THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace G. Knie, Circuit Court Judge

Case No. 2016-CP-42-0727

William A Morgan		Respondent,
	v.	
Sterling Estates Homeowner's Association, Inc. and Paul Thomas Garner		Defendants.
	Of whom	
Paul Thomas Garner	is	Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTION

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THE PARTIES ENTERED INTO AN ENFORCEABLE SETTLEMENT AGGREEMENT?

2. DID THE TRIAL COURT ERR IN FINDING THAT THE TERMS OF THE SETTLEMENT AGREEMENT GIVE THE RESPONDENT THE SOLE RIGHT TO DETERMINE THE CONTRACTOR AND THE SCOPE OF THE WORK TO BE DONE ON APPELLANT'S PROPERTY?

STATEMENT OF THE CASE

On February 17, 2016, William A. Morgan (Respondent) brought this action alleging negligence, negligence per se, nuisance, and trespass against Paul T. Garner (Appellant) and Sterling Estates HOA. The case was set for trial on October 1, 2018. When the case was called to trial on that date, the parties represented to the trial court that they had reached a settlement and put an outline of the settlement agreement on the record before the Honorable R. Keith Kelly. Judge Kelly signed a Form 4 Order on October 2, 2018, indicating that the case had settled.

On November 20, 2018, Respondent filed a Motion to Enforce Settlement. The Honorable Grace G. Knie held a hearing on that motion on August 16, 2019. The Court found that there was an enforceable settlement agreement and issued an order granting Respondent's motion on September 6, 2019.

Appellant filed a Motion to Reconsider on September 15, 2019, which Judge Knie heard on November 1, 2019. Judge Knie denied the Motion to Reconsider and issued an order November 26, 2019. On December 23, 2019, Appellant served the Notice of Appeal on Respondent.

STATEMENT OF FACTS

This case is about water run-off that Respondent claims flows from Appellant's yard into Respondent's yard. Appellant and Respondent are neighbors in the Sterling Estates subdivision in Boiling Springs, Spartanburg County, South Carolina. Respondent alleged that Appellant made changes to his property causing an increase in water run off to erode his yard. (Complaint p. 2). Appellant denied the allegation of the Respondent. (Answer of Appellant P. 2)

The matter came before the court on October 1, 2018. On the record, counsel for Respondent indicated that the parties had reached a settlement, and Respondent wanted to put the settlement on the record. (Transcript of October 1, 2018 p. 4, lines 2-8). The proposed settlement included payment of money to the Respondent by the Appellant and the other Defendant, Sterling Estates Homeowner's Association, Inc. (Transcript of October 1, 2018 p. 4, lines 9-12). The proposed settlement as presented in court also included a discussion about moving a drain that was on Appellant's property. (Transcript of October 1, 2018 p. 4, lines 13-25). Counsel for Respondent further stated, "I **think** what we have agreed to" (emphasis added) with regard to setting money aside to pay for a contractor who would be hired by both Respondent and Appellant jointly. Counsel for Respondent further stated that as the work would be taking place on Appellant's property, Appellant wanted to maintain some degree of control over work. (Transcript of October 1, 2018 p. 5, lines 1-7). Respondent's attorney suggested a contractor, Site Design, but acknowledged no agreement had been made regarding retaining this contractor. (Transcript of October 1, 2018 p. 5, lines 8-13).

Finally, and importantly, counsel for Respondent acknowledged that there was still a dispute as to how the work was to be completed:

> The only thing that I would add, which might – which Mr. Timmons tells me may be in a little bit of dispute is I don't know how that's going to be done,

> what it requires, how high it's going to be, how low it's going to be, whether it needs a little bit of slipping around it to make more - - to make it more effective or not and what I would suggest is that Mr. Morgan and Mr. Garner rely on the engineer or the contractor that does it to make it as effective as possible, Your Honor.

(Transcript of October 1, 2018 p. 5 lines 15-23).

Counsel for Appellant stated on the record that there was a disagreement as to the extent of the work that would be done:

> Mr. Garner does not want them to come in and do his yard. As you can see, it's sort of flat right there. We understand that they may to drop it down a little bit in order for the water to go in it, but he does not want - - so long as that can be part of it, is that they are not going to re-grade his whole yard

(Transcript of October 1, 2018 p. 5 line 25 – p. 6 line 5). Furthermore, counsel for Appellant stated that Appellant wanted for his property to remain flat in the area to the extent possible. (Transcript of October 1, 2018 p. 6 lines 8-10). Counsel for Respondent stated that the intention was not to regrade the property but that the yard would have to be sloped into the drain. (Transcript of October 1, 2018 p. 6 lines 16-18, 21-22). A Form 4 Order was entered on October 2, 2018, stating "Case Settled" and dismissing the case. (October 2, 2018, Order).

