn't had approval for the fence yet"**,

But the relief being sought on March 30, 2016 was relief from Defendant's repeated efforts to scuttle the agreement. The relief sought on March 30, 2016, was to determine whether or not Bank of America's approval was contemplated by "other appropriate authority". The relief sought was relief from Defendant's bombardment of the HOA with"

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

"EXTINGUISH" NECESSARILY MEANS BANK OF AMERICA APPROVAL

Defendant argues that the Settlement Agreement requires that he "extinguish all right to any easement" and this language necessarily implies that Defendant believed, on February 5, 2016, he had to get Bank of America's approval. Defendant says this is what he believes and there was, therefore, no "meeting of the minds" in terms of Bank of America's approval.

However, Defendant's email of February 17, 2016 indicates that this belief came when he discussed the matter with another lawyer after February 5, 2016.

Not only was it not in the proper state of mind, but according to another attorney that I have consulted (he works for Chase Bank), I did not have the legal authority to sign

it. Here is a direct quote from his email: "George does not have the legal authority to enter any agreement that waives or modifies the Picket Fences HOA rules, without the express consent of 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. That was not done. Both Bank of America and Picket Fences HOA are necessary parties to the litigation. Therefore, the Settlement Agreement is void "ab initio" and the parties can reconvene or proceed to trial".

The Court could properly conclude that the Bank of America's consent was not anticipated on February 5, 2016, that notion came later, after the mediation, and Bank of America was never tied to the verb "extinguish". The Court could determine that "extinguish" was believed to be (on February 5, 2016) the signing of a quitclaim deed.

Defendant says that the only thing supporting the Plaintiff's position of this matter is "multiple hearsay". However, Defendant Sakakini put the February 17, 2016 email in play and he must live with what it says. And what it says is that he consulted a Chase Bank lawyer who told him—after the fact—that the Settlement Agreement was 'void ad initio."

FORM 4 ORDER IS DEFECTIVE IN THIS INSTANCE

Defendant says that "it was error to issue a Form 4 Order in this case". He also says the Court should have provided a recitation of facts and a "recitation of the trial Court's analysis". Defendant says that using "Form 4" form is prejudicial and this Court is required to provide more detail.

Rule 84 of the SCRCD says "The Supreme court shall prescribe the content and formation of the forms prescribed by these rules". In this case there is a box indicating the Court's decision and then a box for "Statement of Judgment by the Court". There is no place indicating that the Court must provide a rendition of the facts relied upon or "a recitation of the Trial Court's analysis." Defendant gives us no case law that modifies Rule 84 or requires a recitation of the facts and an analysis of the law.

From the beginning the Defendant's central thesis is that the Settlement Agreement cannot be enforced because there was never a "meeting of the minds" with regard to Bank of America. He repeatedly says the Agreement is, in essence, a contract that cannot be enforced by Plaintiff. The Court has found this argument specious and it has determined that the Settlement Agreement is not broken. It has determined that it is enforceable. This is the court's simple, and obvious, and clear ruling. There is no need, or requirement for the "Trial Court's analysis".

THERE WAS NEVER A MEETING OF THE MINDS

On page 9 of Defendant's April 26, 2016 Brief, Defendant repeats and reinforces his initial argument (made on March 22, 2016) that there was no meeting of the minds.

However, Dr. Sakakini knows it is impossible to verify what he was thinking on February 5, 2016. Thoughts are necessarily ephemeral and unknowable. Words, on the other hand, are the articulation of thoughts. Words spoken are thoughts made audible. Thoughts made audible can be repeated, recorded and transcribed. But, in this instance, the words spoken on February 5, 2016 by Mitch Griffith, Scott Graber, Gregory Galvin are not admissible in this proceeding because of Rule 8.

What is admissible is an Order of the Court (signed by Greg Galvin, Defendant's attorney, outside mediation and not subject to the confidentiality provisions of Rule 8) that says;

"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."

But the words of Defendant's February 17, 2016 email, the words of Defendant's February 23, 2016 email, and the word of Defendant's February 29, 2016 letter show us that Defendant was willing to say anything to get himself out of the deal he had made.

On February 17, 2016 he said to the HOA **"Honestly, I do not think I was in the proper state of mind at the end of the day and not eating since breakfast to sign that document."**

On February 23, 2016, he said to the HOA "I still need you lawyers to opine on the legality of that Settlement Agreement that I signed and sent to the HOA. My concern remains that I signed an agreement that I believe is void ab initio because the HOA's legal interests were not a party to this dispute."

On February 29, 2016 he had a list of six (6) items that he claimed were defects.

It is clear from these words that Defendant was profoundly unhappy with what he had signed and was trying his best to get himself out of the Agreement.

But it is also clear from the February 17, 2016 email that the notion that Bank of America's approval was essential came after February 5, 2016. Defendant says that he consulted another attorney (working for Chase Bank) he told him "George does not have the legal authority to waive or modify easements that run with the land".

This statement, taken together was his statements on February 23, 2016 wherein he advised the HOA that it should have been a party, makes it clear that these notions occurred after the mediation. After the fact.

Finally, Defendant argues that because of a clerical error - - the mistaken dismissal of the case after the Mediation Report was filed – the Court lacked the jurisdiction to entertain the Motion to Enforce the Settlement Agreement.

This argument flies in the face of Rule 61 which says, in part, "no error or defection in any ruling or order or anything done or omitted by the Court . . . . is ground for . . . . vacating, modifying or otherwise disturbing a judgment." Assuming these words mean what they say, "the

Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties".

WHEREFORE, the Plaintiff respectfully prays this Honorable Court affirm the Court's previous decision and reject Defendant's effort to overturn or modify the Court's decision on April 18, 2016.

RESPECTFULLY SUBMITTED,

C. Scott Graber, Esquire
Attorney for Plaintiff
605 Carteret Street
Beaufort, SC 29902
843-524-8204

Beaufort, South Carolina
May 4, 2016

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT		IN THE COURT OF COMMON PLEAS CIVIL ACTION NO. 2015-CP-07-00597
Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004, Plaintiff, vs. George C. Sakakini, Defendant.		**SETTLEMENT AGREEMENT**

The Plaintiff does hereby agree to settle her claims against the Defendant, and the Defendant agrees to settle his counter claims against the Plaintiff and both parties will dismiss those claims with prejudice. The terms of the settlement are that

1. The Plaintiff will convey a one (1') foot wide strip of land running from the southwest corner of lot 44 to the point where the boundary line intersects the western boundary of the asphalt path that runs north and south through Lot 44; Said one (1') foot strip shall be contiguous with the southern boundary of lot 44. Reference can be made to the Gasque and Associates Plat signed January 10, 2013. Costs of the said plat showing the strip and the deed conveying the said strip shall be borne by the Defendant. David Gasque shall prepare the plat showing among other things, the distance between the Sakakini dwelling and the new property line.

2. The Plaintiff will build a fence along the new property line in accordance with the covenants and restrictions of Picket Fences.
3. The Defendants shall extinguish all rights to any easements that may exist to the north of the new property line. The Defendant shall execute a deed conveying any & all rights to the property north of the new property line. The Plaintiff shall bear the costs of the deed preparation.
4. 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.
5. Upon approval of the appropriate authority, the Defendant shall have 30 days to remove any and all encroachments on the Plaintiff's property.
6. The Defendant shall also remove the three trees on the southeastern portion of the Plaintiff's property and one small sapling which has a plant cage over it. If the Defendant does not remove these trees within 30 days of the approval listed in Item 4 above then the Plaintiff may have them removed if she desires.
7. Defendant shall also remove all other plants and pavers that are located to the north of the new property line within 30 days of the approval listed in Item 4 above.

