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, Appellate Case No. 2017-002321

Edward Pugh, Appellant.

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN ORDERING ENFORCEMENT OF A SETTLEMENT AGREEMENT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?

II. DID THE CIRCUIT COURT ERR IN ITS INTERPRETATION OF RULE 43(K) AS APPLIED TO THIS CASE?

STATEMENT OF THE CASE

Then Plaintiff Edward Pugh, now Appellant Pro Se, started this Action on October 15, 2015 in Aiken County, alleging declaratory judgement, breach of contract and unpaid wages.

The reason the Plaintiff/Appellant is in the Court of Appeals is that, according to the lower Courts Order, he did not file a timely objection to the March 2, 2017 Order that denied a Defense motion to enforce an "Agreement to Settle". Several months later, the Defendants filed a motion to compel enforcement and to execute a "Settlement Agreement" in accordance with the express terms of the "Agreement to Settle". That Order was prepared by the Defendants at the request of the lower court, and then granted by the lower court.

Plaintiff/Appellant then filed a motion for reconsideration which was denied.

Plaintiff/Appellant asserts that the "Agreement to Settle" is null and void and therefore cannot be enforced through Rule 43(k) SCRCP or case law.

Plaintiff/Appellant asks the Court of Appeals to reverse the lower Courts Orders and declare the "Agreement to Settle" null and void, which is within its power as a matter of interpretation of law, without deference to the lower court, specifically Rule 43(k) SCRCP.

The Plaintiff/Appellant respectfully asks the Court to overcome any perceived instance of a technical and procedural deficiency of timeliness, and instead render a decision based upon the facts presented in evidence, the law applied to that evidence as detailed in the Arguments, and the merits of the case.

FACTS

The underlying lawsuit which resulted in the Defendant's Rule 43(k) Motion involved claims related to Edward Pugh's employment with Global Pundits, LLC, a staff augmentation company which subcontracted with CB&I AREVA MOX Services, LLC ("MOX Services"). Global Pundits provided personnel to assist MOX Services construct a mixed oxide nuclear fuel plant (MFFF) under a prime "cost reimbursable" contract with the Department of Energy (DOE) and their semi-autonomous agency, National Nuclear Safety Agency (NNSA) R. p. 252, lines 1-7.

The Plaintiff/Appellant began his action on October 15, 2015 in Aiken County alleging three causes of actions: (1) Declaratory Judgment; (2) Breach of Contract; and (3) Unpaid wages under the S. C. Wage Payment Act. R. p. 192, lines 9 – 12. The Breach of Contract dealt with the non-payment of Jobsite Living Expenses (JLE) for contract employees, which the Plaintiff considered wages R. p. 252, lines 8 - 10.

On September 8, 2016, summary judgment was denied as to both parties R. pp. 5-6.

On September 30, 2016, the parties participated in a Mediation to resolve the underlying lawsuit R. p. 252, lines 20 – 21. That Mediation was not successful but the parties reached a preliminary and tentative agreement 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.

The preliminary, tentative, and basic terms of that agreement were confirmed in a 2-page written document entitled "Agreement to Settle" ~~Confidential~~ R. pp. 290-291. The "Agreement to Settle" was signed by the Plaintiff, Plaintiff's then counsel Summerlin, the Defendants, and Defense counsel, Mr. Carrouth. Plaintiff/Appellant knew it was a tentative agreement and that he would have another opportunity to review all its terms and sign a final Settlement Agreement R. p. 253, lines 1 - 5.

A significant note is that the mediation took place one day after a Rule 30(B)(6) deposition on September 29, 2016. Critical information (transcribed about a week later) from that deposition date was not available to the parties to discuss at Mediation.

The critical information that came out during the 30(B)(6) deposition included that the JLE application was evaluated on criteria not in the MOX Services JLE policy, the very policy that the 30(B)(6) designee helped create R. p. 253, lines 18 – 20. The three principle reasons Plaintiff was denied JLE were that (1) Plaintiff has a primary residency in Walhalla (Oconee County) South Carolina at a time when early (year 2012, 2013) county records showed it was a vacant lot, (2) that the primary residence was a trailer, and (3) that not enough public utility usage was consumed. R. p. 253, lines 20 - 23.

