THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2015-CP-02-02389, Appeal Case No. 2017-002321

Edward Pugh, Appellant,

v.

CB&I AREVA MOX SERVICES, LLC and Global Pundits Technology Consultancy, LLC, Respondents.

REPLY BRIEF OF APPELLANT

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REPLIES TO RESPONDENTS COUNTER-STATEMENT OF THE CASE

Resps' Initial Brief p. 5, para. 1 - Appellant replies that Respondents have not provided evidence as to the extent of the NNSA's "varying degrees of oversight, approval, and review" with regard to the Agreement to Settle and the Settlement Agreement.

Resps' Initial Brief p. 6, para. 2 - Appellant replies that while Respondents claim a successful mediation, Appellant claims that mediation was not successful. R. p. 252, lines 21–22, R. p. 233, line 3, R. p. 234, line 2, R. pp. 290-291. Also see continuance Order R. p. 7, lines 3– 4.

Resps' Initial Brief p. 6, para. 3 - Appellant replies that, again, Respondents have not provided any evidence that NNSA has any approval authority over settlements for the MOX project (with its subcontractors).

Resps' Initial Brief p. 6, para. 3 - Appellant replies that the Appellant signed his own version as a gesture of good faith, while Appellants' counsel Jeremy Summerlin continued to negotiate missing terms of payment into a Settlement Agreement, without Summerlin signing "[appellants'] own version of the agreement". This was the breaking point for the Appellant, over the lump sum payment, when settlement negotiations stopped R. pp. 235-237, and Void R. p. 244, line 16-p. 245, line 10, and R. p. 255, line 19– p. 256, line 13.

Resps' Initial Brief p. 6, para. 4 – Appellant replies that the Appellant's counsel withdrew after Respondents decided to end continued negotiations. There was no objection from Respondents. After trying to find another attorney, Appellant then continued pro se R. p. 330, lines 20–p. 331, line 10).

Resps' Initial Brief p. 7, line 2 – Appellant replies that *the Respondent* (emphasis added)

did not file a Rule 59(e), SCRCP motion to alter or amend to challenge the court's order and has admitted here that the circuit court disagreed with the Respondents' position. Respondents did not challenge this Order, entitled "Order Denying Defendants' Motion to Enforce Written Agreement" as noted in the Appellants' Initial Brief.

Resps' Initial Brief p. 7, para. 2 –Appellant replies that this was done after Appellant filed a motion to continue the case and served letter to Respondent for continued discovery R. pp. 248-249 and R. p. 352 line 20–p. 353, line 12. That motion was not to amend or challenge the Courts March 2, 2017 Order that denied the Respondent's Motion to Enforce Written Agreement.

Resps' Initial Brief p. 7, para 2 – Appellant replies that the lower Court requested the Respondents prepare the draft Order for signature R. pp. 371-372 and R. p. 373, and therefore the Court may not have considered Appellants extensive pleadings, motions and arguments from the July 24, 2017 motion hearing.

REPLIES TO RESPONDENTS ARGUMENTS OF THE CASE

I. The Circuit Court Correctly Enforced the Parties' Agreement to Settle Because It Is a Valid Contract and Satisfies Rule 43(k), SCRCP.

A. Replies to - The Agreement to Settle is a valid contract.

Resps' Initial Brief p. 8, para 1 – Appellant replies that it is apparent there was no meeting of the minds here after Respondents would not agree to lump-sum payments if MOX was shut down and therefore cannot be a valid contract.

Resps' Initial Brief p. 8, para 2 - Appellant replies that the "confidential" Settlement Agreement started out being confidential as noted in Respondent Motion to Enforce Written Agreement R. p. 194, lines 5 - 9, but showed up in Respondents Memorandum to Support

their Motion to Enforce R. pp. 210-212, and posted on the Courts website without Appellants consent, and Appellant brought this fact to the Courts attention in Appellant Response to Defense Memo in Opposition R. pp. 320-323.

Resps' Initial Brief p. 8, para 2 – Appellant replies that is exactly correct, the key word being "draft". However, to these Respondents this appears to mean a right, almost sacrosanct, to put whatever they wanted into the draft Settlement Agreement because they have the only word processor, and additionally give them special rights to stop negotiations, whenever they deem fit R. p. 332, lines 9-12, and R. p. 195, lines 3 - 4 and R.p. 205, lines 15-17.

Resps' Initial Brief p. 8, para 2 – Appellant replies that Appellant did not suggest this, he repeated it from quotes where the Respondent used it, to show that the Respondent himself noted the "Agreement to Settle" was a preliminary, tentative, and basic document. While responding to this argument, new matter was discovered from the lower Courts Order of October 4, 2016 filed October 17, 2016, which states that "a *preliminary* agreement …should be finalized" (emphasis added) R. p. 7, lines 3, 4. So now there is evidence of another lower court stating it is "preliminary".

