

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Grace Gilchrist Knie, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2019-001325
Circuit Court Case No. 2018-CP-11-00838
Probate Court, Docket No. 2014-ES-11-00192

Charles E. Deal, Jr., Appellant,

v.

Angela Godfrey, Respondent.

APPELLANT'S INITIAL BRIEF

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December 4, 2019

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STATEMENT OF THE CASE

Charles Deal, Jr. is the son and only legal heir of Charles Deal, Sr. (Information to Heirs and Devisees dated May 22, 2013). Shortly before his death, Deal, Sr., while in a Spartanburg hospital suffering from mental and physical illnesses, allegedly signed a will leaving his entire estate to Respondent Angela Godfrey, whom he had met only a few months earlier, and naming her as his Personal Representative. That same day, Deal, Sr. allegedly signed a power of attorney making Godfrey his attorney in fact.

Deal, Jr. challenged his father will in Probate Court, alleging that Godfrey unduly influenced his father, a vulnerable adult. (R. pp. 18-21). Upon further investigation, Deal Jr. removed the case to the Circuit Court (R. pp. 4-5) and also alleged that Godfrey violated her fiduciary duties as Attorney in Fact and as Personal Representative (R. pp. 27-36), and that Godfrey had drained Deal, Sr.'s bank accounts both before and after his death. (Godfrey's attorney represents her in the will contest, but not in the breach of fiduciary duty action.)

After many months of litigation, Deal Jr. and Godfrey entered into a Mediated Settlement Agreement under the auspices of the Circuit Court. (R. pp. 130-132). The Mediated Settlement Agreement resolved all matters in both the Probate Court and the Circuit Court. The Settlement Agreement reads:

Settlement Agreement

The undersigned parties and their attorneys hereby agree as follows:

Case 2014-CP-11-00741 will settle all disputes between the parties (the will/estate dispute) on the following terms:

1. The house and 1 acre will be sold.
 - a. Angela Godfrey shall receive \$25,000 from said sale;
 - b. the remainder shall be paid to the Plaintiff, Charles Deal, Jr.;
 - c. Charles Deal, Jr. shall retain a life estate in the property;
 - d. Charles Deal, Jr. shall receive the personal property of Charles & Ruth Deal;

- e. Angela Godfrey shall receive the Chevrolet automobile;
 - f. Charles Deal, Jr. is to select a lawnmower for immediate possession;
 - g. Charles Deal, Jr. shall keep "Rover" and keep him on the property.
2. The will/estate case shall be returned to the Probate Court for approval of the settlement and conclusion of the Probate estate.
 3. The Common Pleas case involving the Power of Attorney claims shall be dismissed, with prejudice.
 4. Godfrey shall be out of the property by the closing date but shall be allowed at least 30 days notice before closing.
 5. This agreement shall settle all claims and disputes, both civil and criminal, between the parties and shall be enforceable pursuant to Circuit Court Rules and the parties shall work in good faith to work out any remaining details.

/S/ Charles Deal, Jr.

/S/ Angela Godfrey

/S/ Karen R. McManaway

/S/ William G. Rhoden

/S/ James G. Carpenter

Dated this 22nd day of July, 2015.

Witness: /S/ Reginald L. Foster 7/22/15, Mediator

(R. pp. 130-132)

The mediator reported to the Court that mediation had settled both the Circuit Court case and the Probate Court case. (R. pp. 39-41).

Within a few weeks, the parties had implemented several parts of Mediated Settlement Agreement. The second paragraph of the Mediated Settlement Agreement called for the will contest case to be returned to the Probate Court. Accordingly, the parties entered into a Consent Order returning of the Estate case to the Probate Court. (R. pp. 6-7).

The third paragraph of the Settlement Agreement calls for the dismissal of the Common Pleas case alleging a breach of fiduciary duty against Godfrey. That case was dismissed. (R. pp. 6-7).

Pursuant to Paragraph 1E, Godfrey received the Chevrolet automobile, and pursuant to Paragraph 1F, Mr. Deal, Jr. selected a lawnmower. Most provisions of the Mediated Settlement Agreement have been implemented.

At mediation, Godfrey and Deal, Jr. believed that the house could be sold to a neighbor, Mr. McIntyre. However, an unanticipated complication arose. Deal, Jr.'s half-sister, Patricia, lived in England with or near her aunt, Ms. Bloomfield, sister to the late Mrs. Deal. (R. pp. 124-129). (Ms. Bloomfield helped care for both Charles Deal, Jr and Patricia.) As an intestate heir of her mother's estate, Patricia owned a 12.5% interest in the house. Patricia was not a party to the case and was unaware of the mediation. Patricia and Ms. Bloomfield believed that McIntyre had mistreated the family and/or had taken unfair advantage of them. They opposed the sale to McIntyre. McIntyre offered far less than the true value of the property.

Through many letters, Deal, Jr.'s attorney attempted to persuade Patricia and Ms. Bloomfield of the necessity, practicality, and utility of selling the property, and fully implementing the Mediated Settlement Agreement. After a few months, they agreed to sell the property through Jeff Buice, a realtor they knew and trusted. Buice was willing to list the property and sell it. Patricia later died May 17, 2017. (R. p. 136).