[SIGNATURES ON FOLLOWING PAGE]

Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004 v. George C. Sakakini
Civil Action No. 2015-CP-07-00597

SETTLEMENT AGREEMENT

Graber Law Firm

By: _____

C. Scott Graber
Attorneys for Plaintiff

Mildred Anne Kinghorn, Trustee

Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004

Galvin Law Group

By: _____

Gregory M. Galvin
Attorneys for Defendant

George C. Sakakini, MD

George C. Sakakini

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015CP0700597

Mildred Anne Kinghorn — PLAINTIFF(S)

George C. Sakakini — DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's motion to enforce the settlement, heard by this Court on March 30, 2016, is hereby granted.

2016 APR 22 PM 1:05
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2142 — **Judge Code**

4-18-16 — **Date**

SCRCP Form 4C (03/2013)

000063

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of April, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of April, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

C. Scott Graber 605 Carteret Street Beaufort, SC 29902

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gregory M. Galvin PO Box 887 Bluffton, SC 29910

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT STAFF

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

XFINITY Connect

clhchas@comcast.net

+ Font Size -

Fwd: George's first communication with LaShea

From : mrhchas@comcast.net
Subject : Fwd: George's first communication with LaShea
To : Katie Hyman <clhchas@comcast.net>

Tue, Mar 29, 2016 03:24 PM
1 attachment

From: "cleaefthimiadis" <cleaefthimiadis@aol.com>
To: "mrhchas" <mrhchas@comcast.net>
Sent: Tuesday, March 29, 2016 2:49:40 PM
Subject: George's first communication with LaShea

----Original Message----
From: George Sakakini <gcsakakini@yahoo.com>
To: PICKET FENCES - LaShea Dubois <lashea.dubois@gold-crown.com>
Cc: GEORGE SAKAKINI <gcsakakini@yahoo.com>
Sent: Wed, Feb 17, 2016 4:26 pm
Subject: Settlement Agreement

Dear LaShea,

I have been made aware by my attorney that you and the HOA are in possession of the settlement agreement (attached and/or included in FAX) that I signed on 05Feb2015 concerning the boundary dispute and lawsuit that my neighbor brought against me last March. I signed that agreement after an extremely long day (over 8 hours) of mediation hoping to end the dispute amicably and fairly. Honestly, I do not think I was in the proper state of mind at the end of that day and not eating since breakfast to sign that document.

Not only was I not in the proper state of mind, but according to another attorney that I have consulted (he works for Chase Bank), I did not have the legal authority to sign it. Here is a direct quote from his email: "George does not have the legal authority to enter any agreement that waives or modifies the Picket Fences HOA rules,without the express consent of 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. That was not done. Both Bank of America and Picket Fences HOA are necessary parties to the litigation. Therefore, the Settlement Agreement is void "ab initio" and the parties can reconvene or proceed to trial".

I am currently awaiting Bank of America's legal opinion on this matter.

LaShea, I am asking you to communicate to the HOA that I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT. I would like to re-enter negotiations with my neighbor in order to reach a more equitable agreement that does not relinquish the necessary easements that were put in place by the Covenants so that property owners like me can adequately maintain their property.

If I could re-live one day in my life, it would be 05Feb2015. I can not 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.

Sincerely,

George C. Sakakini
CAPT, MC, USN (RET)

XFINITY Connect

clhchas@comcast.net

+ Font Size -

Fwd: George contacting LaShea hoping she didn't misconstrue his letter

From : mrhchas@comcast.net

Subject : Fwd: George contacting LaShea hoping she didn't misconstrue his letter

Tue, Mar 29, 2016 02:59 PM

To : Katie Hyman <clhchas@comcast.net>

print

From: "cleaefthimiadis" <cleaefthimiadis@aol.com>
To: "mrhchas" <mrhchas@comcast.net>
Sent: Tuesday, March 29, 2016 2:53:45 PM
Subject: George contacting LaShea hoping she didn't misconstrue his letter

-----Original Message-----
From: George Sakakini <gcsakakini@yahoo.com>
To: PICKET FENCES - LaShea Dubois <lashea.dubois@gold-crown.com>
Cc: George Sakakini <gcsakakini@yahoo.com>; Greg Galvin <ggalvin@galvinlawgroup.com>
Sent: Tue, Feb 23, 2016 3:29 pm
Subject: Legal Counsel Review

Dear LaShea,
I hope you did not misunderstand the intent of my original email I sent you that had the attached settlement agreement concerning the property dispute between lots 43 and 44. I still need your lawyers to opine on the legality of that settlement agreement that I signed and sent to the HOA. My concern remains that I signed a document that I believe is void ab initio because the HOA's legal interests were not a party to the dispute. In no way am I trying to repudiate the signed settlement. My intent was to communicate to you and the HOA my regret of signing that document, not to delay the HOA's approval/disapproval process.

As always, I appreciate your help in this matter.

Sincerely,
George C. Sakakini, MD

Thanking you again for your assistance.

Sent from my iPad

000066

in accordance with the terms hereof. Not withstanding the foregoing, as Owner may make interior improvements and alterations within his Homesite and a Multi-Family Association may make interior improvements or alterations within any building or structure which it owns or maintains, without the necessity of approval or review by the ARB. The ARB shall have the sole discretion to determine whether plans or specifications submitted for approval are acceptable to the Association. In connection with approval rights and to prevent excessive drainage or surface water run-off, the ARB shall have the right to establish a maximum percentage of Lot, Homesite or Multi-Family Area which may be covered by Homesites, buildings, structures, or other improvements, which standards shall be promulgated on the basis topography, percolation rate of soil, soil types and conditions, vegetation cover, and other environmental factors. Following approval of any plans and or specifications by the ARB, representatives, or agents of the ARB shall have the right during reasonable hours to enter upon and inspect any Lot, Homesite, or Multi-Family Area, or other improvements with respect to which construction is underway to determine whether or not the plans and specifications therefore have been approved and are being complied with. In the event the ARB shall determine that such plans and specifications have not been approved or are not being complied with, the ARB shall be entitled to enjoin further construction and to require the removal or correction of any work in place which does not comply with approved plans or specifications. In the event the ARB fails to approve or disapprove in writing any proposed plans and specifications within forty-five (45) days after such plans and specifications shall have been submitted, such plans and specifications shall be deemed to have been expressly approved. Upon approval of plans and specifications, no further approval under this Article VI shall be required with respect thereto, unless such construction has not substantially commenced within six (6) months of the approval of such plans and specifications (e.g. clearing and grading, pouring of footings, etc.) or unless such plans and specifications are materially altered or changed. Refusal of approval of plans and specifications may be based by the ARB on any grounds which is consistent with the objects and purposes of this Declaration, including purely aesthetic considerations so long as such grounds are arbitrary capricious. Pingree & Wallace Properties, LLC. are not assignable except unto the Association.

Section 6.7 Approval not a Guarantee. No approval of plans and specifications and no publication of architectural standards shall be construed as representing or applying that such plans, specifications, or standards will, if followed, result in properly designed improvements. Such approvals and standards shall in no event be construed as representing or guaranteeing that any Homesite or improvement built in accordance therewith will be designed and or built in a good workman like manner neither Declarant, the Association, nor the ARB shall be responsible or liable for any defects in any plan or specification submitted, revised, or approved pursuant to the terms of this Article VI, nor any defects in construction undertaken pursuant to such plans and specifications.

