THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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 RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

COUNTER-STATEMENT OF ISSUE ON APPEAL

I. THE CIRCUIT COURT CORRECTLY ENFORCED THE PARTIES' AGREEMENT TO SETTLE BECAUSE IT IS A VALID CONTRACT AND SATISFIES RULE 43(K), SCRCP.

COUNTER-STATEMENT OF THE CASE

CB&I AREVA MOX Services, LLC ("MOX") has a prime "cost reimbursable" contract with the United States Department of Energy ("DOE") to design, build, and operate a mixed oxide fuel fabrication facility that will convert surplus nuclear weapons-grade plutonium into fuel for civilian power generation at the Savannah River Site in Aiken County, South Carolina. R. p. 198. The MOX project is supervised by the National Nuclear Security Administration ("NNSA"), a semi-autonomous agency within the DOE. R. p. 198. The DOE and the NNSA maintain varying degrees of oversight, approval, and review over MOX's operations and the performance of its contract. R. p. 198.

MOX subcontracted with Globalpundits Technology Consultancy, LLC ("Globalpundits"), a staffing company that provides personnel to assist MOX in carrying out its duties under the contract. R. p. 198. At one point, certain personnel were eligible for potential reimbursement of living expenses under MOX's Jobsite Living Expense (JLE) program if they maintained a dual residence and lived more than fifty miles from the MOX facility. R. pp. 199; 206–09.

In October 2012, Globalpundits provided Appellant pro se Edward Pugh ("Appellant"), a welding engineer, to MOX to work on the project. R. pp. 141–42. On October 8, 2015, Appellant filed this action against MOX and Globalpundits (collectively, "Respondents"), alleging breach of contract and unpaid wage claims. R. pp. 26–49. Appellant essentially claimed Respondents wrongfully denied his reimbursement requests under the JLE program. R. p. 26–49. Respondents denied Appellant's allegations, contending the JLE program was discretionary and reimbursements were not guaranteed. R. pp. 59–67; 145–57. Appellant and

Respondents filed motions for summary judgment, which the circuit court denied on September 8, 2016. R. pp. 5–6; 68–190.

On September 30, 2016, Appellant and Respondents concluded a successful mediation by executing an Agreement to Settle. R. pp. 199; 211–12. According to terms of the Agreement to Settle, the parties agreed to a complete release of all claims. R. p. 211. Respondents would provide Appellant with a payment for past JLE reimbursement requests, a retroactive equitable pay increase, and an immediate hourly pay increase following the execution of the settlement agreement. R. pp. 211–12. The Agreement to Settle was signed by all the parties and their counsel. R. p. 212.

Given that the DOE and the NNSA had approval authority over settlements for the MOX project and Appellant had agreed to release "all claims" relating to this matter, Respondents included the DOE and the NNSA as "released parties" in the settlement agreement. R. pp. 200; 216. Appellant objected, removed the DOE and the NNSA from the agreement as released parties, and signed his own version of the agreement. R. pp. 269–71; 279–89. Respondents did not accept this change. R. pp. 269–71.

On December 15, 2016, Appellant's counsel, Jeremy Summerlin, withdrew from his representation of Appellant, who continued pro se. R. pp. 12–16. Respondents filed a Motion to Enforce Written Agreement on January 3, 2017, arguing the DOE and the NNSA should be included in the settlement agreement as released parties. R. pp. 191–220. In a March 2, 2017 order, the circuit court disagreed with Respondents' position, but only denied Respondents' Motion to Enforce the agreement "as to any parties other than those named in the complaint." R. p. 18. Appellant did not file a Rule 59(e), SCRCP motion to alter or amend to challenge the court's order.

Following the court's decision, Respondents asked Appellant to execute a settlement agreement with only the named defendants, MOX and Globalpundits, as released parties. R. pp. 279–80. Appellant refused. R. p. 241. Respondents were then forced to file a Motion to Compel Plaintiff to Comply with the court's order on June 7, 2017. R. pp. 239–42; 303–05. In response, Appellant filed an untimely Motion to Declare the Agreement to Settle Null, Void and Non-Binding on July 3, 2017. R. pp. 243–47. The circuit court heard the motions on July 24, 2017. R. pp. 350–70. On August 14, 2017, the circuit court granted Respondents' motion and denied Appellant's motion. R. pp. 21–23. In its order, the court compelled Appellant to follow its prior order and execute a settlement agreement with Respondents in accordance with the Agreement to Settle. R. pp. 21–23. Appellant filed a motion for reconsideration, which the circuit court denied in a Form 4 order on October 11, 2017. R. pp. 24–25; 313–16. This appeal follows.

ARGUMENT

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

A. The Agreement to Settle is a valid contract.

Courts review and interpret settlement agreements in much the same way as contracts. *Patricia Grand Hotel, LLC v. MacGuire Enters., Inc.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). To constitute a valid and enforceable contract, there must be a meeting of the minds between the parties with respect to all essential and material terms of the agreement. *Id.* at 638, 643 S.E.2d at 694.