The far bigger problem was that Godfrey refused to leave the property or to allow its sale. She continues to live in the property. Buice submitted a sworn statement that Godfrey keeps one or more dangerous dogs on the property that have prevented him from assessing the property to list it. (R. pp. 137-138). Buice and Deal, Jr.'s attorney both attempted to secure the cooperation of Godfrey and her attorney to enable Buice to go on the property to view it and list it for sale, but Godfrey has refused.

Then, Godfrey's attorney wrote to Deal, Jr.'s attorney, setting a deadline for concluding the settlement, while his client refused to allow access to the property. His deadline passed.

About a year after the Mediated Settlement Agreement, Deal, Jr.'s attorney wrote a lengthy email to the Probate Judge and requested a conference with the goal to fully implement the Mediated Settlement Agreement, but the Court did not respond, and it scheduled no conference or hearing. (R. pp. 133-135).

Later, a Deal family friend, Betty Roberson, petitioned the Probate Court to make her the Personal Representative of the estate, in place of Godfrey. (R. pp. 42-48). Godfrey opposed this motion. (R. pp. 49-50). The Probate Court heard the petition September 5, 2018. The Court dismissed the Petition. (R. pp. 10-11).

In dismissing the Petition, the Court enforced one of the remaining provisions of the Mediated Settlement Agreement, paragraph 1.d., requiring items of family history and sentimental value, belonging to the late Mrs. Deal, to be given to Patricia's widowed husband and son: "IT IS FURTHER ORDERED, that the boxes of items of Ruth Deal be turned over to Frank and Harry Petchey." (R. p. 11).

At the same hearing, Godfrey asked the Court to dismiss the entire Probate Court case for lack of prosecution, because the remainder of the Mediated Settlement Agreement had not been implemented. In the Motion to Dismiss, Godfrey acknowledged, "That on July 22, 2015 the parties reached an agreement through mediation. The agreement contemplated approval by the Probate court in the sale of the real property with a life estate being retained by Charles Deal, Junior and a sum of money being paid to Angela Godfrey." (R. p. 55). He failed to say that his client had refused to cooperate in selling the house.

In response to Godfrey's Motion to Dismiss, Deal Jr. again ask the Court to fully implement the Mediated Settlement Agreement. (R. pp. 104-113).

Deal Jr. also argued that Godfrey's Motion to Dismiss for Failure to Prosecute did not meet the legal standards for such motions, and furthermore that it was **Godfrey's conduct** and refusal to cooperate in the sale of the house that caused the failure to implement the Mediated Settlement Agreement.

The Probate Court was supposed to approve the Mediated Settlement Agreement, but until the Mediated Settlement Agreement was fully implemented, Probate Court approval was premature.

The Court dismissed the Probate Case for failure to prosecute without full implementation of the Mediated Settlement Agreement. (R. pp. 12-17).

Deal Jr. requests that this Court reverse the Probate Court's dismissal of the case, and Order implementation of the entire Mediated Settlement Agreement.

STATEMENT OF FACTS

Due to an accident several years ago, Mr. Deal, Jr., has closed head injuries limiting his cognitive abilities. He receives disability payments, but he is able to live alone (with a dog or two). His mother's sister, Mrs. Mary Bloomfield, helps him.

Respondent Godfrey became acquainted with the decedent a few months before his death. While he was in the hospital, suffering from brain cancer, lung cancer, short-term memory loss, confusion, and acute congestive heart failure, Mr. Deal allegedly executed a new will devising everything to Godfrey. (R. PP. 27-36). That same day, he also allegedly executed a new power of attorney, making Ms. Godfrey his attorney-in-fact. *Id.* Two and a half months later, he died.

At the time of his death, major assets of the estate included large sums of money in several bank accounts. Godfrey took all the money out of Deal Sr.'s bank accounts; some before his death, some after. At the time of mediation, the major remaining asset was a 75% interest in a small house and 1 acre worth about \$100,000-\$110,000. Deal Sr. and his late wife each owned 50% of the house. She died intestate. Upon her death, Deal Sr. inherited half of her interest, giving him 75% ownership. The other half of her interest was split between her two children, Deal, Jr. and Patricia, her daughter from a previous relationship. (R. 114-115).

Pursuant to the Mediated Settlement Agreement, Mr. Deal, Jr. and his representatives attempted to sell the house. Deal Jr.'s representatives asked Godfrey to restrain her dogs, to grant the realtor Buice access to the property to inspect the property and assess it for sale. They asked her to cooperate in the sale of the property, including cleaning the property and prepare it for showing, to grant reasonable access for showing the property, and to keep the property in a showable condition. (R. pp. 137-138).

Godfrey resisted all efforts to sell the property. The property is in poor condition. It needs to be cleaned and repaired in preparation for sale. Deal Jr. and his representatives have repeatedly asked Godfrey for access to the property, but she has refused and failed to cooperate. (R. pp. 137-138).

