THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2016-002459

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO APPLY CONTRACT PRINCIPLES TO THE SETTLEMENT AGREEMENT?

2. DID THE TRIAL COURT ERR IN FINDING THAT EQUITABLE PRINCIPLES DID NOT CREATE AN ENFORCEABLE CONTRACT?

STATEMENT OF THE CASE

On November 14, 2014, the South Carolina Human Affairs Commission (Appellant) brought an action in the Charleston County Court of Common Pleas alleging illegal discrimination in violation of the South Carolina Fair Housing Law against Chen and Yang (Respondents). On March 24, 2016, Appellant and Respondents (hereinafter referred to as the "Parties"), participated in mediation resulting in a settlement agreement. After Respondents withdrew their assent to the settlement agreement, Appellant filed a motion to enforce the settlement agreement on April 15, 2016. A hearing was held on July 14, 2016 and the circuit court denied Appellant's motion to enforce on the grounds that Rule 43(k), SCRCP had not been satisfied.

STANDARD OF REVIEW

The circuit court ruled as a matter of law that the settlement agreement entered into by the parties was unenforceable, on grounds that the agreement failed to strictly comply with SCRCP 43(k). Order of November 3, 2016, p. 4. In reviewing the determination of the circuit court that SCRCP 43(k) must be strictly complied with, this court is to consider the question *de novo* without deference to the circuit court as directed by the Supreme Court of South Carolina in *State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E.2d 402, 405 (2011):

> The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted)). Interpretation of court rules applies the same rules of construction used to interpret statutes. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Nichols Holding, LLC v. Divine Capital Grp.*, 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Id. (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." Id. at 336, 785 S.E.2d at 615 (quoting *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010)).

FACTS

The March 24, 2016 mediation was conducted in Charleston, with two attorneys for the Appellant, three attorneys for the Respondents, and an attorney mediator present. Transcript of Record, P. 3, L. 5. Attorneys for Appellant and Respondent were present for the entirety of the mediation. At mediation, the Parties reached a settlement agreement which was reduced to writing; the agreement was signed by Appellant's attorney[1], by Respondents, but not by Respondents' attorney, although Respondents' attorney was present for the signing. Transcript of Record, P. 3, L. 8-13. The terms called for the preparation of a Consent Order reflecting the terms of the settlement agreement that would be entered into the record. Transcript of Record, P. 3, L. 17-18. Appellant prepared a Consent Order and delivered it to Respondents; Respondents' attorney acknowledged receipt of the proposed Consent Order and stated he would review it. Transcript of Record, P. 3, L. 18-21; Pate Email dated April 1, 2016; O'Shea Email dated April 4, 2016. Shortly thereafter, before the Consent Order was signed and entered into the record, Respondents informed their counsel that they were withdrawing their assent to the settlement agreement. Thereafter, Respondents' counsel informed Appellant and its counsel of the withdrawal of assent to the agreement. Transcript of Record, P. 3, L. 25 through P. 4, L. 2.

[1] Appellant's attorney, Lee Ann Wooten Rice, signed on behalf of the South Carolina Human Affairs Commission as a party and as counsel of record.

ARGUMENT

I. BECAUSE SETTLEMENT AGREEMENTS ARE VIEWED AS CONTRACTS, THE RELEVANT LAW OF CONTRACTS SUGGESTS THE INSTANT SETTLEMENT AGREEMENT EXISTS AS AN ENFORCEABLE CONTRACT

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). This applies to enforcement of an agreement as well; *see Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement agreement is a matter of contract law).

Given that settlement agreements are viewed as contracts, the relevant law suggests that the circuit court erred in finding the agreement unenforceable.

A) EXISTENCE

In determining if a valid contract exists, our courts have consistently held that "a binding contract requires a manifestation of mutual assent to its terms." *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). In making this determination, extrinsic evidence may be used, "[a]lthough the majority of case law addressing extrinsic evidence pertains to contract construction and not the existence of a contract, the inquiry in both instances involves giving force and effect to the intent of the parties, and we discern no reason for different rules of analysis." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014). Our courts have consistently emphasized that "[t]he 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be *based on purpose and intention which has been made known or which, from all the circumstances, should be known.*" *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (emphasis added). "The

intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." *Wright v. Trask,* 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997).