Per the Agreement to Settle, Appellant and Respondents agreed to execute a confidential settlement agreement "including a mutual, full and complete release of all claims." R. pp. 211–12. Appellant would receive a payment for past JLE reimbursement requests, a retroactive equitable pay increase, and an immediate hourly pay increase following the execution of the settlement agreement. R. pp. 211–12. These payment terms were all accompanied by specific monetary values. R. pp. 211–12. The parties also acknowledged that Respondents' counsel would draft the settlement agreement and release. R. p. 212. Thus, the Agreement to Settle contains all material and essential terms, which are not "preliminary, tentative, and basic," as Appellant suggests. App. Br. 3, 6–9.

However, Appellant maintains that Respondents attempted to add a material term to the Agreement to Settle by including the DOE and the NNSA as released parties in the settlement agreement. App. Br. 8. Interestingly, Appellant admitted that the parties discussed the release of the DOE at the end of mediation. R. p. 343, lines 20–25 – p. 344, lines 1–2. Nevertheless, although the circuit court disagreed with Respondents' view that the DOE and the NNSA should be included in the agreement as released parties, the court merely interpreted the parties'

intentions with respect to the Agreement to Settle and did not invalidate the entire contract. R. pp. 18; 21–23. *See Mattox v. Cassady*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986) ("Like any other agreement, when 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."). The court only denied Respondents' Motion to Enforce the Agreement to Settle "as to any parties other than those named in the complaint," and it later compelled Appellant to follow this order and execute a settlement agreement with Respondents. R. pp. 18; 21–23.

In addition, Appellant claims that another material term missing from the Agreement to Settle was a prorated lump sum payment to Appellant in the case of a shut-down of the MOX project or layoff. App. Br. 8. However, Appellant's former counsel proposed this lump sum payment on behalf of Appellant *in response to* Respondents' initial inclusion of the DOE and the NNSA as released parties. R. pp. 269–70. Although the parties discussed the release of the DOE at the end of mediation on September 30, 2016, they did not contemplate this lump sum payment before Appellant's former counsel's subsequent proposal. R. pp. 269–70; p. 343, lines 20–25 – p. 344, lines 1–2.

In a last ditch effort, Appellant argues the circuit court should have rescinded the Agreement to Settle because the mediation took place a day after a Rule 30(b)(6), SCRCP deposition of MOX's corporate designee on September 29, 2016. App. Br. 4. Appellant complains that the deposition transcript was prepared a week later and contained critical information that was not available for him to review before deciding to sign the Agreement to Settle. App. Br. 4. As Respondents argued to the circuit court below, this timing is of no consequence because Appellant and his counsel knew the deposition occurred the day before the mediation. R. p. 309. Indeed, Appellant could have waited to sign the Agreement to Settle until

he had an opportunity to review the contents of the deposition transcript. R. p. 309. Appellant's failure to guard his rights does not constitute grounds to rescind the binding contract. *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. The Agreement to Settle Satisfies Rule 43(k), SCRCP.

In determining the meaning of a procedural rule, the appellate 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). "If a rule's language is plain, unambiguous, and coveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.*

Rule 43(k), SCRCP, provides, in pertinent part, the following:

> 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.*

(emphasis added).

Prior to 2009, Rule 43(k) only applied to (1) written stipulations signed by counsel and entered into the court record, (2) consent orders signed by counsel and entered into the court record, and (3) settlement agreements announced in open court and noted upon the record. *See Smith v. Fedor*, Op. No. 5523 (Shearouse Adv. Sh. No. 44 at 48) (S.C. Ct. App. filed Nov. 22, 2017). Effective April 29, 2009, the South Carolina Supreme Court amended Rule 43(k) to add agreements that were "reduced to writing and signed by the parties and their counsel" under the rule's purview. *Id.* (quoting Rule 43(k), SCRCP). Therefore, a court may enforce an agreement to settle an action following mediation according to the plain language of Rule 43(k) as long as

the agreement (1) affects the proceedings and is (2) in writing, (3) signed by the parties, and (4) signed by the parties' counsel.

Here, the Agreement to Settle affects the parties' rights under these proceedings because the parties all agreed to "dismiss with prejudice all claims, counterclaims, and defenses" in this action. R. p. 211. In addition, the Agreement to Settle is in writing and signed by Appellant; Jeremy Summerlin, Appellant's former counsel; Noah M. Hicks, Senior Attorney for MOX; Joe Doyle, Director of Globalpundits; and Michael Carrouth, Respondents' counsel. R. pp. 211–12. Accordingly, the Agreement to Settle strictly complies with the requirements of Rule 43(k), and it is enforceable.