Section 6.8 Maintenance. Notwithstanding the rights and easements reserved by Declarant in Section 7.1(c) (iv), each Owner shall keep and maintain each Homesite and Lot owned by him, as well as all Landscaping thereon, in good condition and repair, including, but not limited to (i) the repairing and painting (or other appropriate external care) of all structures; (ii) the seeding, watering and mowing of all lawns and (iii) the pruning and trimming of all trees, hedges and shrubbery so that the same are not obstructive of a view by motorists or pedestrians of street traffic. If in the opinion of the ARB, any Owner shall fail to perform the duties imposed by this Section, the ARB shall notify the Association. If the Board shall agree with the determination of the ARB with respect to the failure of said Owner to perform the duties imposed by this Section, then the Board shall give written notice to the Owner to remedy

STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2013-CP-07-00597

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

VERSUS

MARCH 30, 2016

TRANSCRIPT OF HEARING

BEAUFORT, SOUTH CAROLINA

GEORGE C. SAKAKINI DEFENDANT

B E F O R E:

HON. CARMEN T. MULLEN, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

ON BEHALF OF PLAINTIFF:

HON. C. SCOTT GRABER
GRABER LAW FIRM
605 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
843-524-8204

ON BEHALF OF DEFENDANT:

HON. M. RICHARDSON HYMAN, JR.
Post Office Box 127
Charleston, South Carolina 29402-0127
843-416-1047

ORIGINAL

INDEX

ATTACHMENTS

EXHIBITS

No exhibits were admitted.

ORIGINAL

BEGINNING 9:19 A.M.

THE COURT: Well, the first case this morning is Mildred Anne Kinghorn, who is the trustee for Mildred Anne Kinghorn Trust, versus George Sakakini. Good morning, everyone.

MR. GRABER: Good morning, your Honor.

MR. HYMAN: Good morning, your Honor.

THE COURT: I'm so glad to see everyone. I'm so glad everyone got together for this matter. This is your motion to enforce settlement. Is that correct, Mr. Graber?

MR. GRABER: Yes, ma'am, it is.

THE COURT: And is there anything, procedurally, that we need to do, as far as, have I gone ahead and appointed you as counsel, and you are in the case? Is that correct, sir?

MR. HYMAN: I filed a notice of appearance as co-counsel. It would be very kind of your Honor to formalize that on the record. I know that my current co-counsel, who is not here today, is very anxious to be relieved.

THE COURT: Okay. Is there any reason why I can't just appoint you as counsel and relieve Mr. Galvin?

MR. HYMAN: I can think of none. It would be by consent, unless there's an objection from my opposing

counsel.

THE COURT: Mr. Graber, we've got him here, and he is here in the case. So, I suggest we go ahead and let Mr. Galvin out. My concern is, though, I am going to be scheduling now with three attorneys versus just two from here on out. So, I think we're better off going ahead and just -- I'll go ahead and relieve Mr. Galvin. I'm going to appoint you as Mr. Sakakini's attorney. Thank you for being here this morning.

MR. HYMAN: Thank you, your Honor.

THE COURT: We appreciate it. So, with that said, is there anything else, procedurally, we need to do before I go ahead and hear Mr. Graber's motion to enforce settlement?

MR. HYMAN: No, your Honor.

THE COURT: Okay. All right. Mr. Graber, whenever you're ready, sir.

MR. GRABER: Thank you, your Honor. If it please the Court?

THE COURT: Yes, sir.

MR. GRABER: Your Honor, this case, this involves a settlement agreement that came after a year-long lawsuit, where the defendant, Dr. Sakakini, who is sitting there next to his counsel, allege that he owned this area of my client, Dr. Kinghorn. Both clients,

your Honor, are doctors, so you'll have to forgive me if I confuse them from time to time.

But Dr. Sakakini alleged that he owned ten feet of Dr. Kinghorn's side yard. And he alleged that -- he alleged that he had adverse possession of that. And indeed, right after Dr. Kinghorn bought the property in 2013, he did, though -- actually, he didn't go, but his companion, who is also sitting here in the courtroom, went into the yard and planted three trees here, and planted another tree here.

Dr. Kinghorn confronted Dr. Sakakini, and indicated to him that he was planting stuff in her yard. And he came back and said, no, no, you're mistaken as to where the boundary is, and you're also mistaken, because there is sort of a tradition here in Picket Fences, and that tradition is that these folks have ownership of this side yard.

Eventually, after several months, actually, after about six months, Dr. Kinghorn hired a surveyor, and the surveyor came out and located the line here, where it is shown on here, and at that point, asked Dr. Sakakini to observe this line, to stay out of her yard. He declined, and we began a lawsuit. Well, I brought a declaratory action, judgment action, to confirm this line.

The lawsuit went on for a year, and in the first part of February, February 5th, we eventually had a mediation. We had a mediation in front of Mitch Griffith, and at that point, Dr. Sakakini was represented by Greg Galvin. I remember this mediation very well, because it went on until about 7:30 at night, and as -- that particular night, I had been invited to a dinner party, and I was getting inquiries from my wife about why I wasn't at this dinner party. So, this mediation is very memorable to me.

The result of the mediation was this. The parties agreed, Dr. Kinghorn agreed to give Dr. Sakakini one additional foot that would go across -- actually, one addition foot that would go from this boundary, over to the concrete boundary. One foot. Now, the reason for the foot was basically, Dr. Sakakini had allowed plants and stones and stuff to go into her yard. So, she said, okay; I'm going to give you -- I'm going to give you a foot. That was the big thing.

MR. HYMAN: Your Honor, I'm sorry. Counsel, I'm terribly sorry to interject at this point. I would not normally do this -- do it at all during oral argument, but this does involve communications that came out of a mediation, which was a violation of Rule 8(a) of the Rules.

THE COURT: Except this is a motion to enforce a settlement.

MR. HYMAN: Well, but still, even then, the agreement says, and Rule 8(a) says, that it can't be introduced for any purpose. What I would like to do, your Honor, is just reserve all --

THE COURT: Objections.

MR. HYMAN: -- objections, for the record --

THE COURT: That's fine.

MR. HYMAN: -- when I get up, so as to not interrupt Counsel.

THE COURT: That's fine. I think, Mr. Graber, what we need to just get to is what the settlement agreement encompasses.

MR. GRABER: Okay. The settlement agreement, your Honor, was that Dr. Kinghorn was going to convey to Dr. Sakakini one foot to the north of her line. She was also going to -- the settlement agreement says this. She was going to put a fence atop the new -- atop the new line. It was -- wanted to define -- wanted to define that new line.

THE COURT: What type of fence?

MR. GRABER: It was called a -- the terminology came to be a living fence. It was going to be, oh, I want to say, five or six feet tall. I honestly do not

remember the details, but she was going to -- the settlement agreement specified that she would put a fence atop the new line, and that Dr. Sakakini would give her a quitclaim deed for everything on the other side of that fence. In other words, he would get a foot, put the fence on top, and then he would convey a quit -- he would give her a quitclaim deed for everything on the other side.

That agreement was reached, again, about 7:30 at night, on the 5th of February. I thought we had a settlement. I thought -- I thought we had done -- I thought we had done a good job.

Thereafter, your Honor, the very next day, Dr. Sakakini's companion came over from her porch, and attempted, with a laser device, to disable a security camera here and a security camera there. Just a -- this is a device that is, frankly, illegal, but she -- the very next day, attempts to do that. I called Greg Galvin. I said, Greg, you know, this has got to stop, and he said, I'll talk to my clients, and it did stop. Dr. Sakakini's companion did stop.

Again, the settlement took place on February 5th, 2016, and again, another part of the settlement was that David Gasque, the surveyor who did this, would go out and do a new survey. I've got it right here. Do a new

survey that showed the new line. However, when David got out there, Dr. Sakakini said, no, I don't want you to do this; you do not have my permission to come on my property; do not do a survey.

Now, your Honor, if you'll look at that survey, you'll see that it is not signed, and the reason it is not signed is, David could not put in the stakes, could not put in the rebar on either side of the line. And therefore, he could not -- we could not fulfill that part of the settlement agreement. Again, this is in the settlement agreement that David Gasque will show the new line, and that, parenthetically, that Dr. Sakakini will pay for it. But Dr. Sakakini, on the 16th, said, no, you're not going to do this, you know, don't do it.