However, the "Agreement to Settle" did not contain all the material terms of the agreement, and in fact contained a term that stated that the "Agreement to Settle" would be null and void after 2-weeks of signing if certain material terms of agreement (payment terms) were not approved R. p. 258, lines 1 – 12. It also stipulated the parties would execute a "Settlement Agreement", but neither the Defendants nor their attorneys or Plaintiff's attorney ever signed a final "Settlement Agreement" because continued negotiations of said "Settlement Agreement" broke down. The 2-page "Agreement to Settle" became a 6-page draft "Settlement Agreement" ~~Confidential~~ R. pp. 279-289.

With the permission of the Defense counsel, the Plaintiff's attorney withdrew in December of 2016, and the Plaintiff/Appellant searched for a new attorney but ended up representing himself R. pp. 12-16.

On January 4, 2017, Defendants filed a "Motion to Enforce Written Agreement" pursuant

to Rule 43(k) SCRCP R. pp. 191-197 and supported it with a Memorandum on February 13, 2017 R. pp. 198-220. On February 15, 2017, a hearing was held and Defendant's motion was denied by Order on March 2, 2017 R. pp. 18-20. Defendants did not appeal from the lower court's Order denying their Motion to Enforce the Written Agreement.

Instead, on June 7, 2017 Defendants filed "Motion to Compel Plaintiff to Comply with Order Enforcing Written Agreement" R. pp. 239-242.

On July 3, 2017, Plaintiff/Appellant timely filed and served his "Motion to Declare the Agreement to Settle Null, Void, and Non- Binding" based on the absence of certain material terms of agreement within the 2-week period after signing. That Motion was supported with a July 18, 2017 "Memorandum to Deny Defendant's Motion to Compel Plaintiff to Comply with Order Enforcing Written Agreement and To Support Plaintiff's Motion to Declare Agreement to Settle Null, Void, Non-Binding" R. pp. 251-302. This Plaintiff Memorandum also referenced Supreme Court Opinion No. 26120 "Farnsworth v. Davis" R. pp. 292-296 and Court of Appeals Opinion No. 3118 "Reed v. Associated" R. pp. 297-302.

Some 10 months after signing of the "Agreement to Settle", but 2-days after Plaintiff/Appellant filed the above July 17 Memorandum, the Defendants created an "Affidavit of Roland Norton" to help support their motion of June 7, 2017 - that certain material terms of agreement were approved within the 2-week period R. pp. 306-307. Both party's motions were heard on July 24, 2017.

On August 10, 2017 an early morning Defense email inquiry as to the status of the previous motions was made to the Clerk of the lower Court because the case had been placed on the July Roster for August 21-25, 2017. The Clerk of the lower Court responded the same day, requesting

the Defendant's counsel prepare an Order granting Defendant's "Motion to Compel Plaintiff to Comply with Order Enforcing the Written Agreement" R. pp. 371-372. Defendants then drafted the Order the next day, R. p. 373, and the lower Court signed the Order on Aug.14, 2017 R. pp. 21-23.

Regarding the above August 14, 2017 Order, the lower Court referenced its previous Order of March 2, 2017 noting "Plaintiff (emphasis added) has not filed any motion to have this Order reconsidered" R. p. 21, lines 7-9. From the same Order, the lower Court denied Plaintiff's Motion to Declare the Agreement to Settle Null, Void, and Non-Binding" with no reason given other than the same failure to file a motion to alter or amend within 10 days per Rule 59(e), SCRCP. R. pp. 21, foot note 1.

Following receipt of the Order, on August 24, 2017, Plaintiff/Appellant filed a "Motion for Reconsideration," R. pp. 313-316 and both parties filed and served Memorandums to support their positions regarding that Motion R. pp. 317-319 and R. pp. 320-326.

The Plaintiff's "Motion for Reconsideration" was denied in an October 11, 2017 Form 4 Order and no reason given R. pp. 24-25.

In November of 2017, the Appellant then filed and served the Notice of Appeal, and this appeal follows.

ARGUMENTS

I. THE LOWER COURT ERRED IN COMPELLING SETTLEMENT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

A. LAW

The agreement reached at Mediation is not binding because it was preliminary and tentative and referred to an agreement to execute a "Settlement Agreement". Plaintiff/Appellant

asserts this does not meet the requirements of Rule 43(k). No agreement between counsel affecting the proceedings in an action shall be biding unless reduced to the form of a consent order or written stipulations signed by counsel and entered in the record, or unless made in open court and noted upon the record." This rule was held to apply to settlement agreements in Ashford Corp. v. Palmetto Construction Group, Inc., 318 S.C. 492, 458 S.E.2d 533 (1995). The Ashfort court opined that "the purpose of rules such as Rule 43(k) is: "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" R. p. 254, lines 6 - 9.