Since Deal, Sr.'s death and even after the Mediated Settlement Agreement, Godfrey has lived in the house, rent free, but refused to pay property taxes, refused to grant access to the realtor, and failed to properly maintain the property. The house would have been seized and sold by the County Tax Office for lack of payment; but Deal Jr. and his representatives paid the taxes and thereby protected the property from being seized and sold.

Godfrey contends that Deal, Jr., failed to take reasonable actions to sell the property and consummate the entire Mediated Settlement Agreement. That is false. Deal, Jr. has repeatedly tried to implement the Mediated Settlement Agreement. Godfrey's refusal to cooperate has frustrated his efforts. Deal reported Godfrey's failure to cooperate to the Probate Court.

On August 29, 2016, Deal Jr.'s attorney wrote to the Probate Court setting out Godfrey's lack of cooperation and seeking the Probate Court's assistance in implementing the entire Mediated Settlement Agreement. (R. pp. 133-135).

Judge Queen,

These cases have a long and winding history. Last summer, July 22, 2015, the parties mediated the cases and agreed to a Settlement, not only of this Estate action, but also of a related action in the Circuit Court alleging that Ms. Godfrey misused her fiduciary powers as attorney-in-fact for the decedent. I attach a copy of the handwritten Settlement Agreement, and a transcribed version for easier reading.

I represent Charles Deal, Jr., son and only heir of the decedent Mr. Deal. Karen McManaway was representing Mr. Deal, Jr., earlier, and she asked me to take over representation of the case.

I understand that due to an accident several years earlier, Mr. Deal, Jr., had closed head injuries resulting in some limitations on his cognitive abilities, but he is able

to live alone (with a dog or two), and he receives some kind of disability payments. I found him quite able to communicate and able to understand the proceedings at the mediation.

Early in this litigation, apparently out of an abundance of caution, Ms. McManaway had another lawyer appointed as a guardian ad litem for Mr. Deal, but since I have been involved in this case, the GAL's involvement has consisted of one or two conversations in which I explained the mediation and the Settlement Agreement. I think he agreed with the mediated result.

Mr. William Roden¹ represents Angela Godfrey, a Cracker Barrel waitress, who became acquainted with the decedent about 3-4 months before his death. Ms. Godfrey was also Mr. Deal, Sr.'s attorney-in-fact by virtue of the power of attorney executed the same day as the will, about three months before he died.

The major asset of the estate is a small house and 1 acre worth about \$100,000-110,000. As you can see from the attached Settlement Agreement, the parties agreed that the house and 1 acre would be sold and that Angela Godfrey should receive \$25,000 from the sale.

Post-mediation problems arose from the fact that Charles Deal, Jr., has a half-sister, Patricia, the daughter of his mother, but not his father. She lives in England with or near an aunt, Ms. Bloomfield, who is very influential in the lives of both Charles Deal, Jr and Patricia. Patricia owns a 12 1/2% interest in the house and lot by virtue of her mother's intestate estate.

At mediation, the parties believed that the house could be sold to a neighbor, Mr. McIntyre. However we later learned that Patricia and Ms. Bloomfield were inalterably opposed to the sale to McIntyre. They believed, rightly or wrongly, that McIntyre had mistreated the family and/or had taken unfair advantage of them.

I attempted for months, and through many letters, to explain the nature of the Mediated Settlement Agreement to the two ladies in England, and attempted to convince them of the necessity, practicality, and utility of selling the property, and implementing the Settlement Agreement.

Eventually, this past Spring, **they consented to list the property** with a particular realtor, Jeff Buice (whom they knew and trusted). He is willing to list the property and sell it.

Ms. Godfrey still lives in the property. The realtor is informed and believes that there are **dogs on the property that would prevent him from assessing the property** for the purpose of listing it.

¹ The misspelling of Mr. Rhoden's name was unintentional.

Mr. Buice and I both have attempted to secure the cooperation of Mr. Roden and his client to enable the realtor to go on the property to view it and list it for sale.

Mr. Roden can certainly speak for himself, but he has stated that he wrote to me in February and gave me a deadline for getting the deal completed, and that his deadline has come and gone, and he wants to throw out the whole settlement and have a trial of the case. As I understand it, he represents Ms. Godfrey in the Estate case, but not in the breach of fiduciary duty action in the Circuit Court.

Parts of the Settlement Agreement have already been implemented. The second paragraph of the Settlement Agreement called for the Estate case to be returned to the Probate Court for approval of the Settlement Agreement and conclusion in the Probate Estate. The parties entered into a Consent Order returning of the Estate case to the Probate Court. (That's why we are writing to you.)

Furthermore, the third paragraph of the Settlement Agreement calls for the dismissal of the Common Pleas Court case alleging a breach of fiduciary duty against Ms. Godfrey. I believe that case has been dismissed.

Paragraph 1E has been implemented, in that Ms. Godfrey has received the Chevrolet automobile. Paragraph 1F has been implemented and that Mr. Deal, Jr. has selected a lawnmower. Thus, **many parts of the multipart Settlement Agreement have been implemented**, and now, to go back to square one and try both of these cases in court—one in Circuit Court (and with a pro se defendant), and the other in Probate Court, is simply not called for, as I see it.

