THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1116698
Appellate Case No. 2018-001294

Ex Parte: Robert Horne, as Personal Representative of the Estate of Gus A. King, and Laura King ..... Appellants,

In Re: Gus A. King, Claimant, ... Appellant,

v.

Pierside Boatworks, Employer, and PMA Insurance Group, Carrier, ... Respondents.

REPLY BRIEF

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ARGUMENT

The arguments to reverse are correct and should be persuasive. There is no authority in the Workers' Compensation Act for displacing the basic principle that parties are free to resolve the disputes between them and that written agreements are binding. The reasons the commission gave for not enforcing this agreement are either wrong as a matter of law or do not make sense. And though other jurisdictions follow varying approaches to similar issues, the better-reasoned decisions employ logic cutting in favor of this agreement's enforcement.

The respondents throw their weight on a constellation of points. Those points do not withstand meaningful scrutiny. The parties signed an agreement. This Court should enforce the agreement and reverse.

A. This was a settlement, not a "proposed settlement."

The respondents call this agreement a "proposed settlement." Resp. Br. at 5. That is not what the agreement says. The agreement begins "Following a mediation conference before F. Earl Ellis, Jr., the mutually agreed upon mediator, the parties to the case agree that this case has been fully and completely resolved by agreement as follows[.]" (R.p.187). If the respondents did not like that language, they should not have signed an agreement saying the case was "fully and completely resolved." *Id.*

B. The relevant statute authorizes this sort of agreement.

The relevant statute in the Workers' Compensation Act begins by stating "*Nothing* contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title." S.C. Code Ann. § 42-9-390

(2017) (emphasis added). Respondents never mention this language from the statute in their brief.

The respondents and the commission seem to believe the Act does not authorize parties to agree to resolve a case without the commission's involvement. The statute's language refutes that position. The statute says "nothing" prevents the parties from settling. The sole caveat is that the amount of compensation and the time of payment be appropriate.

This language supports the idea that the parties have the same power to bind each other as they do in any other area. The term "settlements" is not defined in the Workers' Compensation Act. By referencing "settlements" and stating "nothing" can be construed as preventing them, the statute acknowledges the parties in a workers' compensation case have the same ability to resolve their dispute as do the parties in any other dispute.

The caveat about the amount of compensation and time of payment does not undercut the idea that the parties' signatures on an agreement binds them. There do not appear to be any judicial opinions discussing that language, but this language does not suggest the parties who signed an agreement would have the right to walk away from the agreement after it is signed. At most, the language suggests the agreement could be set aside by the commission if the commission found the settlement inadequate or unlawful, but that view cannot survive the statute's 2007 amendment, as described below.

C. The commission and the respondents wrongly refuse to ascribe any significance to the statute's 2007 amendments.

Prior to 2007, the statute said:

> Nothing contained in this chapter shall be construed so as to prevent settlements made by and between an employee and employer so long as the

> amount of compensation and the time and manner of payment are in accordance with the provisions of this title. A copy of any such settlement agreement shall be filed by the employer with *and approved by the commission.*

S.C. Code Ann. § 42-9-390 (Supp. 2006) (emphasis added). The principal difference between that version of the statute and the present one is that commission's approval has been deleted when both parties are represented by counsel.

The commission and the respondents rely heavily on South Carolina's sole published appellate decision involving this issue—*Mackey v. Kerr-McGee Chem. Co.*, 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984). That case was grounded in part on the requirement that a settlement receive the commission's approval. The opinion quoted a Louisiana case explaining judicial approval "protects the parties from unwise actions." *Id.* at 270, 312 S.E.2d at 568.

That rationale cannot survive the statute's 2007 amendment. The legislature deleted the approval process in cases where all parties were represented. Following *Mackey* renders the amendment a nullity.

Mackey was also grounded on the fact that no written settlement agreement had ever been signed. That alleged agreement was an oral agreement supposedly reached immediately prior to a hearing. At the call of the hearing the lawyers announced the case was settled and the hearing closed without the commission approving or disapproving the alleged settlement. *Id.* at 267, 312 S.E.2d at 566. The opinion concludes by citing American Jurisprudence for the proposition that a settlement has been reached "only when the writing manifesting the terms of the compromise has been signed by the parties." *Id.* at 271, 312 S.E.2d at 569.