Your Honor, thereafter, Dr. Sakakini telephoned the Homeowners Association. Now, the Homeowners Association had to be -- had to agree to the relocation of the line. They had to agree to the fence. They had to agree to the quitclaim deed. They had to agree to all those three things. Dr. Sakakini calls the Homeowners Association on the 17th, and says, stop, I'm repudiating this agreement; it is wrong; and parenthetically, the Homeowners, you, the Homeowners Association, should have been a party to this lawsuit; and because you were not a party, you -- this whole thing -- this whole thing is

off.

Shortly after that, your Honor, on February 18th, I called -- I called Greg Galvin. I said, Greg, what is going on? He said, let me talk to my clients. When he called me back later that day, he said, Scott, we will honor -- we will honor the settlement agreement; the settlement agreement; I talked to my clients, and we will honor the settlement agreement.

Your Honor, on February 29th, we were told by the Homeowners Association that Dr. Sakakini had, yet again, changed his mind, and that he was going to -- he repudiated the agreement. And once again, he said, I think the Homeowners Association -- we need an opinion from the Homeowners Association as to whether or not they should have been a party; and I have a list of other reasons, but we want a second opinion from the Homeowners Association attorney about whether this agreement is, in fact, legitimate.

The Homeowners attorney, thereafter, looked at this, and rendered an opinion. I've got the opinion here, your Honor, that says that, fundamentally, the settlement agreement complies with all of the covenants, et cetera, of the Homeowners Agreement. Thereafter, your Honor, wrote to the Homeowners Association, and again, I put this -- you'll have to forgive me, I made

marks on this -- but on my -- in my memo, I -- the marks aren't there. That's my copy. But Dr. Sakakini wrote, on the 29th, and he said, the new survey is inaccurate; the living fence would bisect my mulch beds; there is no access for pest control operators.

Judge Dukes' order -- Judge Dukes had rendered an earlier order, telling the parties they could not do anything in the disputed area; Judge Dukes' order is wrong; that he had faithfully maintained the area for ten years; and that his sewer line would be inaccessible. He listed a total of seven or eight reasons on the 29th of February about what was wrong with the settlement agreement.

What he did not say, your Honor, was this. He did not say, the settlement agreement is premised on me getting approval from the Bank of America to give you a quitclaim deed. And again, your Honor, at that point in time, Dr. Sakakini had a five-foot maintenance easement over here. He had agreed, at the settlement agreement, to give us a quitclaim deed, extinguishing his rights in that. But then, in March, he comes up with this idea. He says, look, Bank of America should be a party to this; Bank of America has an interest in this; and Bank of America, I need to get approval from Bank of America before I can go forward. That, then, became his reason

for not honoring the settlement agreement.

And your Honor, that is what is before the Court today. The entire argument of Dr. Sakakini is that the settlement agreement presumes that, in fact, Bank of America will have a role in this; Bank of America will either be a party; or Bank of America will either give its -- give its approval.

Your Honor, Dr. Sakakini has come in, and if you -- I don't know if you have read yet -- yet read his -- his memorandum, or his brief. I know the Court will, but Dr. Sakakini has put into play events that occurred in the mediation on the 5th. He said that it was in -- that everybody there, everybody at the mediation, who was there, knew that the Bank of America was now a player, and that he had to go to Bank of America. And if I could -- he repeatedly says -- defendant -- he says the parties knew very well that there may be other parties whose comment was necessary; Bank of America is precisely the type of other authority, apart from Picket Fences and the Board of Review, that the parties anticipated.

In other words, Dr. Sakakini is saying that I knew, that Mitch Griffith knew, that Dr. Kinghorn knew, that Bank of America was going to be consulted; that these words -- that these words, *other authority* -- in other

words, if you look at the settlement agreement, the settlement agreement says all of this is contingent upon approval by Picket Fences, the Homeowners Association, and other appropriate authority. He has now said that other appropriate authority necessarily means the Bank of America. He's connected those two up. He says, that's what we meant. And in his memorandum, he injects this content, this commentary, this -- this -- into these proceedings, in violation of Rule 8.

You know, Rule 8 says, you know, you won't talk about, as my colleague just admonished me -- you won't talk about what took place in the mediation; you won't comment about who said what, or what was intended, or what happened. You won't -- you can't do that. And so, we haven't done that. I'm not going to sit here and tell you what I know about that mediation, because I can't do it. But I was there. Greg Galvin is not here today, and so, he cannot comment.

But anyway, we simply cannot comment. But Dr. Sakakini has come in, and he has said, hey, let me tell you what we all meant. Let me tell you, for example, if I can quote him here, Bank of America is precisely the type of other authority, apart from Picket Fences, that the parties anticipated. On the other hand, defendant thought the agreement included not only B.O.A. as the

mortgage holder -- in other words, he is communicating to this court, in violation of Rule 8, what was said, what took place in the mediation.

Then, your Honor, in the brief, Dr. Sakakini pivots, and says, oh, by the way, Rule 8 prevents my opponent, the plaintiff, from taking issue with this; Dr. Kinghorn can't comment about what was said or what happened; Scott Graber can't comment; Greg Galvin can't comment; nobody can comment, notwithstanding the fact that I have just told the Court what the parties believed, what the parties anticipated.

Your Honor, patently unfair. Patently wrong. He's told the Court what was in my mind, what was in his mind, what was in the mind of all the parties. And then, he steps back, and he says, oh, by the way, you can't -- we're not going to let you -- we're not going to let you -- you can't talk; you can't come in and talk. So, I cannot tell you, even though I was in that room, and did the negotiation. I can't tell you what happened, with reference to Bank of America.

But I can tell the Court -- I can tell the Court that this mediation went on for hours, and for hours we dealt with this. But he has effectively boxed me in, and said, okay, okay, we talked about this, and it was understood, and everybody knew Bank of America -- Bank

of America had to sign off; but by the way, Court, you can't get a response from anybody else. So, he's put us in a box. He's put us in a terrible box. I mean, you know, I can't come in here, and I can't comment on it. The only thing I can tell you was, I was there. I was there the entire time, and I know what those words mean. I know precisely what they mean, but I cannot, as an officer of the Court, violate Rule 8, as Dr. Sakakini has.

Your Honor, finally, I would say this. We have a letter dated February 29, 2016, that I handed up to you. That letter has all the reasons that Dr. Sakakini wants out of this -- out of this agreement. It lists -- the Court indulged me earlier, and I appreciate that. I went down and listed all of the things that he talked about. But not once, not once, in this letter of February 29th, does he mention the Bank of America. Not once does he say, oh, by the way, this agreement has no validity; this agreement has no -- because Bank of America wasn't a party, and Bank of America wasn't -- and I need to go and get approval from Bank of America.

Your Honor, I know, I know fully well that people emerge from a mediation usually unhappy. Usually, they come out unhappy, because they've been required to give something up. I was not happy. I was not happy that

Dr. Kinghorn gave this gentleman a foot of her property as a consequence of his naked, adverse possession. But Dr. Kinghorn said -- excuse me -- the settlement agreement, Dr. Kinghorn gave a foot for his flower beds and for maintenance of his house. Because, with that foot, now, he will have six feet. He'll have six feet on this side of his house to maintain the house. I was not happy about that, and Dr. Sakakini was clearly not happy about it.

But the idea of mediation is this. If you're there with your lawyer, and he was, and you sign the document, and he did, and your lawyer signs the document, Rule 43(k) says you're bound. You're bound. And I can tell you, that settlement agreement was valid, and everybody knew what was -- what it said. So, I would respectfully ask this court to enforce the settlement that was reached on the 5th of February, 2016.

THE COURT: Thank you, Mr. Graber. All right. Mr. Hyman, whenever you're ready, sir.

MR. HYMAN: Thank you, your Honor. Your Honor, with your permission, before I start, may I approach? I previously provided Counsel with a copy of my memoranda and a supplemental affidavit. May I approach, and present it to the Court?

THE COURT: Is it dated March 28th of 2016?

MR. HYMAN: Yes, ma'am. The affidavit is dated today, but the memorandum is, indeed, dated the 28th of March.