Prior to mediation, the parties signed an Agreement to Mediate; included in this agreement was a recognition that "[a]ny partial or global settlement will be reduced to a written and enforceable Memorandum of Settlement on the date of settlement." Mediation Agreement, p2. On the date of settlement, both parties and their attorneys distilled the agreed settlement terms down to a Settlement Agreement. Transcript of Record, P. 3, L. 8-10. This agreement was signed by both parties in the presence of their respective counsel and by counsel for the Appellants; an oversight in the preparation of the document resulted in an absence of a signature line for the Respondents' attorney. Transcript of Record, P. 3, L. 10-16. There is no dispute as to the meaning of the terms and Respondents signed on their own behalf with their counsel present; Respondents' counsel further acknowledged the existence of an agreement in emails with the Appellant and in the circuit court. O'Shea Email dated April 4, 2016; Transcript of Record, p 9, line 8. For formation of a valid contract, there must be an offer and an acceptance accompanied by valuable consideration; these elements are all present. Under traditional contract law, there would be no question of the existence of a contract as the essential elements have all been met: the parties agreed that any agreement resulting from mediation would be enforceable, there was mutual assent to the terms of the agreement and there is no ambiguity in the agreed upon terms.

Respondents argued below that SCRCP 43(k) relieves them of compliance with the agreement. Rule 43(k) states:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

SCRCP 43(k).

The circuit court, relying on *Farnsworth*, found that the agreement was unenforceable as it had not strictly complied with the conditions of 43(k). *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006). However, *Farnsworth* involved an agreement entered into solely between counsel; while authorized by the parties, there was no writing signed by the parties and one of the parties later rescinded the agreement. In the instant matter, the parties signed the agreement with their attorneys present; allowing a party that would be otherwise bound under contract law to withdraw from a contract due to an unnecessarily strict adherence to 43(k) could not possibly have been intended. Our Supreme Court has previously noted that "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artist Commun., Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). In interpreting the meaning of the South Carolina [Court] Rules ... the Court applies the same rules of construction used to interpret statutes. *Maxwell v. Genez,* 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). The strict application of 43(k) to the agreement reached at mediation requires the courts to ignore long-established rules of contract interpretation. In *Ashfort*, our Supreme Court noted that "the purpose of rules such as Rule 43(k) is: '[T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes[.]'" *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995) (quoting 83 *C.J.S. Stipulations* § 4 (1953)). In this regard, 43(k) is most similar to the Statute of Frauds in contract law, serving similar proposes and requiring similar formalities. The circuit court's determination that 43(k) must be strictly adhered to in the

instant matter is in direct conflict with the existing body of law that allows for certain exceptions to the requirements of a signed writing to evince the existence of a valid contract. *See, e.g.*, *Bekham v. Short*, 294 S.C. 415 (S.C. Ct. App. 1988) (part performance doctrine as exception to Statute of Frauds), *Florence Printing Co. v. Parnell*, 178 S.C. 119, 182 S.E. 313 (1935) (doctrine of estoppel as exception to Statute of Frauds). The strict adherence to 43(k) the circuit court reads into *Farnsworth* requires invalidating years of settlements-as-contracts precedence.

B) ENFORCEMENT

1) Specific Performance

"Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250 (1939)). In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)).

Here, there is no adequate remedy at law as the settlement agreement requires specific acts on behalf of the Respondents that promote the public good. Specifically, the requirements of adherence to Fair Housing Laws, undergoing fair housing training provided by the Human Affairs Commission, and the posting of fair housing materials at properties offered for rental cannot be reduced to monetary damages, rendering any remedy at law inadequate. The agreement is valid as there are no disputes as to the terms and strict adherence to 43(k) should be waived through

application of traditional contract law (see above) or, in the alternative, on equitable grounds (see below). The agreement had been partially carried into execution as evidenced by the Appellant's creation of a Consent Order, the mutual assent to the case status being changed from active to "settled" status with the clerk of court, and the preparation of training and poster materials for the Respondents. Appellant remains willing and able to perform any additional obligations under the contract.

In *Peddler, Inc. v. Rikard*, 266 S.C. 28, 31, 221 S.E.2d 115, 117 (1975), the supreme court noted that "[t]he appellant . . . contend[ed] that the franchise agreement was never signed by him, so there was no meeting of the minds and hence there was no contract between the parties..." The court determined, however, that "[i]t is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other." *Id.* at 32, 221 S.E.2d at 117 (quoting *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927)).

Here, Respondents accepted the signed agreement and acted upon it. Respondents' counsel reviewed the proposed consent order and allowed the mediator to submit a report to the court stating that the matter had been settled. Proof of ADR filed March 29, 2016. Respondents at no time made any effort to update the court on their rescinded agreement and the original complaint was only restored to active status with the court after the Appellant sought and received an order from the circuit court. Respondents' actions and inaction demonstrate that they accepted the agreement and derived benefit from it prior to rescinding their assent. "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 472–73, 351 S.E.2d 343, 346 (Ct. App. 1986) (citing *Peddler, Inc. v. Rikard*, 266 S.C.