Rule 43(k) addresses agreements of counsel in four parts:

> (k) Agreements of Counsel. 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. Settlement agreements shall be handled in accordance with Rule 41.1 SCRCP.

There has never been any final comprehensive "Settlement Agreement" signed by all parties. The preliminary and tentative "Agreement to Settle" was by definition just that – preliminary and tentative. Such a preliminary agreement may not, and in this case did not, contain proper material terms satisfactory to the Plaintiff in the case.

B. DISCUSSION

In this matter, when the Defense counsel proposed the Order granting continuance on Dec.19, 2016 R.p. 233, lines 3-4, R.p. 266, lines 3-4, it stated that: "The parties mediated this case on September 30, 2016 and came to a preliminary agreement." Also see Order R. p. 7, lines 3– 4.

Defense contacted the lower Court judge by email and admitted as much: "This case was mediated and a tentative settlement was reached on September 30, 2017" R. p. 234, line 2 and

R. p. 267-268. Also, "The requested continuance will allow Plaintiff time to find new counsel and for the parties to continue to consummate the negotiated settlement" R. p. 234, line 10 and R. p. 268, line 10. Also see previous continuance Order R. p. 7, lines 3 – 4.

Again, in the same letter, Defendant's attorney stated: "The parties have been unable to finalize the settlement terms because Mr. Pugh objected to the scope of the parties to be released." R. p. 234, line 5 and R. p. 268, line 5.

Later, in its Motion to Enforce Written Agreement of January 4, 2017, defense counsel stated on page 2 of R. p. 193, lines 11 – 12 and R. p, 273, lines 11 - 12: "All terms for a comprehensive Settlement Agreement were accepted except for one issue related to the scope of parties to be released by the comprehensive Settlement Agreement." This is not true as explained here.

The Defendants by their own admission have agreed no full and final settlement ~~or a "meeting of the minds"~~ was ever reached by the parties R. pp. 192, lines 5 – 7. Plaintiff / Appellant also asserts that there was more than one term that was not agreed to. For example, in Plaintiff's former counsel's email to defense counsel dated November 17, 2016 ~~Confidential~~ R. p. 235, lines 8 – 22 and R. p. 269 lines 8 - 22, there was a second term, one which would provide a prorated lump sum payment to the Plaintiff if the MOX project was shut down or Plaintiff was laid off within a fixed amount of time, up to two years. The Defendants rejected this term. Without the added assurance of a prorated lump sum payment and what seemed to be a shutting down of the MOX project, the Plaintiff's attorney refused to sign any final "Settlement Agreement".

Indeed, the lower Court acknowledged that Plaintiffs and Defendants "got awfully close" to a Settlement Agreement R. p. 345, lines 9-10.

Because of the two unfinished terms (unknown parties and no prorated lump sum payment), the lower Court erred in granting Defendant's motion to compel settlement of a "tentative" agreement.

The purpose of Rule 43(k) is to prevent possible disputes that can arise over the existence of terms of an agreement that has not been met. The Plaintiff/Appellant has shown in the FACTS that disputed terms exist. Consistent with Ashfort, there has been no "meeting of the minds" regarding the terms of a final comprehensive "Settlement Agreement."

II. THE LOWER COURT ERRED IN INTERPRETING RULE 43(K) UNDER THE FACTS AND CIRCUMSTANCE OF THIS CASE.

A. LAW

In Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 627 S.E.2d 724 (2006), our Supreme Court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement following a Mediation prior to signing the final settlement agreement, arguing Rule 43(k) was not met. Farnsworth, through a letter by her attorney, offered to release Davis from all liability in a breach of contract and negligence cause of action. Davis' attorney accepted the offer by signing the letter. Soon thereafter, Farnsworth rescinded the agreement. Davis moved to compel Farnsworth to comply with the agreement. In reversing the trial court's order granting the motion, the Supreme Court stated: "Rule 43(k) provides that 'no agreement...shall be binding unless' one of the three conditions listed in the Rule is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, that party is entitled to withdraw assent." The lower court ordered Farnsworth to comply with an agreement that did not exist.