THE COURT: I have a copy of the memorandum. I just need the affidavit.

MR. HYMAN: May I approach, your Honor?

THE COURT: Please.

MR. HYMAN: Thank you. Your Honor, we have a good bit to go over here. If we can, I'd just like to go ahead and get some objections on the record for this matter, and clarify a couple of things before I go into my argument, because there is a good bit that needs clarification after that.

First thing I would like to do is make several objections to the fact that facts not in evidence were argued before the Court. The only evidence before the Court, the evidence that has been submitted, and Dr. Kinghorn's three memorandums, which have been filed with this court previously. I trust the Court has a copy of all three.

THE COURT: I do, along with the settlement agreement.

MR. HYMAN: Okay. Good. Then, in that case, I would object to certain paragraphs of the March affidavit. Paragraph 1, it deals -- it's not relevant.

Deals with a non-party to this action. It has nothing to do with settling or enforcing a settlement.

Paragraphs -- the 2nd, 3, 4, 5, 7, and 8, on the grounds of hearsay. I do not think 801(d)(4) is applicable, and that they are not the one to whom the party made the allegation. So, therefore, it's multiple hearsay.

In regard to the 22 March affidavit, 2016, it would appear that there is a clerical error in regard to the time spent on the motion, because I don't see either one of us, together, having that much time. But regardless, I would object, because there's no rule or statute or contractual provision which would allow for the recovery of attorney's fees, and even if there were, there's not an itemization, in accordance with *Johnson versus Johnson*, nor with any of those factors that were presented to the Court.

Moving from all of these facts, which were argued again, I think that we are operating under a bit of a misconception that I must not have written a very good brief, because I don't think I made my point very clear, and I will try to move into that.

One last objection is that all of the background that was given as to what happened, you know, leading up to the mediation, et cetera, I don't think was

relevant to whether or not a settlement agreement should be enforced. We did not come into this courtroom today, your Honor, suggesting to the Court that we do not have a valid agreement. We suggested to the Court that the agreement is not ripe for enforcement. And what we have asked the Court to do is to look at the agreement before we jump off of the cliff, like a bunch of lemmings following a very appealing argument from a very astute counsel. A settlement agreement -- and I will tell you, your Honor, I think that we have relied upon the law. In regard to the enforcement of this, there is not one citationed law in the plaintiff's memorandum at all, because there is no law which would support it. And *Patricia Graham*, which has already been cited, the cites, if your Honor will -- essentially, you have the --

THE COURT: Got it.

MR. HYMAN: To save time. But in *Patricia Graham*, the Courts said that the Circuit Court's ruling in determining the terms of the settlement agreement between the parties, is similar to a Court interpreting a contract, and what the Court should do is look to the parties' intentions. And you heard a lot from Counsel, but there was not a lot of reading off of the settlement. So, I would ask that -- you have a copy of

that -- let's turn to the settlement.

Paragraph 4, it says:

The entire agreement --

This is a quotation.

The entire agreement is contingent and subject to approval by governing boards of the Picket Fences P.O.A. or Board of Review, or any other appropriate authority that may be required to approve Items 1, 2, and 3.

So, we must start by the plain language of the document in front of you, realizing that this is a contingent document, and that Dr. Sakakini's obligation to do anything under this document is purely contingent upon approval by the board of reviews of any -- Picket Fences P.O.A. or Board of Review, or any other appropriate authority, and what they must approve is Items 1, 2, and 3.

And we're not talking about a one-foot strip of land running from the southwest corner of Lot 44, because that's been approved by the Board of -- and I do not think that any other approval from any other party is necessary for that.

It has come to my attention yesterday, as you will find in Dr. Sakakini's affidavit, and I also have an

email from the Homeowners Association, that the Contingency Number 2 has not been approved by the Board of Architectural Review, though it was represented to be so in Paragraphs 1, 2, 3, 4, of Page 2, of the plaintiff's memorandum.

You will notice that Dr. Kinghorn, in her affidavit, states that they have approved the relocation of the line, but she omits any reference to the fence. And so, we know that the fence is not referenced. So, now that we know another contingency, which we just learned yesterday, has not been approved, which is mandated in Item 1, 2, and 3. But the next thing, and this is what my memorandum is about, it says -- it doesn't say that we would grant a quitclaim deed. That is not what our obligation under this settlement agreement is to do. We are to extinguish all right to any easements that may exist north of the new property line.

Now, that's a different thing from saying we need to grant a quitclaim, because we cannot, by quitclaim alone, extinguish this easement that both of us acknowledge is there.

We have a mortgage holder. That mortgage holder acquired a mortgage interest in the Donovan Estate and all appurtenances and rights which went along with the

Donovan estate. We cannot convey that mortgagor's recorded rights away without their consent. Now, this is standard dirt law 101. We can't give away land that's mortgaged without their consent or approval.

We have, as Dr. Sakakini has told you in his affidavit, we have worked with Bank of America, and I want to now step off back into the facts a little bit, because there was too many mis-facts that were stated up there that cannot be left out.

THE COURT: Well, let me ask you, you said that if Dr. Sakakini has met with and is attempting to work with Bank of America, but what's the result of that?

MR. HYMAN: Your Honor, I was just informed of this, the five-second version. I don't have this in evidence, but I'll be glad to answer your question. He had submitted a request to them. They said they need an appraisal, and he needed to pay for it. He sent a check. The check had cleared. They called him yesterday, and set up an appointment for Tuesday for him.

THE COURT: For an appraisal?

MR. HYMAN: For an appraisal. So, the answer is, it's not just pie in the sky. This was relayed to me by my client yesterday. I do not have this -- it was just too much at that time of the day to try and re-do the

affidavit when I wasn't in the office. But to the extent the Court will accept my representation of that, that is what was represented to me, and I would move my client to be -- I don't believe my client would tell me something that was not true, particularly since I did not solicit that, by the way. He volunteered that to me in the phone call at a very late hour of the day.

But it was said, and it's been said in the memorandum, and it was said in oral argument, about this famed 29 February letter being the first time that this ever occurred, and that the -- and then, in March, this argument of Bank of America came up, and that was the first time. Well, it was well into March before I came into this suit. Mr. Galvin did not bring up this issue at any given point. I was the one that took this, I was the one that ran with it. And we have definitive proof, your Honor, that this issue was brought up long before current counsel got involved in the ball game.

I would call the Court's attention to Mrs. -- or, Doctor, my apologies -- Dr. Kinghorn's affidavit of, I believe this is the affidavit of -- it's the second one. I believe it's the affidavit of 2-3, March, and it would be Allegation 6. And I did not object to this, because, (1) I didn't feel like I had warrant to object to it, so we're not offering for the matter asserted. But on

February the 29th, Mr. Graber told me that he learned Dr. Sakakini was also claiming that the settlement was void, because Dr. Sakakini's mortgage lender had not been a party to the settlement.

So, this issue didn't arise in March. The plaintiff knew it didn't arise in March. Mr. Graber knew it didn't arise in March. And if the Court will be so kind as to look at the affidavit that Dr. Sakakini placed in evidence, Dr. Sakakini mentioned this to the Homeowners Association, and it's the second email attached to it, which is authenticated, and is in it, in which he says:

> *Likewise, George does not have legal authority to waive or modify easements with the land, without the express consent of the lien holder, Bank of America.*

Now, this was an email sent to the H.O.A. on the 17th of February. So, this argument that supposedly came up in March was known to them on the 29th, when they argue so much that it was a novel concept. It came up on the 17th, long before that. And the reason is, is because, what we are representing to the Court is not what was just represented to you. I'm not saying what happened, or what anyone thought in mediation. I don't think it's relevant what anyone thought in mediation.