I understand Mr. Roden sees it differently. Therefore, **we need a conference** with Your Honor.

The things I would request in such a conference would be a commitment to implement the Settlement Agreement. This would involve Ms. Godfrey **restraining the dog** or dogs on the property, **granting the realtor access** to the property to inspect and assess the property for sale; the **cooperation of Mr. Roden and his client in the sale of the property**, including **cleaning** the property up and the **preparation** of the property for showing, **reasonable access for showing** of the property and **keeping the property clean** and in a show-able condition.

I would prefer a face to face meeting with Your Honor and Mr. Roden. I have quite a lot of flexibility over the next few weeks for scheduling purposes.

Thank you for your consideration.

Respectfully submitted,

Jim Carpenter

(R. pp. 133-135) (emphasis added).

The Probate Court never responded to the email and did not grant a hearing or conference. Deal Jr.'s attorney again attempted to enlist the help of the Probate Court early in 2017, again without any response or cooperation from the Probate Court. Godfrey continued to refuse to cooperate to sell the house.

In August 2018, Betty Roberson petitioned the Probate Court to replace Ms. Godfrey as the Personal Representative. Godfrey moved to dismiss the entire case. Deal, Jr. filed a Return to Godfrey's Motion to Dismiss. Part of Deal's Return to Godfrey's Motion states:

7. Petitioner asked realtor Jeff Buice to sell the house. Buice asked the Respondent for permission to view and appraise the house to make it ready for sale. Buice testifies that Respondent refused him access to the house. In addition, Respondent kept dogs on the property that prevented Buice from entering the property to make a review and appraisal.
8. Upon information and belief, the property is maintained in poor condition, and it needs to be cleaned up and repaired to have the best chance of selling it.
9. Respondent resists these actions.
10. For more than three years, since the Settlement Agreement, Respondent has lived in the house, rent free, but refused to pay property taxes, refused to grant access to the realtor, and failed to properly maintain the property
11. In late 2016, the attorney for the Petitioner asked the Court for a status conference or hearing to enforce the Settlement Agreement. No hearing or status conference was scheduled.
12. **Petitioner requests implementation of the remainder of the Settlement Agreement.**

(R. pp. 105-106) (emphasis added).

Deal, Jr.'s Prayer for Relief requests:

WHEREFORE, Petitioner, Charles Deal, Jr., prays the Court that:

1. Godfrey's Motion to Dismiss be **DENIED**;

2. this Court **ORDER** Godfrey to grant the realtor free access to the property;
3. this Court **ORDER** Godfrey to vacate the premises, leaving them cleaned, in good order, and in good repair;
4. this Court **ORDER** the property to be sold, and the proceeds distributed, as required by the Settlement Agreement; and
5. for such other and further relief as the Court deems just and proper.

(R. p. 108) (emphasis in original). Accordingly, Deal again asked the Court in writing to implement the entire Mediated Settlement Agreement.

The Court heard both Motions on September 5, 2018. At the hearing, the realtor Buice submitted a sworn statement to the Probate Court:

In August 2015 I was contacted by Mary Bloomfield about the possibility of selling a house located at 238 Silverton Rd., Gaffney, SC 29341. In order to give a true and accurate market analysis to determine value I must be able to see the property, both outside and inside. Upon verifying by driving by and by contacting the local utility companies that the property was occupied I was informed that Angela Godfrey was residing in the house.

At first I was told the only way to contact Angela Godfrey to gain access into the house was through her attorney, William Rhoden. That was the route I took. **I was told to not go to the house without someone home as there was a dangerous dog** that would bite. So I had to wait for approval from either Mr. Rhoden or Ms. Godfrey to get inside. Initially it seemed Ms. Godfrey would allow me access into the house as she actually came to my office to talk to me about the situation. But my job was not to take sides or pass judgment, it was to determine value and I couldn't do that without access inside the house. After many failed attempts to gain access I gave up.

Time passed and then I was told that I would have to locate a buyer in order to show the property before I could gain access inside, even though I did not have a value, a listing agreement or even any marketing done on the property. As luck would have it **I located a buyer** who lived nearby and who was familiar with the property. He indicated he was interested in taking a look before he decided if he was interested and, if so, what price he would be willing to pay. He was a cash buyer.

After seemingly another round of initial cooperation I was told that as long as Ms. Godfrey was present during the showings that I could in fact show the house. I contacted Ms. Godfrey about a time for which she replied that she needed some time to get the house cleaned up before anyone could view the property. She requested a week. A week went by and I called again. She responded that she got busy with personal stuff and she needed another week or two. So I waited another

two weeks and called again. This time she sounded confrontational saying **nobody was going to get inside the house until she talked with her attorney** first.

I also contacted her attorney and told him what had transpired. He didn't seem to know what to do and said he'd just contact his client. Time passed and **I was never able to gain access inside or even on the property** by the occupant, Angela Godfrey. I also **lost the prospective buyer** as he was not interested in getting involved in the drama of looking at a house with an uncooperative occupant and being put off week after week from not being allowed to see it.