28, 221 S.E.2d 115 (1975); *Bullwinkle v. Cramer*, 3 S.C. 776, 27 S.E. 376, 13 Am.St.R. 645 (1887)).

II. BECAUSE RESPONDENTS' ATTORNEY WAS PRESENT FOR AND ADMITTED TO THE EXISTENCE OF THE AGREEMENT, THE BALANCE OF THE EQUITIES SUGGESTS ENFORCING THE AGREEMENT.

This court has previously addressed "courts' substantial flexibility when deciding cases in equity, stating '[o]nce invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.'" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011) (referring to, *e.g.*, *Brown v. Plata*, No. 09-1233, 2011 WL 1936074, at 28 (U.S. May 23, 2011) (internal citation and quotation marks omitted). The *Regions* decision involved the awarding of a first priority equitable lien superior to the mortgage of appellant Regions Bank. Just as in *Regions*, the instant matter "involves the consideration and balancing of several equitable maxims: equity regards as done that which ought to have been done; equity applies substance over form; ...[and] equity follows the law." *Id.* The *Regions* court found that the balance of the equities favored application of substance over form, in spite of urging from the appellant that "equity should follow the law and reward the party who filed first according to section 30-7-10 of the South Carolina Code (2007)." *Id.* In *Regions*, despite appellant's argument that the statutory guidelines dictated the court's decision, the court states that "[t]he principle 'equity regards as done that which ought to be done' applies in cases where the party seeking equitable relief establishes 'a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.' The notion 'equity looks to substance rather than form' evolved out of judicial regard for that which ought to be done. This maxim applies by '*dispensing with pure formalities which would otherwise defeat the equity.*'" *Id* (internal

citations omitted; emphasis added). Our Supreme Court has held that "[w]hen applying this principle, courts look to the substance and intent of the parties, and give a construction consistent with such intent. *Harpending v. Reformed Protestant Dutch Church of City of N.Y.*, 41 U.S. 455, 480, 16 Pet. 455, 10 L.Ed. 1029 (1842). The *Regions* court points out that "[t]his maxim has at times guided a court to relieve a party from the consequences of accident, mistake, and fraud." *Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011)* (citing *Camp v. Boyd*, 229 U.S. 530, 559 (1913)).

The record clearly shows that the parties and their counsel were all in agreement at the time the mediation agreement was signed. All parties agree that the failure of Respondents' attorney to sign the agreement at the mediation was a mistake. As shown above, Appellant has partially performed their obligations under the agreement; strict adherence to 43(k) removes all power from a court to craft an equitable remedy when warranted by the facts. We urge this court to treat as done that which ought to be done and apply substance over form by reversing the circuit court's decision to not enforce the agreement.

III. PUBLIC POLICY FAVORS ENFORCING SETTLEMENT AGREEMENTS REACHED THROUGH MEDIATION AND A CLIENT

Our courts have repeatedly recognized "South Carolina's strong public policy favoring alternative dispute resolution" as a means of resolving disputes prior to judicial hearings. *Ross v. Waccamaw Community Hosp.* 404 S.C. 56, 744 S.E.2d 547 (2013); *see also* Order of the South Carolina Supreme Court 2013-03-14-01 and 2015-11-12-04.

In its orders adopting mandatory mediation, the Supreme Court adopted the Court-Annexed Alternative Dispute Resolution (ADR) Rules. Among those rules is a requirement that "[u]pon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce

the agreement to writing and sign along with their attorneys." Rule 6(f), SCRADR. This rule comports with the language of 43(k) in requiring attorneys to sign the settlement agreement. In this instance, the Respondents changed their minds after an agreement was reached; only as a result of their attorney's mistake is there even a question of enforceability. Strict adherence to 43(k) in this instance rewards Respondents' attorney for failing to comply with the ADR and civil procedure rules. Requiring strict adherence to 43(k) could easily result in the opposite situation, where a party could be unjustly denied enforcement of an agreement due to a mistake by their attorney. Finally, strict adherence to 43(k) could create a sort of perverse incentive for an attorney to avoid signing an agreement in order to retain the option to later rescind the agreement[2].

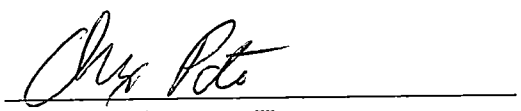
As the public policy of South Carolina favors alternative dispute resolution; an attorney's failure to comply with the rules should not be rewarded; and strict adherence to 43(k) could potentially create a perverse incentive to avoid compliance, we urge this Court to reverse the judgement of the circuit court.

CONCLUSION

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

Respectfully submitted,

March 31, 2017



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[2]To be perfectly clear, Appellant does not believe this to be the case in the instant matter. The issue is raised here prospectively as a potential harm to maintaining a strict adherence to 43(k).