Nonetheless, Appellant argues two appellate decisions support his claim that the circuit court erred in enforcing the Agreement to Settle under Rule 43(k). However, both cases predate the 2009 amendment to Rule 43(k) and are simply inapposite with respect to signed agreements by parties and their counsel. In *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, the supreme court reversed the circuit court's grant of the defendant's motion to compel the plaintiff to comply with a settlement agreement because the pre-2009 version of Rule 43(k) had not been satisfied. 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). During discovery, the defendant's attorney signed a letter from the plaintiff's counsel that offered a settlement, but the parties never entered a consent order or written stipulation into the record. *Id.* at 636, 627 S.E.2d at 725. Soon thereafter, the plaintiff gave notice to the defendant that she wanted a trial. *Id.* The supreme court found "[a]s soon as [the defendant] received notice of rescission, the letter signed by counsel ceased representing an agreement. The circuit court, therefore, ordered [the plaintiff] to comply with an agreement that did not exist." *Id.* at 637, 627 S.E.2d at 725.

Like the agreement in *Farnsworth*, Appellant argues the Agreement to Settle was rendered null and void by virtue of Paragraph 2(b)(i). App. Br. 13. That paragraph provides, "[t]he 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." R. p. 211. Appellant claims MOX did not approve the retroactive pay increase within two weeks of the effective date because he "never received, reviewed[,] or agreed with the purported terms of the retroactive equitable pay increase within the 2-week time period." App. Br. 13.

As Respondents submitted to the circuit court, no language in Paragraph 2(b)(i) of the Agreement to Settle even comes close to suggesting such approval was required to be in writing, or that it even had to be presented to Appellant. R. p. 365, lines 10–25 – p. 366, lines 1–12. The pay increase was approved by MOX and was included in Section B(2) of the settlement agreement that Appellant signed after removing the DOE and the NNSA as released parties. R. p. 281. As further evidence in opposing Appellant's attempt have the circuit court set aside the Agreement to Settle, Respondents submitted an affidavit of Rolland Norton, Vice President of Contracts and Supply Chain for MOX, who is responsible for approving subcontract actions on behalf of MOX. R. pp. 306–12. Norton affirmed he was involved in telephonic discussions regarding Appellant's settlement terms on September 30, 2016, the day of mediation, and that the retroactive pay increase was approved by MOX within two weeks of the effective date of the Agreement to Settle. R. pp. 306–07.

Finally, Appellant notes this court's decision in *Galloway v. Regis Corp.*, which reversed the circuit court's decision to enforce an oral settlement agreement. 325 S.C. 541, 546, 481 S.E.2d 714, 716–17 (Ct. App. 1997) (per curiam). In that case, the plaintiff brought a personal

injury action against a retail establishment for an alleged fall. *Id.* at 543, 481 S.E.2d at 715. The parties engaged in formal mediation before trial. *Id.* There, the defendant orally agreed to pay the plaintiff $190,000 in exchange for a complete release of all claims. *Id.* at 543–44, 481 S.E.2d at 715. However, according to the defendant, the agreement was conditioned upon its receipt of the plaintiff's tax returns to substantiate the extent of her lost income claims. *Id.* at 544, 481 S.E.2d at 715. When the plaintiff failed to produce the tax returns, the defendant refused to tender payment of the settlement funds. *Id.* The plaintiff then filed a motion to compel the defendant to comply with the oral settlement agreement, which the circuit court granted. *Id.*

This court reversed, finding there was simply no consent order or other writing that revealed the terms of the alleged settlement. *Id.* at 545, 481 S.E.2d at 716. Likewise, the court found the requirements of the pre-2009 version of Rule 43(k) were not satisfied by the handwritten notes of the defendant's attorney or the correspondence between the parties' attorneys following the mediation because they were silent as to the terms of the settlement agreement. *Id.* at 545–46, 481 S.E.2d at 716.

Appellant claims an "absence of agreement of the terms of settlement" exists here like in *Galloway*. App. Br. 9–10. However, *Galloway* sheds no light on this matter because the Agreement to Settle is not an oral agreement, and it is not silent on the terms of the agreement. R. pp. 211–12. As previously discussed, all the material terms are in writing and set forth in the Agreement to Settle. R. pp. 211–12. The circuit court was correct to enforce the Agreement to Settle as to the named defendants because it satisfies Rule 43(k).

CONCLUSION

Appellant agreed to conclude this action by executing the Agreement to Settle. The circuit court correctly enforced the Agreement to Settle because it is a valid contract and satisfies Rule 43(k), SCRCP. Respondents respectfully ask this court to affirm that decision.

Respectfully submitted,

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April 24, 2018

CERTIFICATE OF COUNSEL FOR RESPONDENTS

The undersigned certifies to the best of his ability that this Final Brief of Respondents complies with Rule 211(b), SCACR.

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April 24, 2018