It is anticipated the Defendants/Respondents will argue a preliminary amount of settlement was agreed to. This is irrelevant where the parties agree on the amount of a settlement but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997).

B. DISCUSSION

The lower Court's Order of March 2, 2017 properly denied Defendant's Motion to Enforce Written Agreement. At that point in time, the Plaintiff/Appellant was entitled to his day in Court (Plaintiff/Appellant had already asked for his day in Court in R. p. 275, line 28.) Later, in a strange twist, Defendants took another shot and refiled a Motion to Compel after it had already been ruled on by the lower Court. This time Defendants argued Plaintiff should have moved to alter or amend the Order. This is hard to reconcile since the Plaintiff/Appellant was in opposition to the Motion to Enforce Written Agreement the first place and agreed with the Court's determination on March 2, 2017.

The net effect of the July 24, 2017 Order R. pp. 21-23 from the lower Court is to contravene the true purpose of Rule 43(k). That is for the parties to have a complete and final agreement reaching a meeting of the minds on all issues that are signed. This was never done.

Specifically quoting Galloway v Regis, "Because the conditions upon which 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 conclude otherwise would largely render meaningless the requirement that settlement agreements be in writing." Id. 546, 481 S.E.2d 716.

There was clearly "the absence of agreement of the terms of settlement." There was an agreed upon sum of money, but not the specific terms of payment of a "retroactive equitable pay

increase" that were to be approved within 2-weeks.

In the September 30, 2016 "Agreement to Settle", the parties and their attorneys agreed to the following consideration:

> "2.b. Plaintiff will receive a payment for a retroactive equitable pay increase in the amount of "X" (confidentiality). The amount is subject to normal withholding as required by law.
>
> i. The terms of this retroactive equitable pay increase must be approved by CB&I AREVA MOX Services, LLC within two (2) weeks of this effective date of this agreement. If such approval is not obtained, the Agreement is null and void." (underline emphasis on terms and approval added).

To defend the missing "terms" of 2(b)(i) above that were not agreed upon within the 2- weeks, Defendants created an "Affidavit of Roland Norton" R. pp. 306-307 – (Norton Affidavit) approximately 10-months after the preliminary and tentative Agreement to Settle was signed, 2-days after Appellant/Plaintiff mentioned it in his July 17, 2017 Memorandum to Deny Defendant's Motion to Compel, and 4-days before the July 24, 1017 Motion hearing. The up until then missing "terms" of the retroactive pay increase were described in the Norton Affidavit thusly:

> "a fixed sum was being offered as a part of the consideration in exchange for Mr. Pugh executing a full and comprehensive settlement and release".

Appellant/Plaintiff described the Affidavit as "pretextual" throughout his further

pleadings. Instead of pointing to where the missing terms should have logically been – in any one of the Settlement Agreements the Defendants were drafting, they had to create them in the form of the Norton Affidavit, in very close proximity (within 2-days) of Plaintiff/Appellant's Memorandum. Using that logic, more Affidavits could be created at will by the Defendants to explain other settlement terms they say are "missing" from the "Agreement to Settle" that only they need create and approve. Regarding the pleadings of the July 24, 2017 Motion hearing, about the payment terms of the retroactive equitable pay increase and the Plaintiff/Appellant focusing on the null and void language of that term, the Defendants simply told the lower Court that: "there's no requirement in the agreement to settle that that approval had to be in writing or submitted in any particular manner or fashion":

Defendant attorney MR. CARROUTH speaking July 24, 2017 R. p. 366, lines 2 – 9:

So it really had to do with more of a discussion between the Defendants. And Mr. Pugh has focused on that because of the null and void language. But it was approved and there's no requirement in the agreement to settle that that approval had to be in writing or submitted in any particular manner or fashion. It just -- it had to be approved and it's approved, Your Honor. As an officer of the court, the parties, the Defendants intend to pay these sums as soon as we have Mr. Pugh to sign the order -- I mean, a settlement agreement consistent with your order from March 2nd.

THE COURT: Anything else?

MR. PUGH: Those are his terms that he just said describing what it is. I never knew about those terms until I got the affidavit.

Returning to Galloway v Regis, "Because the conditions upon which 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 conclude otherwise would largely render meaningless the requirement that settlement agreements be in writing." (underline emphasis added). Id. 546, 481 S.E.2d 716.

It is self-evident that a party cannot have an "agreement of the terms of settlement" if only one party knows about those terms.

