

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY  
ALISON RENEE LEE, CIRCUIT COURT JUDGE  
CASE NO. 2015-001556

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AUG 23 2017

SC Court of Appeals

Jimmy Boykin, Sammy Boykin a/k/a Sandy H. Boykin, Sr., and  
Kenny Boykin,

Plaintiffs

v.

Zady R. Burton, Individually and as Personal Representative of  
the Estate of Helen L. Burton,

Defendants

Of Whom Zady R. Burton, Individually and as Personal Representative of the Estate of Helen L.  
Burton is the Appellant and Jimmy Boykin is the Respondent

PETITION FOR REHEARING

Roger B. Jellenik  
Attorney at Law  
1106 Little Street  
Camden, SC 29020  
Telephone: (803) 424-1919

Attorney for Appellants

Camden, South Carolina  
August 21, 2017

Attorney for Respondent Jimmy Boykin:

Moultrie B. Burns, Jr.  
Savage, Royall & Sheheen, LLP  
P.O. Drawer 10  
Camden SC 29020

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## INTRODUCTION<sup>1</sup>

This Petition is submitted pursuant to Rule 221, SCACR, regarding points overlooked or misapprehended by the Court's Unpublished Opinion No. 2017-UP-340 filed August 9, 2017 ("Court's Opinion"). As background, Burton's appeal arose out of Boykin's Motion to Enforce Mediation Agreement ("Boykin's Motion"), the motion hearing held April 26, 2015 ("April 6 hearing"), and two Circuit Court Form 4 Orders, the first ("Order1") granting Boykin's Motion and the second ("Order2") denying Burton's Rule 59(e) Motion ("Burton's Motion"). Two additional points: i) Burton does not take issue with the case law cited in the Court's Opinion, but ii) Burton does take issue with whether the Court's Opinion applies that law properly here.

### STATEMENT OF POINTS OVERLOOKED OR MISAPPREHENDED

- I. "Burton's first argument".<sup>2</sup> The Court's Opinion rejects Burton's first argument that South Carolina courts will not enforce a settlement that does not comply with Rule 43(k), SCRCR. After citing background law, the Court quotes from Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial."). As set forth in Argument 1 below, this reasoning misapprehends the substance of "Burton's first argument", *i.e.*, that Boykin's Motion should be denied because it seeks to enforce a non-existent mediation agreement.
- II. "Burton's second argument". The Court's Opinion rejects Burton's second argument that Boykin's Motion should not have been granted because it alleged terms not in the Proof of

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<sup>1</sup> If desired, a Statement of the Case may be found in the Final Brief of Appellant at 4-6.

<sup>2</sup> The phrase "Burton's first argument" and similar phrases used in this Petition's headers are borrowed from the Court's Opinion. The actual content and sequence of Burton's arguments as presented at the April 6 hearing and in the Final Brief of Appellant differ somewhat.

ADR or the handwritten mediation agreement prepared by the mediator (“mediator’s memo”) at the end of the mediation. Here, the Court cites Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 638, 640, 643 S.E.2d 692, 695 (Ct. App. 2007):

In an action at law, tried without a jury, this court is limited merely to the correction of errors of law and the circuit court’s factual findings will not be disturbed unless wholly unsupported by the evidence or controlled by an error of law. ...

The circuit court’s role in determining the actual terms of [a] settlement agreement between the parties is similar to the court’s role in interpreting the terms of a contract. ...

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

As set forth in Argument 2 below, this reasoning overlooks i) Burton’s First Argument, ii) the absence of findings of fact in Judge Lee’s orders, iii) ADR rule violations, and iv) other errors of law in the Circuit Court’s rulings, as a result of which Boykin’s Motion should be denied.

III. “Burton’s third argument”. Burton does not now take issue with the Court’s Opinion here.

#### **ARGUMENTS AND AUTHORITIES**

1. “Burton’s first argument”. Boykin’s Motion “moves for an Order to enforce the mediated agreement” including a private sale of real estate. *See* ROA at 41. By focussing solely upon Rule 43(k), the Court overlooks the real issue that Burton’s appeal raises here, namely, that there is no “mediated agreement”, let alone one that requires a private sale of real estate. *See, e.g.*, Final Brief of Appellant at 6-7. More specifically,