Ultimately **three years have passed by and I still have not been authorized or allowed to gain access into the house** to ascertain value, condition or even to show the house to perspective [sic] buyers. Obviously the occupant does not want me there. In my 20 years of real estate I've learned that if someone truly is cooperative about selling or showing or even seeing inside a house that they would work with me to gain access. **No cooperation was granted after many attempts** (I lost count how many times I tried).

If you have further questions about this please feel free to contact me at 864-489-7194.

Sincerely,

Jeff Buice
Broker in Charge
Buice Realty, Inc.

(R. pp. 137-138) (emphasis added).

The first provision of the Mediated Settlement Agreement (R. pp 130-132) was, "The house and 1 acre will be sold." Second, the estate case was to be returned to the Probate Court for approval of the settlement. Because of the failure and refusal of Godfrey to cooperate in the sale of the house, the parties couldn't get past the first point of the settlement in order to get to the second, the dismissal of the probate case. Furthermore, the Mediated Settlement Agreement required, "the parties **shall work in good faith** to work out any remaining details" (R. p. 132, par. 5) (emphasis added). Respondent Godfrey failed to "work in good faith." Nevertheless, the Probate Court denied Deal, Jr. his requested relief, refused to enforce the Mediated Settlement

Agreement, but rather dismissed the case, making Deal, Jr. to bear the consequences of Godfrey's refusal to "work in good faith."

Godfrey admits many facts supporting Deal's appeal requesting for full implementation of the Mediated Settlement Agreement, or at least she does not contest those facts. Godfrey does not contest Deal Jr.'s assertion that he is the sole heir at law of Deal Sr. She admits that at the death of Deal Sr., the house was owned by Deal Sr., Deal Jr., and Patricia. Brief of Respondent, p. 3.

Shortly before his death, Deal Sr., in the hospital with debilitating illnesses allegedly executed a new will naming Godfrey as his beneficiary and Personal Representative. Brief of Respondent, p. 4. Deal Jr. filed an action contesting his father's will. Brief of Respondent, p. 1. The case was removed to Circuit Court. Brief of Respondent, p. 2.

In addition, in the Circuit Court, "Charles Deal, Jr. filed his action in the Court of Common Pleas against Angela Godfrey, seeking damages for Breach of Fiduciary Duty, Constructive Trust, Tortious Interference with Expectancy to Inherit, Intentional Infliction of Emotional Distress/Outrage and Accounting (2014-CP-11-793)." Respondent's Notice of Motion and Motion to Dismiss filed August 16, 2018, p. 1.

Godfrey does not contest the content of the Mediated Settlement Agreement. Brief of Respondent, p. 5. The Mediated Settlement agreed that the property would be sold. Brief of Respondent, p. 5.

Godfrey admits that after mediation, the Circuit Court case was dismissed, and the matter was returned to the Probate Court. Brief of Respondent, p. 2. The Mediated Settlement Agreement was not implemented in its entirety. Godfrey had retained several boxes of the personal items of the late Mrs. Deal. Brief of Respondent, p. 3.

STATEMENT OF THE ISSUES:

1. Did the Probate Court err in dismissal for failure to prosecute?
 - a. Did the Probate Court use the proper legal standard?
 - b. Did Godfrey establish the factual predicate for dismissal for failure to prosecute?
2. Did the Probate Court err in failing to enforce a Mediated Settlement?
3. Did Deal Jr. ask the Probate Court to enforce the Mediated Settlement Agreement?

STANDARD OF REVIEW

The Probate Court dismissed this action for failure to prosecute. The standard of review is an abuse of discretion. *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006). “An abuse of discretion occurs when the judge’s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981).” *Fontaine v. Peitz*, 291 S.C.536, 538,354 S.E.2d 565, 566 (1987).

ARGUMENT

I. THE PROBATE COURT ERRED IN DISMISSING THIS ACTION FOR FAILURE TO PROSECUTE.

A. The Probate Court Failed to Use the Proper Legal Standard.

The appellate courts of this State have established standards for dismissal for failure to prosecute.

In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of **repeated warnings** to the offending party or **multiple opportunities to proceed with trial**, and only then upon a finding of **unreasonable neglect**. See *Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); *Bond v. Corbin*, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of **indifference to the rights of the defendant**. E.g., *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of **willful disobedience** when exclusion amounted to a judgment of default or dismissal).

Our Fourth Circuit Court of Appeals has also addressed this issue. The court in *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir.1976) held that dismissal is a harsh sanction, which “should be resorted to only in **extreme cases**.” Dismissal is generally permitted only in the face of a **clear record of delay or contumacious conduct** by the plaintiff. *Id.* The discretion should be exercised discreetly and only after **due consideration of the availability of sanctions less severe than dismissal**. *Id.*; *Bush v. U.S. Postal Serv.*, 496 F.2d 42, 44 (4th Cir.1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff’s degree of **personal responsibility**; (2) the amount of **prejudice** caused the defendant; (3) the presence of a drawn out history of **deliberately proceeding in a dilatory fashion**; and (4) the effectiveness of **sanctions less drastic than dismissal**. *Hillig v. Comm’r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990). See also *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir.1989); *McCargo*, 545 F.2d at 396; *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir.1982).