Resps' Initial Brief p. 8, para 3 - Appellant replies that the above reference to the Appellant admitting a purported discussion does not say we agreed to have the DOE and the NNSA in it, and it certainly was not discussed sufficiently enough to have Respondents include it in the Agreement to Settle. The transcript states that Appellant said "It's not in the Agreement to Settle, but there was mention of it at the very end" with the given Respondent reference.

Resps' Initial Brief p. 9, para 1 – Appellant replies that the Mar. 2, 2017 Order R. pp. 18-20 denied Respondents Motion to Enforce Written Agreement, and that Respondents did not appeal from the lower courts' Order App. Br. 5, p. 5, lines 3-4, and the Aug. 14, 2017 Order (to Compel) R. pp. 21-23 was written by the Defendants and did not address the Appellants arguments why the Agreement to Settle should be null and void App. Br. 5, p. 5, line 20 – p. 6, line 4.

Resps' Initial Brief p. 9, para 1 – Appellant replies that there is a possible mistake in reference here by Respondents, as the lump sum payment was not mentioned at this point in the transcript. Respondents acknowledgement of a contemplated lump sum payment here, even without reference, show that continued negotiations were still being carried out to form the Settlement Agreement. The lower Court did ask one of several questions "Does it call for a one-time payment or lump sum payment?" To which Respondents replied "It's complicated, Your Honor...." R. p. 360, lines 11-13.

Resps' Initial Brief p. 9, para 3 – Appellant replies that this was not a "last ditch effort". "The parties mediated this case on September 30, 2016 and came to a *preliminary* (emphasis added) agreement that should be finalized within two weeks of that date. However, because this case is [was] on the October 10, 2016 trial docket, the parties will be [were] unable to finalize the agreement prior to appearing for trial. Therefore, it is ordered that this case shall be continued until the November 2016 jury term" R. p. 7, lines 1-8. So, there were no plans in place to allow for review of the contents of the deposition transcript, the case was already getting close to the next jury term. The case had already been continued twice. The very nature of the mediation did not lend itself to any such delay to allow development of the transcript and its review. This is why Plaintiff has asked for appeal on the merits of the case App. Br. p. 2, line 20, and p. 14,

line 10. Appellant listed principle reasons why he was denied the Jobsite Living Expenses App. Br. p. 4, lines 1-10 and R. p. 226, emphasis para. 26 "Mot. for Summ. J.)–p. 227, para. 55), R. pp. 87–88. Final Br. clarification–Ref'ed in error. ~~See also Ex. 2 Pls Reply DOM to supp. this Ex. 7~~.

It is safe to say that Respondents did not guard their rights carefully when they put in the 2-week limitation on *the terms* (emphasis added) of the retroactive equitable pay increase and then failed to comply, but created the Norton affidavit that said they did in order to defend it. *See* S.C. *Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC,* 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, *or the parties' failure to guard their rights carefully."* (emphasis added)).

B. Replies to - The Agreement to Settle Satisfies Rule 43(k), SCRCP.

Resps' Initial Brief p. 11, para 1 – Appellant replies that there has been no case law presented by Respondents where the Court of Appeals have enforced an Agreement to Settle under the same or similar circumstances as presented by Appellant.

Resps' Initial Brief p. 11, para 2 – Interestingly enough, after Appellants Initial Brief was filed January 22, 2018, and challenged the validity of portions of the "Norton affidavit" in this Court of Appeals, the Senior Attorney for MOX, Noah M. Hicks, who had acted as Notary Public on the affidavit, is no longer with MOX Services at least since February 15, 2018. (New Final Br. clarification – Noah M. Hicks was immediately rehired by MOX Services.)

Resps' Initial Brief p. 11, para 3 – The two cases presented by the Appellant are not inapposite, aside from the point, at variance, beside the mark, beside the point, etc. Appellant argues because the Agreement to Settle is null and void, it cannot be enforced, because as in

Farnsworth v. Davis, as Respondents cited in their response, it does not exist.

Resps' Initial Brief p. 12, para 1 – Appellant replies that Respondent is not using the word "terms" throughout his Initial Brief, and here it is missing in parts and just uses the word "approval".

Resps' Initial Brief p. 12, para 2 – Appellant replies that this is not correct, as noted in the above reference to Respondent counsel Carrouth speaking at the hearing – this is what Appellants examples of case law are for. Case law states that terms of payment have to be in writing App. Br. p. 10, lines 17-20.

Resps' Initial Brief p. 12, para 1 – Appellant replies that the *terms* of the *[retroactive equitable]* pay increase is *[are]* <u>not</u> in Section B(2) of this reference R. p. 321, and R. p. 322, emphasis line 8. It is certainly not approved by MOX without the approval signatures on the Settlement Agreement (same Respondent reference). Again, Respondent is not using the word "terms" because the case law referenced by Appellant is about the *terms* (emphasis added) App. Br. p. 11, lines 7 - 11.