- a. The ADR Rules governing mediation require a mediator's agreement signed by the parties and their attorneys. *See* Rule 6(f), SCADR Rules. The mediator's memo was not signed by the parties' attorneys as required by Rule 6(f), SCADR Rules. *See* ROA at 76.
  - b. Alternatively, the parties could have relied upon the "Family Settlement Agreement" required by the mediator's memo. *See* ROA at 76. But that agreement was unacceptable to Boykin and never signed. *See, e.g.*, ROA at 48-49, 51-55, 119; *see also* Final Reply Brief of Appellant at 4-5 and citations to Respondent's Initial Brief set forth therein (Respondent's Final Brief was not yet available to Appellant).
  - c. Also material here is that, contrary to the Court's Opinion, the issues noted in the two preceding paragraphs were raised at the April 6 hearing, thus meeting the test cited in Patterson v. Reid. *See* ROA at 113:7-19.
  - d. As to Rule 43(k), SCRCF, in particular, it sets forth means for having a court approve a settlement agreement. However, that issue appears moot for the reasons set forth above. Also, Rule 2(a), SCADR, points out that "Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial."
2. "Burton's second argument". It is respectfully submitted that the excerpts quoted in the Court's Opinion from Patricia Grand, LLC v. McGuire Enters., are immaterial because the Court's Opinion overlooks or misapprehends Argument 1. But even assuming that the mediator's memo signed by the parties is an agreement, it is respectfully submitted that Boykin's Motion should still be denied because Judge Lee's orders contain i) no findings of fact or any discussion of contrary documented facts to support her rulings (*see* Argument

2.A); ii) no discussion of how ADR rules apply here (*see* Argument 2.B); and iii) other errors of law material to the outcome of this case (Argument 2.C). More specifically,

A. As to facts, the Court's Opinion overlooks the Form 4 format and the content of both Order1 and Order2: they contain no findings of fact (*see* ROA at 2-4), but overlook documented facts that raise questions. As examples,

1. Order1 directs that the parties "shall simultaneously execute the following [eight] items ... within 90 days of the date of this Order." *See* ROA at 2. Why? Items 1, 2, and 5 do not appear in the Proof of ADR or the mediator's memo, and items 6 and 8 modify terms in the mediator's memo. *Cf.* ROA at 2 and ROA at 44.
2. During the April 6 hearing, Boykin's attorney stated that reference to real estate was made in the Proof of ADR or mediator's memo. This allegation is untrue. *See* ROA at 42-44, 114:16-23, and 119:8-9. Did it affect Order1? If so, how? If not, why not?
3. During the April 6 hearing, Judge Lee discussed some concerns with Boykin's Motion (*see* ROA at 126:4-127:1): "Because you are adding in terms that are not contained and apparently since the parties can't agree on those terms, then there is not a meeting of the minds." Judge Lee's later said: "I'm not inclined to enforce it [the mediator's memo] as written because I don't think there is an agreement on it." Did these concerns affect Order1? If so, how? If not, why not?

B. As to rules, a mediation and a mediation agreement are subject to ADR rules that do not apply to other kinds of contracts. Judge Lee's orders overlook these rules. As examples,

1. Argument 1 above raises the point that execution of the mediator's memo did not comply with Rule 6(f), SCADR Rules. Order1 does not discuss this rule violation or its effect upon the mediation's outcome or upon Order1. Why not?
2. Rule 6(f) also requires that "Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing ... ."
  - a) Boykin's Motion seeks enforcement of an alleged mediation agreement including, "inter alia, a private sale of 72 Burdell Road, Lugoff. The case was mediated ... resulting in a Proof of ADR ... specifying the terms of the sale, which would be accomplished by Defendant executing a Deed of Distribution ... ." See ROA at 41. But, contrary to Boykin's Motion, neither the Proof of ADR nor the mediator's memo says anything of the kind. See ROA at 42-44. Notwithstanding, Order1 does not even mention Rule 6(f) in this context. Why not?
  - b) The Memorandum supporting Boykin's Motion lists terms related to a private sale of real estate that Boykin wants included in an order of enforcement, but those terms do not appear in the Proof of ADR or the mediator's memo either. Notwithstanding, once again, Order1 does not even mention Rule 6(f). Why not?
3. Despite the mediator's memo not mentioning it, Boykin's Motion and its supporting Memorandum asked Judge Lee to find that this private sale was part of the mediation (see ROA at 41, 48-50), thereby violating Rules 6e and 8, SCADR Rules.<sup>3</sup> Rule 6(e) sets forth the following duty of a mediating party: "Communications during the

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<sup>3</sup> Nevertheless, given Rule 8, SCADR, Burton makes no comment regarding mediation contents not in the Proof of ADR or the mediator's memo.

mediation settlement conference shall be confidential in accordance with Rule 8.”

Rule 8(a) states that “... [T]he parties, their attorneys, and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any ... judicial ... proceeding, any oral or written communications having occurred in a mediation proceeding ... .” Rule 8(b) contains limited exceptions to confidentiality that do not include these communications.

Confidentiality issues were raised at the April 6 hearing (*see* ROA at 113:20-114:1).