I am, by nature, a constructionist, statutes, testamentary, instruments, contracts. It is the instrument itself, and my first argument to this Court is that this is an unambiguous contract, and the words alone control. We don't need any testimony from anyone. If you look at the words of this, they anticipated that there would be possible other people that were needed to approve Items 1, 2, and 3, which was the extinguishment of the easement, not a quitclaim deed. Extinguishment of the easement, the grabbing of the one-foot slot, and the fence. And of course, you're in there in mediation all day long. You can't possibly think of every contingency, so they allowed for a contingency.

It just so happens that, as a matter of law, black-letter dirt law, this easement cannot be extinguished without Bank of America's consent. So, to accomplish 1, 2, and 3, which is what Item 4 says, you must do before the contingency arises, to extinguish Item -- to accomplish 1, 2 and 3, well, particularly 3, you have to have Bank of America's consent to that easement, because they do have a mortgage right on the real estate.

Now, that being said, that is our argument. I am not telling you, based on what they shouldn't have thought at the mediation. I'm saying what anybody said at the mediation is irrelevant. It is what the two

parties thought when they put their pen to paper. And Dr. Kinghorn can testify to that. I think she is -- I think that there's a danger that, if she gets up there and testifies that she thought one thing when Dr. Sakakini thought another thing, when you have a situation that the parties did not have a meeting of the minds, -- and by the way, that is the holding that was addressed in one of these cases, and I'm trying to think. I briefed it in here, so I'm not going to brief it again to you, your Honor. But you've got -- somebody got into trouble with the separation agreement when they actually realized, when they delved into an enforcement hearing, that the parties didn't reach a meeting of the minds, because one was thinking one thing, the other was thinking another. And regardless of how we talked all day long, or what they talked about, two parties can watch and listen, and your Honor has to know this from taking evidence in criminal cases, two people can see a person get shot, and come up with a completely different version of what happened.

Other than the case law, it makes no sense to go outside, when a plain-language reading of this shows that the parties anticipated more than just the Homeowners Association may be needed to approve this. The facts, as they come along, Bank of America is needed

to accomplish what they want to, and though there is a valid settlement agreement, it is contingent. And that contingency does not arise until Bank of America approves it, because that's the only way you're going to be able to extinguish this easement.

Now, keep in mind, as we just said, she hasn't had approval for the fence yet, which we've just learned yesterday, so that contingency has now arisen. This is not ripe for adjudication. But in case the Court does wish to do it, and doesn't believe that it's an ambiguous contract, standard contractual provisions and cannons of construction should be applied. Construction that renders language of the contract superfluous and mere surplusage from the inception of the contract should be avoided. And if the H.O.A. and Board of Architectural Review were the only approvals that Dr. -- that the parties, at the time, thought would be necessary, then, including the language in the settlement agreement that said, *or other appropriate authorities*, would have been superfluous from the very beginning. It would also have been absurd, because Dr. Sakakini would not likely have done something that would end up with him possibly being in violation of his own mortgage by conveying rights in the mortgage and mortgaged property.

I'm not going to go on further, because I've briefed this out well. I think, for the record, I've got in everything I need to say, but again, the representations that there is anything that the Court needs, outside of this separation agreement, and the facts that these contingencies have not yet come to play, is immaterial; that, if the Court does need it, I think there's plenty of evidence.

THE COURT: I think it's plenty. I certainly understand your argument, so.

MR. HYMAN: Thank you, your Honor. And again, I apologize for going on a little bit longer. I did feel like we needed to get it on the record.

THE COURT: No, you're fine. Absolutely. Absolutely. All right. I'm going to take it under advisement, and I will let you know something shortly.

MR. HYMAN: Thank you, your Honor.

MR. GRABER: Thank you, your Honor.

THE COURT: Thank you.

END PROCEEDING 9:58 A.M.

CERTIFICATE OF REPORTER

MARCH 30, 2016 TRANSCRIPT OF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing March 30, 2016, Transcript of Hearing is a true, accurate, and complete record of the proceedings had on said date, in the case of MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATES APRIL 28, 2004, VERSUS GEORGE C. SAKAKINI, Beaufort County, South Carolina, Court of Common Pleas, Case Number 2013-CP-07-00597; that no exhibits were admitted; that I am of neither kin, counsel, nor interest to any party hereto.

A CERTIFICATE OF REPORTER IS ATTACHED TO THIS EMAILED COPY OF THE TRANSCRIPT AND CONTAINS MY DIGITAL SIGNATURE. PURSUANT TO SCACR 607, REQUESTS FOR COPIES OF THIS TRANSCRIPT MUST BE MADE TO THE COURT REPORTER. UNAUTHORIZED COPYING OF THIS TRANSCRIPT IS PROHIBITED.

Witness my signature April 8, 2016.

S/Wanda H. Rowe
Wanda H. Rowe, CVR-M
Official Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004 Plaintiff, vs. George C. Sakakini Defendant.	)	IN THE COURT OF COMMON PLEAS PROOF OF ADR OR EXEMPTION FILE NO.: 2015-CP-07-00597

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

A. X 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

Mediation

2. The neutral was E. Mitchell Griffith

3. The ADR was conducted on February 5, 2016

4. As a result of ADR, this case should be considered (please check one);

(x) Fully Settled.

( ) by Consent Judgment, to be filed by _____

or ( ) Voluntary Dismissal to be filed by _____

( ) Partially Settled.

( ) At an Impasse.

( ) In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____.

5. Plaintiff X was present ☐ was not present
Defendant X was present ☐ was not present

6. Other partcipants were:

x Lawyer for Defendant Greg Galvin

x Lawyer for Plaintiff Scott Graber
____ Representative for Insurance Carrier ____
____ Guardian *ad Litem* ____
____ Experts
____ Others ____

7. Choice of the neutral was by:

x Stipulation
____ Court Order

8. The total number of hours spent in ADR was: 9 hours.

9. Further comments of the neutral:
The lawsuit involves property located in a planned unit development. The terms of the settlement require that the POA give approval to effectuate the terms of the settlement. Therefore the entire settlement if contingent upon the POA or other appropriate body approving items contained in the settlement.

E. Mitchell Griffith

Date: February 5, 2016

SCADR 104B (11/2012)

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT		IN THE COURT OF COMMON PLEAS CIVIL ACTION NO. 2015-CP-07-00597
Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004, Plaintiff, vs. George C. Sakakini, Defendant.		**SETTLEMENT AGREEMENT**

The Plaintiff does hereby agree to settle her claims against the Defendant, and the Defendant agrees to settle his counter claims against the Plaintiff and both parties will dismiss those claims with prejudice. The terms of the settlement are that

1. The Plaintiff will convey a one (1') foot wide strip of land running from the southwest corner of lot 44 to the point where the boundary line intersects the western boundary of the asphalt path that runs north and south through Lot 44; Said one (1') foot strip shall be contiguous with the southern boundary of lot 44. Reference can be made to the Gasque and Associates Plat signed January 10, 2013. Costs of the said plat showing the strip and the deed conveying the said strip shall be borne by the Defendant. David Gasque shall prepare the plat showing among other things, the distance between the Sakakini dwelling and the new property line.

2. The Plaintiff will build a fence along the new property line in accordance with the covenants and restrictions of Picket Fences.
3. The Defendants shall extinguish all rights to any easements that may exist to the north of the new property line. The Defendant shall execute a deed conveying any & all rights to the property north of the new property line. The Plaintiff shall bear the costs of the deed preparation.
4. 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.
5. Upon approval of the appropriate authority, the Defendant shall have 30 days to remove any and all encroachments on the Plaintiff's property.
6. The Defendant shall also remove the three trees on the southeastern portion of the Plaintiff's property and one small sapling which has a plant cage over it. If the Defendant does not remove these trees within 30 days of the approval listed in Item 4 above then the Plaintiff may have them removed if she desires.
7. Defendant shall also remove all other plants and pavers that are located to the north of the new property line within 30 days of the approval listed in Item 4 above.

