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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Opinion No. 2017-UP-340 (S.C. Ct. of App. filed September 22, 2017)

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

v.

Zady R. Burton, Individually and as Personal Representative of
the Estate of Helen L. Burton, Petitioner(s).

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
Petitioner

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 22, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a mediation agreement existed?
2. Even if a mediation agreement did exist, did the Court of Appeals err in holding that it should be enforced as ordered?

STATEMENT OF THE CASE

This action arose out of the probate of a decedent's estate. The decedent's Will named one of her sons ("Burton") as personal representative and residual devisee of her residence.¹ *See* ROA at 15-17. One of Decedent's grandsons ("Boykin") and others filed an Amended Petition seeking, among other things, a private sale of decedent's residence. *See* ROA at 11-17. Burton filed a responsive pleading including defenses and counterclaims. *See* ROA at 18-39. On May 2, 2014, the parties participated in a mediation held pursuant to applicable Alternative Dispute Resolution Rules ("ADR Rules"). The result was a purported mediation agreement — which says absolutely nothing about any sale, conveyance, transfer, title, real property, real estate, or residence — signed by the parties, but not by their attorneys. *See* ROA at 44. It was then filed along with the mediator's Proof of ADR, which noted that a final settlement had been reached. *See* ROA at 42-43. Boykin then refused to sign a final settlement agreement mentioned in the purported mediation agreement. Thereafter, Boykin filed a Motion to Enforce Mediation Agreement ("Boykin's Motion") seeking a private sale of the decedent's residence and related terms unmentioned in the purported mediation agreement. After a motion hearing on April 6, 2015 ("April 6 hearing"), the Kershaw County Court of Common Pleas issued a Form 4 Order ("Order1") granting Boykin's Motion followed by a second Form 4 Order ("Order2") denying Burton's Rule 59(e) motion. *See* ROA at 2-4.

This Petition, submitted pursuant to Rule 242, SCACR, results from the Court of Appeals' Unpublished Opinion No. 2017-UP-340 ("Unpublished Opinion"), filed August 9,

¹ Decedent's Will contained other dispositive provisions not deemed relevant to the subject matter of this Petition.

2017, affirming the Circuit Court's Order¹ granting Boykin's Motion to enforce the purported mediation agreement. *See* Appendix at 2.

ARGUMENTS

1. THERE IS NO MEDIATION AGREEMENT TO ENFORCE. The ADR Rules governing mediation require a mediator's agreement signed by the parties and their attorneys. *See* Rule 6(f), SCADR Rules. The handwritten agreement prepared by the mediator was not signed by the parties' attorneys as required by Rule 6(f), SCADR Rules. *See* ROA at 76. Further, the "Family Settlement Agreement" required by the purported mediation agreement was unacceptable to Boykin and never signed. *See, e.g.,* ROA at 48-49, 51-55, 119; *see also* Final Brief of Respondent at 7 and 9, 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). Finally, in this regard, the Proof of ADR required a "Consent Judgment"¹ to be filed by the attorneys in this matter, (*see* ROA at 74), but no such agreement between counsel was ever reached or filed pursuant to Rule 43(k), SCRCP.

2. EVEN IF AN AGREEMENT IS DEEMED TO EXIST, IT DID NOT PROVIDE ANY BASIS FOR THE REMEDY GRANTED BY THE COURT OF COMMON PLEAS. The Court's Opinion grants Boykin's Motion and construes whatever the Court viewed as an agreement to include terms not in the Proof of ADR or the purported mediation agreement prepared by the mediator. 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)).