McComas v. Ross, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006) (emphasis added).

McComas is the leading South Carolina case on this issue, decided under the South Carolina Rules

of Civil Procedure. The Order of Dismissal failed to address these factors and criteria from *McComas*. (R. pp. 12-17).

When the proper standard is applied to the facts of the case, dismissal for failure to prosecute is not appropriate, but rather, it is an abuse of discretion. The *McComas* standard requires “repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect;” and “indifference to the rights of the [opponent];” and “a clear record of delay or contumacious conduct” and “due consideration of the availability of sanctions less severe than dismissal” and finally, “(1) the plaintiff’s degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.” *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006). Both the Probate Court and this Court failed to address these factors. If the lower Courts had utilized the appropriate standard, they would not have dismissed the case.

The Probate Court relied older cases, decided under “Code Pleading,” prior to the adoption of the South Carolina Rules of Civil Procedure. *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983), and on *Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970). South Carolina adopted the South Carolina Rules of Civil Procedure, effective July 1, 1985. See Rule 86(a), SCRPC. The Rules of Civil Procedure repealed all other rules of procedure. See Rule 85(c), SCRPC.

In *Small v. Mungo*, the Court dismissed the case under Rule 86 of the Circuit Court Rules. This case was decided in 1970 under a pleading system known as “Code Pleading,” and under the Circuit Court Rules (now superseded). The statutory standard was “unreasonable neglect” as stated in § 10-1502 of the 1962 Code of Laws.

Godfrey also relies on *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983), which was also decided under “Code Pleading.” The Plaintiff had used a technique called “Summons (Complaint Not Served).” The dissent in that case refers to Dean Harry Lightsey’s authoritative treatise called *South Carolina Code Pleading*. Later, South Carolina adopted the South Carolina Rules of Civil Procedure, effective July 1, 1985. See Rule 86(a), SCRPC. When the Rules of Civil Procedure became effect, all other rules of procedure for the Circuit Courts were repealed. See Rule 85(c), SCRPC. Counsel for Godfrey relies on these cases which were decided under the “Circuit Court Rules” and under Code Pleading, both of which are repealed.

This Court should rely on a more modern case decided under the South Carolina Rules of Civil Procedure. *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (Ct. App. 2006). *McComas* cites federal cases. The South Carolina Rules are based on the Federal Rules of Civil Procedure. Accordingly, the federal cases cited by *McComas* are also strong authority for the proper analysis of a motion to dismiss for failure to prosecute under the South Carolina Rules of Civil Procedure.

Unfortunately, the Probate Court relied on the older cases decided under Code Pleading. Accordingly, the dismissal was not based upon proper legal standard, and the Probate Court thereby erred.

B. Godfrey Failed to Establish the Factual Basis for Dismissal.

Second, Godfrey has not established facts to justify a dismissal. Deal Jr. is not accused of “willful disobedience” to any Court Order. Deal Jr. has not been charged with any misconduct. Deal Jr. received no prior sanction or warning of any kind. None of the other factors listed in the *McComas* case apply to Deal Jr. Accordingly, the granting of the Motion to Dismiss for failure to prosecute was based on an error of law and amounted to an abuse of discretion.

The *McComas* factors do not describe the conduct of Deal Jr.; they embody the conduct of **Godfrey**. It was her refusal to cooperate in the sale of the house, that showed “indifference to the rights of [Deal, Jr.]” Her conduct demonstrates “a clear record of delay or contumacious conduct.” Her conduct has demonstrated a great “degree of personal responsibility” causing the delays in this case. Her conduct shows “a drawn out history of deliberately proceeding in a dilatory fashion.” Yet, the Court’s dismissal, instead of implementing the remaining provisions of the Settlement Agreement that benefit Deal Jr., causes Deal, Jr. to bear the consequences of Godfrey’s misconduct. It is fundamentally unfair to punish Deal, Jr. for the conduct of Godfrey. The Dismissal should be reversed, and the Mediated Settlement Agreement should be enforced. (R. 130-132).

II. THE PROBATE COURT ERRED IN FAILING TO ENFORCE A MEDIATED SETTLEMENT.

Rule 41(k) governs the enforceability of settlement agreements: “No agreement between counsel affecting the proceedings in an action shall be binding unless . . . reduced to writing and signed by the parties and their counsel.” *Id.* The Settlement Agreement between these parties was “reduced to writing and signed by the parties and their counsel.” Accordingly, it is “binding” and enforceable.

The final provision of the Mediated Settlement Agreement states, “the parties shall work in good faith to work out any remaining details.” (R. 130-132). That duty was as incumbent upon the parties as any other duty, but Godfrey has not fulfilled that duty. If Godfrey had acted in accordance with the Mediation Settlement Agreement, which she and her lawyer signed, both parties would have been asking the Probate Court to conclude the case following the full dispersal of the estate **years ago**, as everyone had agreed.

“In South Carolina jurisprudence, settlement agreements are viewed as contracts.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009). **“The court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.”** *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Rather, interpretation of a contract “is governed by the objective manifestation of the parties’ assent at the time the contract was made,” rather than “the subjective, after the fact meaning one party assigns to it.” *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct.App.1984).