[SIGNATURES ON FOLLOWING PAGE]

Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004 v. George C. Sakakini
Civil Action No. 2015-CP-07-00597

SETTLEMENT AGREEMENT

Graber Law Firm

By: _____
C. Scott Graber
Attorneys for Plaintiff

Mildred Anne Kinghorn, Trustee
_____
Mildred Anne Kinghorn as Trustee for the Mildren Anne Kinghorn Trust, Dates April 28, 2004

Galvin Law Group

By: _____
Gregory M. Galvin
Attorneys for Defendant

George C. Sakakini, MD
_____
George C. Sakakini

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004, Plaintiff, -versus- GEORGE C. SAKAKINI, Defendant.	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2015-CP-07- 00597 AFFIDAVIT OF MILDRED KINGHORN

2016 FEB 22 PM 4:21

I, Mildred Anne Kinghorn, make oath as follows:

1. On February 5, 2016, I participated in mediation with George Sakakini.

2. On that date I was represented by Scott Graber; George Saksakini was represented by Gregory Galvin; the mediator was Mitchell Griffith, Esquire.

3. Mediation consumed the entire day but in the early evening of February 5, 2016 we reached a settlement which was memorialized by the written Settlement Agreement that attached hereto.

4. Thereafter Mitchell Griffith, Esquire informed the Court of the Settlement and copies of the Settlement Agreement were sent to the Resident Judge and filed with the Clerk of Court.

5. On or about February 10, 2016 I sent an application to the Architectural Review Board indicating a Settlement had been reached regarding the boundary line between my Lot 44 and Defendant's Lot 43. A copy of my application is attached hereto.

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. . . . . "

7. Presently, the 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 homeowner requests. D.R. Horton will leave Picket Fences in six (6) weeks.

11. I believe that whatever 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.

13. I believe I am entitled to rely on the signatures of George Sakakini and his lawyer, Gregory Galvin (on February 5, 2016) that settled this matter.

14. My attorney indicated that he will spend at least ten (10) hours preparing the Motion to Enforce the Settlement.

15. I believe I'm entitled to be reimbursed for any attorney's fees and costs associated with the enforcement of the Settlement Agreement dated February 5, 2016.

16. I would ask this Court for a hearing on this matter at the first available opportunity.

I SO SWEAR.

Mildred Anne Kinghorn

Mildred Anne Kinghorn

SWORN TO BEFORE ME THIS
22nd DAY OF February, 2016.

Sharon C. Rains

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 7-19-2023

51 White Pond Boulevard
Beaufort, South Carolina 29902
February 10, 2016

Picket Fences Management
200 Heritage Parkway
Bluffton, South Carolina 29910

Dear Members of the Architectural Review Board:

I have been engaged in a property dispute with my neighbor, George Sakakini. We have reached a tentative settlement which is contingent upon your ruling(s).

My attorney will present the following two settlement issues to your legal team:

1. Whether I am allowed to give my neighbor, George Sakakini, a one foot (1') wide strip of my property (adjacent to his property) which will extend from my front property boundary to the common path near the rear of our properties. The width of his property by the side of his house will then be six feet (6') wide.
2. Whether his easement rights on my property will subsequently be voided.

Now I request that the Architectural Review Board rule on a third matter:
-Whether I can build a fence along the new property boundary with my neighbor.

Enclosed is my completed application to build a "living fence" along our property boundaries. A plat plan is also enclosed. A blue line is drawn on the plat plan to show the new property boundary. Two red lines are drawn on the plat plan to show the location of the new fences. The fences will end approximately three feet away from the common path.

I wish to have Palmetto Fence Company build a four foot (4') high fence along our property boundary on the riverbank, and I will plant Carolina Jasmine plants along the fence.

I also wish to have Palmetto Fence Co. build a five foot (5') high fence along the property boundary between our houses and front yards. I will plant Carolina Jasmine along this fence as well.

There are many eyesores on Dr. Sakakini's property next to his house (various pipes and rods sticking out of the ground, random pieces of black tape attached to the side of his house, weeds, poorly manicured bushes, etc.) I hope to hide some of these eyesores from my view with an aesthetic, living fence. Also, because of our property dispute, my neighbor and I need a fence to henceforth mark the boundary between our two properties.

If you have any questions regarding this application, please contact me at: imsissyk@gmail.com, or (843)300-0311, or (843)271-2345.

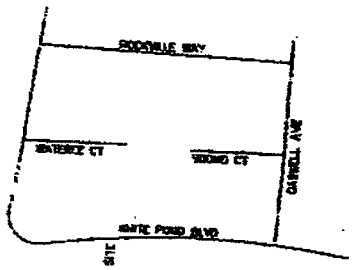
Thank you.

Sincerely,

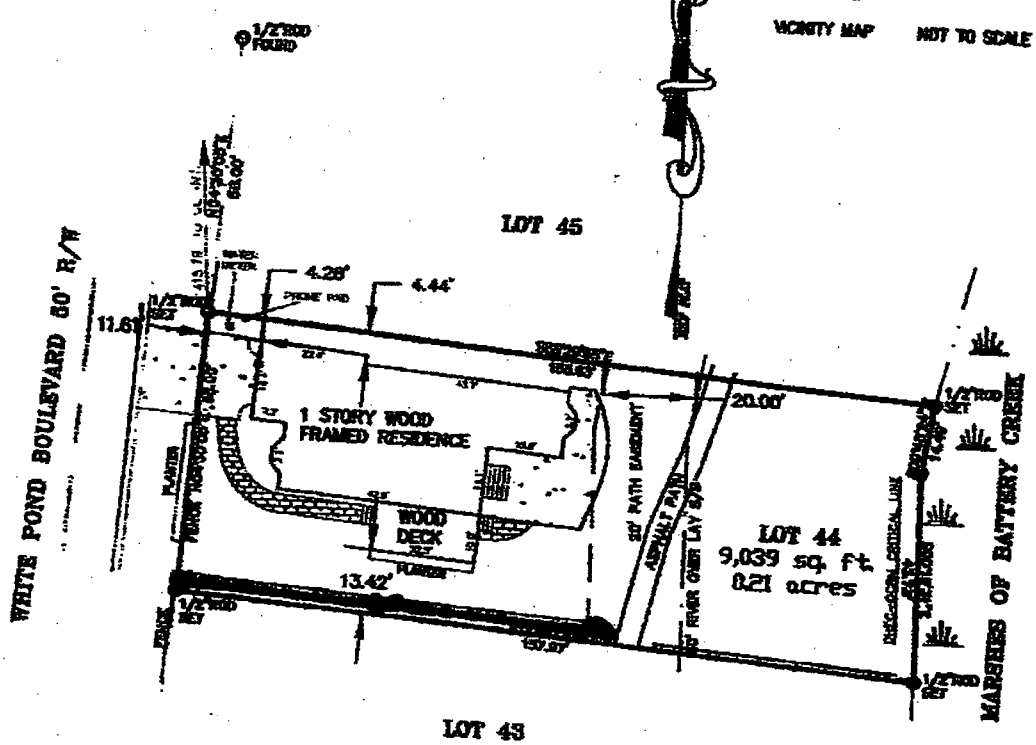
Mildred Anne Kinghorn, trustee of the Mildred Anne Kinghorn Trust

SOUTH CAROLINA
GASQUE & ASSOCIATES, INC. No. C00192
CERTIFICATE OF AUTHORIZATION

GASQUE & ASSOCIATES INC.
LAND SURVEYORS & PLANNERS
28 PROFESSIONAL VILLAGE CIRCLE, BEAUFORT, S.C.
P.O. BOX 1383, BEAUFORT, S.C.
PHONE (843) 522-1738



VICINITY MAP NOT TO SCALE



CRITICAL LINE

THE AREA SHOWN ON THIS PLAT IS A REPRESENTATION OF DEPARTMENT PERMIT AUTHORITY ON THE SUBJECT PROPERTY. CRITICAL AREAS BY THEIR NATURE ARE DYNAMIC AND SUBJECT TO CHANGE OVER TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES IT'S RIGHT TO ASSERT PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREON OR NOT.