It is respectfully submitted that, even if an agreement is deemed to exist, the above excerpt is immaterial here — and Boykin's Motion should still have been denied — because Judge Lee's orders a. contain no findings of fact or any discussion of contrary documented facts to support her rulings; b. no discussion of how ADR Rules apply here; and c. other errors of law material to the Unpublished Opinion. More specifically,

a. As to facts, the Court's Opinion overlooks the content of both Order1 and Order2: they contain no findings of fact (*see* ROA at 2-4), thus ignoring 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 — related to execution of a deed of distribution, payoff of an existing mortgage, and proof of insurance — do not appear in the Proof of ADR or the purported mediation agreement; and items 6 and 8 — stipulations of dismissal of this action and a related landlord/tenant action in Magistrate's Court and mutual releases in compliance with the purported mediation agreement and Order1 — modify terms set forth in the purported mediation agreement. *Cf.* ROA at 2 and ROA at 44.

- 2) Boykin's Motion and supporting Memorandum express or imply that the purported mediation agreement recited the terms of sale to Boykin of decedent's residence. *See* ROA at 41 and 48. No evidence is presented to support this allegation. Also, at 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 simply untrue. *See* ROA at 42-44, 114:16-23, and 119:8-9. How did this allegation affect Order1?
 - 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." How did these concerns affect Order1?
- 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 notes that execution of the purported mediation agreement did not comply with Rule 6(f), SCADR. Neither Order1 nor the Unpublished Opinion mentions this violation or any effect that it should have upon Order1. Why not?
 - 2) 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. As already noted, neither the Proof of ADR nor the mediator's memo says anything of

the kind. *See* ROA at 42-44. Nevertheless, 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). It is respectfully submitted that, if this allegation is true, Boykin's Motion and arguments at the April 6 hearing violate Rules 6e and 8, SCADR Rules.² Rule 6(e) sets forth the following duty of a mediating party: "Communications during the 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" While Rule 8(b) contains limited exceptions to confidentiality, they do not include what was done here. Nevertheless, Order1 does not mention or apply 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 purported mediation agreement 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

² Confidentiality issues were raised at the April 6 hearing. *See* ROA at 113:20-114:1). If Boykin's allegation is false, obviously it still does not deserve to influence the outcome of this case. In any event, under these circumstances, Burton makes no comment affirming or denying mediation contents not in the Proof of ADR or the purported mediation agreement.

example, in McPherson v. J. E. Serrine & 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. Serrine & Co., 206 S.C. 183, 204, 206, 33 S.E.2d 501, 509-510, (S.C. 1945).³

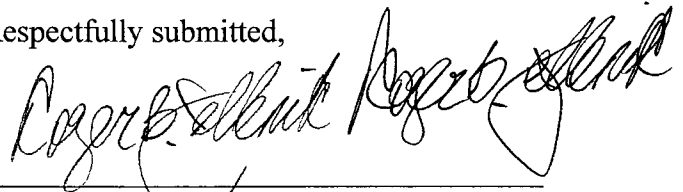
Against this background, why should the Unpublished Opinion ignore generally accepted case law and specific opinions of the Supreme Court of South Carolina so as to add terms to a purported mediation agreement “clear and unequivocal” on its face. Also, why should it allow a party’s arguments regarding an unsigned agreement that party rejected to define which terms from it to add to anything?

CONCLUSION

³ 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 (S.C. 1985); and Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539, (Ct. App. 2008).

This Unpublished Opinion appears to ignore facts, raise novel questions of law involving ADR Rules, and conflict with prior Supreme Court of South Carolina decisions regarding generally accepted contract law. If the Court's Opinion stays in place, remains unpublished, and cannot be cited as precedent, all of these questions remain unanswered. It is respectfully submitted that such a result is simply inconsistent with South Carolina's Appellate Court Rules. *See* Rule 220(b)(1)(A) and D, SCACR. For these and the reasons stated above, Petitioners ask the Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Carole L. Jellenik, Administrator, do hereby certify that, on October 20, 2017, I served
a copy of the Petition for a Writ of Certiorari in the captioned case on the following individuals
by U.S. Mail, first class, sufficient postage affixed, addressed as follows:

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Carole L. Jellenik
Carole L. Jellenik, Administrator

October 20, 2017
Camden, South Carolina