In other words, **the court must ascertain and give effect to the intention of the parties**, looking first to the language of the contract. *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct.App.2010). “When the language of a contract is clear and unambiguous, the determination of the parties’ intent is a question of law for the court.” *Id.*

Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 335-36, 785 S.E.2d 613, 617 (Ct. App. 2016) (emphasis added).

South Carolina encourages Mediated Settlement Agreements and their enforcement. The Court-Annexed Alternative Dispute Resolution (ADR) Rules govern mediation in the Circuit Courts and Family Courts. “These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.” ADR Rule 1.

Unfortunately, the ADR Rules do not address this situation, when a party to a Mediated Settlement Agreement fails to cooperate in the implementation of the Agreement. They do not address the duties of the parties, the lawyers, or the Court. But when an aggrieved party to the written, signed, Mediated Settlement Agreement, entered into under the ADR Rules, requests the Court’s help to enforce the Mediated Settlement Agreement, surely the Court surely has a duty to help enforce it.

South Carolina has a strong public policy of encouraging settlements, and courts will generally uphold contracts that parties entered into freely. See *West v. Gladney*, 341 S.C. 127, 136, 533 S.E.2d 334, 338 (Ct. App. 2000) (“It is not for [the court] to determine whether the parties’ agreement was reasonable or wise, or whether they carefully guarded their rights.”). The parties negotiated specific terms during the mediation with the help of their counsel and voluntarily came to an

agreement. Allowing Appellants to terminate that agreement because they discovered potentially helpful information would be setting a dangerous precedent and go directly against our state's policy of favoring settlement agreements.

Sparrow v. Fort Mill Holdings, LLC, Opinion No. 2018-UP-321, SC Ct. App., (July 11, 2018) 2018 WL 3387240 at *2 (emphasis added).

This Court should enforce the Mediated Settlement Agreement in its entirety. The implementation of parts of the Mediated Settlement Agreement demonstrates that the remainder of the Agreement should also be implemented. “The subsequent conduct of the parties and attorneys establishes the parties had a meeting of the minds and intended to be bound by the Agreement.” *Byrd v. Livingston*, 398 S.C. 237, 244, 727 S.E.2d 620 (Ct. App. 2012) (emphasis added).

On the other hand, when a party to a Mediated Settlement Agreement attempts unilaterally to frustrate the purposes and implementation of the settlement, the Court should not countenance such efforts, but rather should enforce the settlement as written. *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620, 623 (Ct. App. 2012).

The parts of the Mediated Settlement Agreement that benefited Godfrey have been completed, but she has prevented the fulfilment of those provisions that benefitted Deal, Jr. and his family. It is fundamentally unfair to enforce only part of a Settlement Agreement. *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In *Byrd*, the Court of Appeals quoted with approval the analysis of the Circuit Court:

In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a person who is not a party to the Agreement.... The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

Id., 398 S.C. 237, 244-45, 727 S.E.2d 620, 623 (emphasis added).

Similarly, in this case, “the law does not and should not sanction a party’s own” conduct of non-cooperation “only to later argue that its very” non-cooperation “renders an agreement unenforceable.” *Id.*

As stated above, many of the terms of the Mediated Settlement Agreement have been implemented, particularly those beneficial to Godfrey. It is the one main provision that benefits Deal Jr., the sale of the house and the disbursement of the proceeds, that has not been implemented, and Godfrey’s conduct has prevented that provision from being implemented.

III. DEAL ASKED THE PROBATE COURT FOR FULL IMPLEMENTATION OF THE MEDIATED SETTLEMENT AGREEMENT.

Deal asked the Court in writing to implement the entire Mediated Settlement Agreement, and suggested practical ways to implement it. The Probate Court acknowledged that Deal presented these issues and his requests to the Probate Court and requested implementation of the full Settlement Agreement:

A hearing was held on September 5, 2018 at which time counsel for both the Petitioner and Respondent made arguments in support of their position. Respondent submitted a Memorandum of Law which contained letters and emails of communication between counsel concerning the status of the case. Also submitted were various documents which had been filed in the Probate file. The Petitioner submitted a Return to Respondent’s Motion to Dismiss which contained a copy of the mediated agreement and the mediator’s report. Petitioner also submitted an affidavit from a local realtor. **The Petitioner submits in his return that the Settlement Agreement should be enforced in its entirety.** The Petitioner also submitted that all **terms** of the settlement agreement, except the sale of the real property, **have been implemented** and that the **Respondent had effectively prevented the sale.** The Petitioner also submitted that **Petitioner’s counsel had asked for a hearing in 2016, but no hearing was scheduled.**

Order entered November 19, 2018 (R. p. 14) (emphasis added).

The Probate Court acknowledged that it had never responded to the email or granted a hearing or conference: “no hearing was scheduled.” Deal Jr.’s attorney again sought the help of

the Probate Court in 2017, without any response from the Probate Court. Godfrey continued to refuse to cooperate to implement the Mediated Settlement Agreement.