There was no written settlement agreement in *Mackey*. There *is* a written settlement agreement here. And the parties signed it.

The respondents seem to believe the statute's requirement that the employer file a copy of the agreement is either equivalent to the approval process or the point where a settlement transitions from being freely revocable to binding. The language is not written that way. All the statute says is "The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney." § 42-9-390 (2017). That would be an odd way to write a rule saying "no settlement is effective unless it is filed." It would also be odd to give one party—the employer—the ability to veto or stall an agreement's binding nature by delaying (or potentially refusing) to file a signed agreement. And the statute does not even require the original agreement. The employer is only required to file "a copy." This reads like an instruction to aid the commission in tracking its docket. It does not read like a prerequisite to the agreement becoming enforceable.

D. The respondents' reading of the persuasive authorities is not faithful to those authorities.

The respondents cite Professor Larson's treatise for a general rule that statutory requirements for workers' compensation settlements "must be followed to the letter before they are binding." Resp. Br. at 9. Yet, the respondents also quote language from the treatise explaining that rule as based on statutes requiring commission approval of settlements. *Id.* There is no such requirement in this case. The citation does not support the decision below.

The respondents also oddly claim the cases cited in favor of enforcement actually cut the other way and do not, even on their own terms, support enforcing this agreement. It is

difficult to understand how respondents can plausibly make this argument. To be sure, there are factual differences between this case and the decisions appellants cited from Arizona, Delaware, Maryland, Massachusetts, Mississippi, and New Mexico. Many of those cases involved settlement agreements that were signed, filed with the commission, and awaiting approval when one party attempted to withdraw. Still, those decisions were to a large extent grounded on the idea that a claimant's death does not provide grounds to rescind an agreement since an unexpected death is not mutual mistake, fraud, failure to express the agreement of the parties, or material breach. *B. Frank Joy Co. v. Isaac*, 636 A.2d 1016, 1023 (Md. 1994). Those are the reasons basic contract law accepts for setting a binding agreement aside. If that reasoning applies, it plainly supports enforcing this agreement.

E. There is no logical distinction between medical benefits and disability benefits and no sensible suggestion of a "windfall."

As they did below, the respondents emphasize that this settlement involved paying Mr. King a lump sum in exchange for a release from liability for Mr. King's future medical care. Respondents suggest the circumstances might be different if the settlement involved other forms of compensation like disability benefits.

Respondents do not identify, and have never identified, a principled basis for that distinction. Indeed, it difficult to see how the type of benefits has any relevance given the commission's holding that both parties are free to back out of a settlement until the formal document that would officially end the litigation is filed with the commission. The Fifth Circuit discussed, at some length, the reasons why this sort of rule inherently favored employers; explaining "[t]here is no public policy need for insurers to be afforded []

protection against their own poor judgment" and that while bad bargains for the employers tend to show up sooner, bad bargains for injured workers tend to show up over time as an injury becomes more disabling or the settlement funds are depleted quicker than anticipated. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 781-782 (5th Cir. 1988). The court explained "[e]xperience demonstrates ... insurers benefit overall" because they escape liability "more often than they pay beyond the liability they would otherwise have borne." *Id.* at 781 n.8.

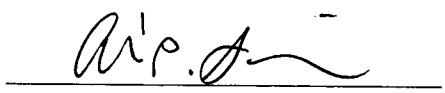
Respondents also claim enforcing the settlement would lead to a "windfall." Suppose Mr. King's fatal car wreck happened days after the formal document concluding the case had been filed with commission rather than, as here, days before. The circumstances would basically be the same. It is not clear why this would be a "windfall" but that would not.

Everybody signed because the agreement seemed like a good idea at the time. Parties should not be free to back out just because a bargain turns out to be worse than they thought.

CONCLUSION

For the foregoing reasons this Court should reverse.

Respectfully submitted,



November 13, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

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