SIGNATURE 1/11/13 DATE

THE CRITICAL LINE SHOWN ON THIS PLAT IS VALID FOR FIVE YEARS FROM THE DATE OF THIS SURVEY, SUBJECT TO THE LIMITATIONS ABOVE.

EXEMPT
THE DEVELOPMENT PLAN SHOWN HEREON IS EXEMPT FROM THE REQUIREMENTS OF THE CITY OF PORT ROYAL SUBDIVISION REGULATIONS PURSUANT TO THE PROVISIONS OF
ARTICLE III SECTION 7.5-41(6)
CERTIFIED BY J. B. J. 2-25-13
DATE
Joint Metropolitan Planning Commission

ASBUILT SURVEY PREPARED FOR

ARTHUR S. LUCAS, II

BEING LOT 44 PICKET FENCES SUBDIVISION AS SHOWN ON A PLAT BY DAVID E. GASQUE DATED 2/9/2000 RECORDED IN PLAT BOOK 75, PAGE 142 BEAUFORT COUNTY R.M.C. OFFICE
LOCATED ON PORT ROYAL ISLAND, BEAUFORT COUNTY SOUTH CAROLINA
TAX MAP R112 031 000 0334 0000

THE CERTIFIER HAS NOT INVESTIGATED OR BEEN INSTRUCTED TO INVESTIGATE THE EXISTENCE OR NONEXISTENCE OF ANY OVERLAY DISTRICTS, SUCH AS: AIRPORT, MILITARY, NOISE, CRASH POTENTIAL OR ENVIRONMENTAL ISSUES.
CERTIFICATIONS ARE NOT TRANSFERRABLE TO ADDITIONAL INSTITUTIONS OR SUBSEQUENT OWNERS.
THIS PLAT IS CERTIFIED AND IS INTENDED ONLY FOR THE ENTITY OR PERSON(S) SHOWN HERE ON.
THIS PLAT DOES NOT REPRESENT A SURVEY BASED ON THE LISTED REFERENCES ONLY AND IS NOT THE RESULT OF A TITLE SEARCH.
BEFORE ANY DESIGN WORK OR CONSTRUCTION ON THIS SITE IS STARTED FLOOD ZONE INFORMATION MUST BE VERIFIED BY PROPER BUILDING CODES OFFICIAL.
THIS PROPERTY APPEARS TO LIE IN FLOOD ZONE AE EL 10.00' AS DETERMINED BY F.E.M.A. FIRM COMMUNITY PANEL NUMBER 450025 0006 D EFF. 09/29/86 (INDEX DATE 11/05/92).
THE SURVEYOR DOES NOT CERTIFY THAT THE PROPERTY SHOWN HEREON COMPLIES WITH ANY RESTRICTIVE COVENANTS OR ANY CITY AND/OR COUNTY ORDINANCES.

I, DAVID E. GASQUE, HEREBY CERTIFY TO ARTHUR S. LUCAS, II THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARD MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN. THIS SURVEY IS NOT VALID UNLESS IT BEARS THE ORIGINAL SIGNATURE AND HAS AN EMBOSSED SEAL. AREA DETERMINED BY COORDINATE METHOD.

30 15 0 30 60 90
SCALE: 1"=30' SCALE IN FEET DATE: 1/8/2013

1-10-13
DAVID E. GASQUE, R.L.S. JOB # 33886
S.C. REGISTRATION NUMBER 10506 FB/PG CC DESCRIPT
THIS PLAT IS NOT BINDING UNLESS ACCOMPANIED BY AN ORIGINAL SIGNATURE AND AN EMBOSSED SEAL.

Blue line = new property line.

* Red lines = proposed land of fences.

000108

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-07- 00597
MILDRED ANNE KINGHORN AS)
TRUSTEE FOR THE MILDRED ANNE)
KINGHORN TRUST, DATED)
APRIL 28, 2004,)
)
Plaintiff,)
)
-versus-)
) AFFIDAVIT OF
GEORGE C. SAKAKINI,) MILDRED KINGHORN
)
Defendant.)
)

I, Mildred Anne Kinghorn, make oath as follows:

1. On February 6, 2016, Clea Efthimiades, fiancé and agent of Dr. Sakakini, fired a green laser device at my house on three (3) separate occasions. I have video documenting this act. Thereafter there was a malfunction of one of my surveillance cameras which is mounted off the back corner of my house pointing in the direction of my side deck and front yard.

2. On February 16, 2016, Dr. Sakakini told David Gasque not to perform the survey that was agreed to in the Settlement Agreement. This survey was to the "new" boundary as defined in the Settlement Agreement.

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 objection, Ms. Dubois at the HOA office told me they would not go forward with any ruling.

4. On or about February 18, 2016, Mr. Graber contacted Dr. Sakakini's lawyer, Mr. Galvin. Mr. Galvin subsequently told Mr. Graber that Dr. Sakakini had decided not to object to the settlement, and would notify the HOA.

5. On or about February 19, 2016, I called LaShea Dubois at the Picket Fences HOA. She told me that Dr. Sakakini – instead of agreeing to proceed – had sent the HOA a letter telling them the tentative settlement agreement was "void ab initio" because an HOA representative had not been present during the settlement negotiations.

6. On February 29th, Mr. Graber told me that he'd learned that Dr. Sakakini was also claiming that the settlement was void because Dr. Sakakini's mortgage lender had not been a party to the settlement.

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 the Picket Fences management that they could proceed with the approval process.

8. On March 1, 2016, I called LaShea Dubois. She said that Dr. Sakakini had just sent her another email disputing the right of the HOA to proceed with the approval process. Ms. Dubois would not tell me what Dr. Sakakini's correspondence said or why he was disputing the HOA's right to proceed.

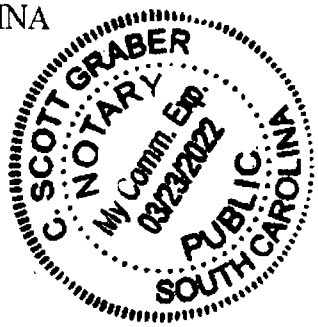
I SO SWEAR.

Mildred Anne Kinghorn

Mildred Anne Kinghorn

SWORN TO BEFORE ME THIS
5 DAY OF March, 2016.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES:



STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MILDRED ANNE KINGHORN AS TRUSTEE FOR THE MILDRED ANNE KINGHORN TRUST, DATED APRIL 28, 2004, Plaintiff, -versus- GEORGE C. SAKAKINI, Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2015-CP-07- 00597 SUPPLEMENTARY AFFIDAVIT OF MILDRED KINGHORN

I, Mildred Anne Kinghorn, make oath as follows:

1. On February 5, 2016 a Settlement Agreement was signed by George Sakakini, and me as well as our respective lawyers, wherein we agreed to the adjustment of the property line separating Lots 44 and 43, Picket Fences S/D, Port Royal, SC.

2. On February 5, 2016 the same Settlement Agreement provided for a fence to be built atop the 'new' property line.

3. The Settlement Agreement also provided for a quitclaim deed extinguishing Sakakini's rights "to any easements" that may exist North of the new property line.

4. The Settlement Agreement was contingent on approval from HOA, ARB or the "appropriate authority".

5. Approval for the property line adjustment has come from the Picket Fences Home Owner's Association.

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.

7. The contingency of the line adjustment and the extinguishment of the easement have been approved.

8. My lawyer, Scott Graber, has spent 26.75 hours in preparation of the Motion to enforce the Settlement Agreement.

I SO SWEAR.

Mildred Anne Kinghorn

Mildred Anne Kinghorn

SWORN TO BEFORE ME THIS
22nd DAY OF March, 2016.

Sharon C Ramo

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES:

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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

27 December 2016

RECEIVED
JAN 03 2017
SC Court of Appeals