The Plaintiff never received, reviewed or agreed with the purported terms of the retroactive equitable pay increase within the 2-week time period ~~July 24, 2017~~ R. p. 366, lines 14– 16.

The Appellant/Plaintiff never received any type of payment for the retroactive equitable pay increase within the 2-week time period. The consequences of either one of these failures is to make the "Agreement to Settle" null and void, which was denied by the lower court.

The present case was very similar to Farnsworth v. Davis, Supreme Court Opinion 26120 as noted by Plaintiff/Appellant July 24, 2017 R. p. 367, line 24 - 25 and R. p. 368, lines 1 - 4. The lower Court has granted the Order to Compel, when it was ordering Plaintiff/Appellant to comply with an "Agreement to Settle" that is null and void and therefore, like Farnsworth, does not exist. Also, the terms which were tentatively agreed to at Mediation, but were not agreed to in a final form by either one of the parties, is similar to Galloway v. Regis. This was noted by

Plaintiff/Appellant July 24, 2017 R. p. 19 lines 12 - 19 by citing Court of Appeals Opinion 3118 Reed v. Associated Investments. This should have eliminated any right to compel settlement as Rule 43(k) could not be complied with.

CONCLUSION

The reason the Plaintiff/Appellant is in the Court of Appeals is that, according to the lower Courts Order, he did not file a timely objection to the March 2, 2017 Order that denied a Defense motion to enforce an "Agreement to Settle". The Plaintiff/Appellant respectfully asks the Court to overcome any perceived instance of a technical and procedural deficiency of timeliness, and instead render a decision based upon the facts presented in evidence, the law applied to that evidence as detailed in the Arguments, and the merits of the case.

The fact that not having disclosed the payment terms anywhere in the case is fatal to the lower Courts Order. Not having disclosed the same payment terms within the 2-week period after the "Agreement to Settle" was signed is even "more fatal" because of the null and void clause in said "Agreement to Settle."

The fact that a Settlement Agreement was never signed by all parties and their counsel because of two unfinished terms and the break down of settlement discussions is also grounds for reversal.

The fact that the "Agreement to Settle" was described as "preliminary" and "tentative" throughout the Defendant's pleadings.

As outlined, at issue in this case is the interpretation of Rule 43(k), SCRCP. The interpretation of a rule or statute is reviewed de novo. Limehouse v. Hulsey, Op. No. 4805 (S.C. Ct. App. filed June 2, 2011) (Shearouse Adv. Sh. No. 18 at 26, 37); see Catawba Indian Tribe of

S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court).

Plaintiff requests that the Court of Appeals assert its authority per the above case law, and reverse the lower Courts three (3) Orders, as further outlined in the Arguments of this Appeal. A South Carolina Court cannot order enforcement of an agreement that is null, void, non-binding or one that does not exist as per Rule 43(k) SCRCP.

There is a very precious right to trial by a jury in this country. Precluding a litigant from access to the Courts should be and has been frowned upon by our South Carolina Supreme Court as set forth in the cases above. Plaintiff/Appellant wrote to the judge and asked for a trial R. p. 275, line 28 after the mediation failed to produce a Settlement Agreement signed by all parties and their counsels.

Accordingly, Plaintiff/Appellant prays the Court of Appeals reverse the decision of the lower Court and grant him a trial.

Respectfully submitted:

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Friday, May 11, 2018

CERTIFICATE OF APPELLANT

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

Respectfully submitted:

s/ Edward W. Pugh

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(5)

PROOF OF SERVICE
OF THE FINAL BRIEF, REPLY BRIEF, ETC.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Doyet A. Early, III
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Edward Pugh — Appellant

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CB&I AREVA MOX SERVICES, LLC and Globalpundits Technology Consultancy, LLC — Respondents

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PROOF OF SERVICE

I certify that I have served the bound copies of the **Final Brief, Reply Brief, and Record on Appeal, and loose copies of the Final Brief and Reply Brief** of the Appellant on Respondents CB&I AREVA MOX SERVICES, LLC and Globalpundits Technology Consultancy, LLC by depositing a copy of it in the United States Mail, postage prepaid, on May 11, 2018, addressed to their attorneys of record, Michael D. Carrouth and Benjamin Dudek, c/o Fisher & Phillips, LLP, PO Box 11612, Columbia, South Carolina 29211.

Friday, May 11, 2018

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