Deal presented these issues to the Probate Court on multiple occasions, requesting full implementation of the Settlement Agreement, culminating at the hearing on September 5, 2018. At the hearing September 5, 2018, Appellant submitted a sworn statement of realtor Jeff Buice, which also set out Godfrey's repeated failure to cooperate. (R. pp. 139-140).

The Probate Court dismissed the case, thereby enforcing a one-sided, *partial* Settlement Agreement, **not** the Settlement Agreement that the parties had agreed to. This decision was an abuse of discretion.

Second, the Probate Court Order makes factual findings based on unsupported assertions. For instance, the Order asserts that Charles Deal Sr. was "estranged" from his son and from his stepdaughter. There is **no evidence** to support the estrangement of either. These are mere assertions of counsel, and contrary to testimony. Accordingly, neither of these assertions should be listed as findings of fact by the Court.

It is fundamentally unfair to penalize Deal, Jr. for Godfrey's misconduct. This Court should "ascertain and give effect to the intention of the parties, looking first to the language of the contract." *Nichols Holding, LLC v. Divine Capital Group, LLC*, 416 S.C. 327, 336, 785 S.E.2d 613, 617 (Ct. App. 2016) (emphasis added).

When the proper legal standard is applied to the facts of the case, dismissal for failure to prosecute is erroneous and an abuse of discretion. The standard from *McComas* is "repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect;" and "indifference to the rights of the [opponent];" and "a clear record of delay or contumacious conduct" and "due consideration of the availability of sanctions

less severe than dismissal” and finally, “(1) the plaintiff’s degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.” *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006). The Probate Court failed to address these factors.

This Court should employ the proper standard and reverse the judgment of dismissal and grant full implementation of the Mediated Settlement Agreement. This Court should “ascertain and give effect to the intention of the parties, looking first to the language of the contract.” *Nichols Holding, LLC v. Divine Capital Group, LLC*, 416 S.C. 327, 336, 785 S.E.2d 613, 617 (Ct. App. 2016) (emphasis added).

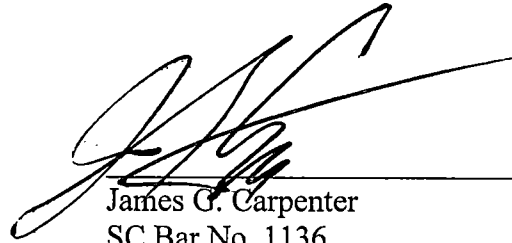
The Dismissal should be reversed, and the Mediated Settlement Agreement should be enforced.

CONCLUSION

Petitioner, Charles Deal, Jr., prays the Court to reverse the Probate Court judgment of Dismissal and:

- **ORDER** Godfrey to grant the realtor free access to the property;
- **ORDER** Godfrey to vacate the premises, leaving them cleaned, in good order, and in good repair;
- **ORDER** the property to be sold, and the proceeds distributed, as required by the Settlement Agreement;
- **ORDER** the full implementation of the Mediated Settlement Agreement, and
- Grant such other and further relief as the Court deems just and proper.

Respectfully submitted
THE CARPENTER LAW FIRM, PC

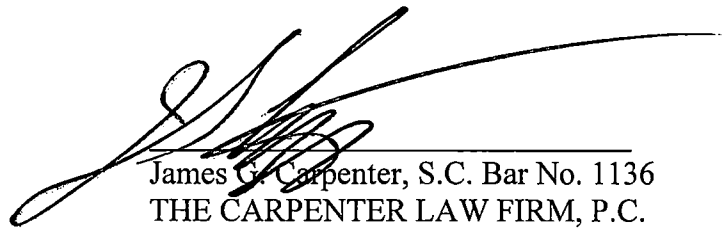
A handwritten signature in black ink, appearing to read 'J. G. Carpenter', is written over a horizontal line. The signature is stylized and cursive.

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Attorney for Appellant Charles Deal, Jr.

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellant's Initial Brief and Designation of Matters for the Record on Appeal on counsel for Respondent by US Mail, postage prepaid on Wednesday, December 04, 2019, addressed as follows:

Mr. William G. Rhoden
221 E. Floyd Baker Blvd.
Gaffney, SC 29340



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WHEN IT'S WORTH FIGHTING FOR

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December 4, 2019

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
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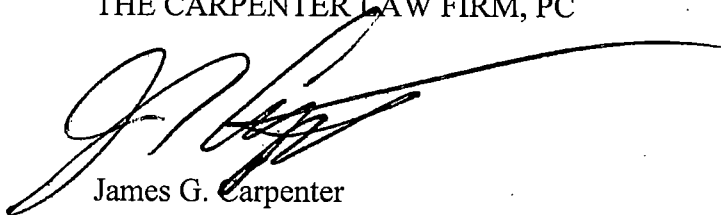
Re: *Deal v. Godfrey*, Appellate Case Number 2019-001325

Dear Ms. Kitchings:

I enclose Appellant's Initial Brief, Appellant's Designations of Matter to be Included in the Record on Appeal, and a Certificate of Service.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

Enclosures
CC w/enclosures: William Rhoden

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