Notwithstanding, Order1 does not mention Rule 6(e) or Rule 8. Why not?

- C. As to other errors of law, Order1 imposes settlement terms (*see* ROA at 2-3) not included in the Proof of ADR or the mediator's memo. Citing no legal authority, Boykin asserts that, because Boykin’s pleading and a proposed, unsigned Family Settlement Agreement referred to a private sale of real estate, the mediator’s memo should be amended accordingly. *See* ROA at 119:8-120:21. The Court's Opinion overlooks or misapprehends case law governing whether and when to interpret a contract. For example, in McPherson v. J. E. Sitrine & Co., the Supreme Court of South Carolina states that:

In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument. and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention. ...

It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for

denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract. 17 C. J. S., Contracts, § 296, pp. 698-702 and 17 C. J. S., Contracts, § 296, pp. 702-707 as quoted in McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 204, 206, 33 S.E.2d 501, 509-510, (S.C. 1945).<sup>4</sup>

Against this background, why should the Court's Opinion i) ignore these cases and enforce a "clear and unequivocal" mediation agreement (the mediator's memo) by adding terms to it and ii) allow a party relying upon an unsigned agreement he rejected to define which terms from it to add and which terms not to add?

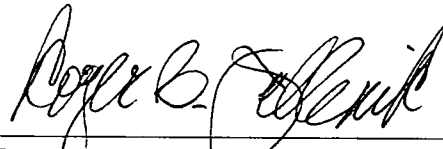
### CONCLUSION

The Court's Opinion misapprehends or overlooks facts, rules, and case law that raise real questions about mediations, ADR Rules, contract law, and the appellate process. If the Court's Opinion is not published and cannot be cited as precedent, these questions remain unanswered. Given the role of mediation in dispute resolution, it is respectfully submitted that leaving these questions unanswered is not helpful to litigants or courts. Accordingly, Appellant Burton respectfully asks that the Court vacate the Court's Opinion, grant this Petition and reverse Order 1 in a published opinion on the ground of either Argument 1 or any part or all of Argument 2, and remand this case to the Court of Common Pleas for further proceedings.

Respectfully submitted,

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<sup>4</sup> See also Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (S.C. 1984); Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334, 1985 S.C. LEXIS 357 (S.C. 1985); and Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539, (Ct. App. 2008).



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Roger B. Jellenik  
S.C. Bar No. 13546  
1106 Little Street  
Camden, South Carolina 29020  
(803) 424-1919  
[rbjatty@mac.com](mailto:rbjatty@mac.com)

Attorney for Appellant

August 21, 2017  
Camden, South Carolina

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Jimmy Boykin, Sammy Boykin a/k/a Sandy H. Boykin, Sr., and  
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Of Whom Zady R. Burton, Individually and as Personal Representative of the Estate of Helen L.  
Burton is the Appellant and Jimmy Boykin is the Respondent

CERTIFICATE OF SERVICE

I, Carole L. Jellenik, Administrator, do hereby certify that, on August 23, 2017, I served a  
copy of the Petition for Rehearing in the captioned case on the following individuals by U.S.  
Mail, <sup>certified</sup> ~~first class~~, sufficient postage affixed, addressed as follows:

The Honorable Janet C. Hasty  
Kershaw County Clerk of Court  
PO Box 1557  
Camden, SC 29021-8557

Moultrie B. Burns, Jr.  
Savage, Royall & Sheheen, LLP  
P.O. Drawer 10  
Camden SC 29020

Carole L. Jellenik  
Carole L. Jellenik, Administrator

August 23, 2017  
Camden, South Carolina

ROGER B. JELLENIK  
ATTORNEY AT LAW

1106 Little Street  
Camden, SC 29020

Telephone 803-424-1919  
Facsimile 803-424-1922  
[rbjatty@mac.com](mailto:rbjatty@mac.com)

Wednesday, August 23, 2017

**BY CERTIFIED MAIL**

Hon. Janet C. Hasty  
Kershaw County Clerk of Court  
P.O. Box 1557  
Camden SC 29021-8557

RE: Jimmy Boykin et al., v. Zady R. Burton, Individually and as Personal Representative of the Estate of Helen L. Burton, Case No. 2015-001556  
Document Transmittal

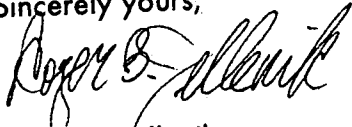
Dear Ms. Hasty:

Enclosed and hereby served upon you are the following documents:

1. Appellant's Petition for Rehearing; and
2. A Certificate of Service.

Thank you for your attention to this matter.

Sincerely yours,



Roger B. Jellenik

RBJ/AMBP 20170823 doc trans to KC.pages

Enclosure(s): Yes ✓

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