Resps' Initial Brief p. 12, para 2 – Appellant replies that here again, the word *terms* are missing. Again, Respondent is not using the word "terms" because the case law referenced by Appellant is about the *terms* (emphasis added). App. Br. p. ~~11~~. 13, lines 5-11. The only terms ever discussed were first seen in the Norton affidavit July 24, 2017 transcript App. Br. p. 12, lines 1-4 and App. Br. p. 13, lines 1-4.

Resps' Initial Brief p. 13, para 2 – Appellant replies that the Respondent references the phrase "the terms" in his argument, this is exactly what is missing with the retroactive equitable pay increase and opposite to what he is arguing elsewhere. Quoting this Court again "Because

the conditions of an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement of the terms of settlement is fatal to Galloway's claim. To conclude otherwise would largely render meaningless the requirement that settlement agreements be in writing" App. Br. p. 10, lines 17-20.

Galloway v. Regis was cited in Reed v. ASSOCIATED INVESTMENTS, 528 SE 2d 94, 339 SC 148: Court of Appeals, 2000 – SC154. Reed was cited in Exhibit I – Court of Appeals Opinion No. 3118 R. pp. 297-302 and explained to the lower Court R. p. 368, lines 12-25. Regarding a land dispute, the lower Court errored by compelling enforcement of only a portion of the claims. This Court reversed, "because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the writing requirements of Rule 43(k) preclude enforcement of the settlement. Accordingly, the order compelling enforcement of a portion of the alleged settlement agreement is reversed and remanded". *Id.* This was for an unsigned agreement. ~~*Id. 151.*~~ Here, the terms of payment for the retroactive equitable pay increase are not here, except in the Norton affidavit.

Resps' Initial Brief p. 13, para 2 – Appellant replies that the Appellants' former attorney's email as shown in Confidential Exhibit C is not silent regarding the continued negotiations to arrive at a settlement agreement. Here the Respondents contradicts themselves by using the word "terms" and noting that in the case law example, they were not in writing. This is what Appellant has been stating all along, that the terms of payment in this case do not exist anywhere else except in the Norton Affidavit. And these terms can't be approved if they didn't exist until the creation of said affidavit.

The potential affirmation of the lower courts Order by this Court of Appeals would allow any missing term to be "written into" a Settlement Agreement: "This is what we meant to state, here's an affidavit by a Vice President (or some other person), of what we meant to state, should have stated, wished we would have stated, forgot to state, etc".

Resps' Initial Brief p. 13, para. 3 – Appellant replies that Respondent missed the point of Galloway. It does shed light on it. Galloway's light is: Absence of agreement on payment terms, means no enforceable settlement agreement.

CONCLUSION

To 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*, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character. (emphasis added). See Ashfort Corp. v. Palmetto Construction Group, Inc., 318 S.C. 492, 493, 458 S.E.2d 535 (1995)

Regarding Smith v. Fedor, Op. No. 5523 (Shearouse Adv. Sh. No. 44 at 48) (S.C. Ct. App. filed Nov. 22, 2017) this was mentioned quietly, under the "agreement to settle satisfies Rule 43(k)" response, but Appellant feels it was more directed to more subtle points of the case – that of Smith not giving the trial judge a copy of his Motion for Reconsideration, and that the trial court may deny the motion solely on the basis of the rule Smith v. Fedor, Op. No. 5523 (Shearouse Adv. Sh. No. 44 at 48) (S.C. Ct. App. filed Nov. 22, 2017), Section II. Appellant here believes that the merits of his case outweigh any merits requested by Smith after their

confidential agreement was never entered into a record, and Fedor defaulted on that agreement.

Respondents state that Appellant had a "last ditch effort", but the *temporal proximity* of the Norton affidavit to the motion hearing and the Appellants memorandum should make the Respondents argument simply "without merit".

Respondents state that Appellant failed to guard his rights per S. C. Dep 't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645,655,667 S.E.2d 7, 13 (Ct. App. 2008). But Appellant states that Respondents failed to guard their own rights by the same case law, by they themselves typing at their own word processor, the partial terms of the retroactive equitable pay increase with a 2-week time limit for approval of the terms of the payment. Respondent counsel then told lower court it was not necessary to include them.

There is no precedence for an Agreement to Settle being enforced to 43(k) simply because it was signed by all and is under "all documents affecting a proceeding". All cases shown so far were for Settlement Agreements or partial Settlement Agreements. If this Appeal fails, the Court is inviting future cases to allow last minute "we forgot to add these terms, here's an affidavit" to affect a 43(k) agreement. It also takes away the final signature authority of a party at the Settlement Agreement. If a party signs at an Agreement to Settle, why should a party have to sign at the Settlement Agreement?

Accordingly, Plaintiff/Appellant prays the Court of Appeals reverse the decision of the lower Court and grant him a trial. As in all other cases cited, there has been no monies exchanged with this case.

Respectfully submitted:

s/ Edward W. Pugh

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Friday May 11, 2018

Reply Brief

CERTIFICATE OF APPELLANT

I certify, to the best of my ability, that this Reply Brief of Appellant complies with Rule 211 (b), SCACR.

Respectfully submitted:

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Friday, May 11, 2018