Subsequent to that, Respondent hired an engineer to begin work on moving the drain. (Respondent's Motion to Enforce Settlement, November 20, 2018, Ex. A). Appellant had no agreed to this contractor doing any work. Respondent then filed his Motion to Enforce Settlement on November 20, 2018. In the motion, he alleged that Appellant had violated the terms of the settlement by refusing to allow an engineer (who the Respondent unilaterally hired) onto Appellant's property to create a proposal for repair. Respondent also alleged that Appellant had not prepared a Release. (Respondent's Motion to Enforce Settlement, November 20, 2018, p. 2). At this time, there was not any written settlement agreement between the parties, and nothing put on the record October 1, 2018, stated that Appellant would prepare a Release. After the motion

was filed, and in an attempt to confirm the alleged settlement, Appellant prepared a written Settlement Agreement and Release. (Appellant's Memorandum in Opposition to Motion to Enforce Settlement, p. 8-9; Ex. C). Respondent refused to execute the proposed Agreement and Release. (Respondent's Memorandum in Support of Motion to Enforce Settlement, Ex. I).

Prior to the hearing on Respondent's Motion to Enforce Settlement, Respondent filed a Memorandum in Support of his Motion to Enforce Settlement. Of note, the Memorandum requested that the court require Appellant to allow the engineer of Respondent's choosing onto Appellant's property to perform an inspection and be able to prepare a scope of repair. The Memorandum further requested the court require Appellant "to comply with the scope of repair drafted by Site Design and give **any** contractor access to his property to implement the scope of repair." (Respondent's Memorandum in Support of Motion to Enforce Settlement, P. 5) (emphasis added).

Judge Knie heard Respondent's Motion to Enforce Settlement on August 15, 2019. At the hearing, Respondent argued that Appellant had refused to comply with the terms of the settlement agreement by refusing to allow the contractor hired by Respondent onto Appellant's property and by rejecting Respondent's choice of contractor. (Transcript of August 15, 2019, p. 5 line 18 -p. 6, line 13). Respondent then agreed to work with an engineer of Appellant's suggestion, but that engineer reported to Respondent that he would not get involved in the matter due to the different scopes of work being told to him by the two parties. (Transcript of August 15, 2019, p. 6 line 19 - p. 7, line 15; Respondent's Memorandum in Support of Motion to Enforce Settlement, Ex. O) Counsel for Respondent told Judge Knie that Appellant's instructions to the engineer to move the drain over would not necessarily fix the problem of water running from Appellant's property onto Respondent's property, which he stated was the whole point of the agreement. (Transcript of

August 15, 2019, p. 7 lines 9-15). Counsel for Appellant pointed out to the court that the agreement reached in front of Judge Kelly was only to move the drain over. (Transcript of August 15, 2019, p. 10 line 18 -p. 11 line 3; p. 12 line 2 – p. 13 line 2). However, the engineer suggested by Appellant and agreed to by Respondent communicated to Appellant that respondent was requesting additional work such and grading and berms. (Appellant's Memorandum in Opposition to Motion to Enforce Settlement, Ex. B).

Following the hearing, Judge Knie issued an order granting the Motion to Enforce Settlement on September 6, 2019. The order stated that the Appellant would have to comply with the alleged settlement agreement by

> [A]llowing an engineer of Plaintiff's choosing access to the property to do an investigation, and an inspection, and present a proposed scope of repair; and by complying with the scope of repair drafted by the engineer; and giving the contractor access to his property to implement the scope of repair.

(September 6, 2019, Order, p. 8).

Appellant filed a Motion to Reconsider on September 15, 2019. Judge Knie heard that motion on November 1, 2019, and on November 26, 2019, she issued an order denying the motion.

STANDARD OF REVIEW

In South Carolina jurisprudence, settlement agreements are viewed as contracts. "An action to construe a contract is an action at law." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (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." Nichols Holding, LLC v. Divine Capital Grp., 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016) (quoting Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "Whether the language of a contract is ambiguous is a question of law for the court." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 803 (Ct. App. 2009). However, this Court is free to decide questions of law with no particular deference to the trial court. S.C. Dept. of Transp. V. M & T Enters. Of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E. 2d 7, 12 (Ct. App. 2008).

ARGUMENTS

I. BECAUSE THERE WAS NO MEETING OF THE MINDS, THERE IS NOT AN ENFORCEABLE CONTRACT

The Circuit Court erred in finding that there was an enforceable settlement agreement between the parties.

South Carolina courts see settlement agreements as contracts." Pee Dee Stores, Inc. at 241, 672 S.E.2d at 802. To determine if there is an enforceable contract, this Court must first consider if the statements of counsel put on the record on October 1, 2018, are sufficient to constitute such a contract.

In order to have an enforceable contract, there must be an offer, acceptance, and consideration contract. Sauner v. Public Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003). Furthermore, "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all

essential and material terms of the agreement." Byrd v. Livingston, 398 S.C. 237, 243, 727 S.E.2d 620, 622 (Ct. App. 2012), (quoting Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007)) (emphasis in original).

Whether there was a meeting of the minds can be determined first by the language used by the parties and then by conduct of the parties. "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Byrd, supra, at 243, 727 S.E.2d at 623 (quoting Wright v. Trask, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997)). "The parties' intention must, in the first instance, be derived from the language of the contract." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). In this case, the matter was never put in writing. The Court must turn to the language put on the record in court. In relevant part, Respondent's counsel stated:

> "I know, and Mr. Timmons may know, there is a place called Site Design with Andy Sherard in Greenville that's not only engineers, but they also do the work. I don't know how expensive they are, but that's something I will throw out to these gentlemen, depending on the price of that."
>
> "The only thing that I would add, which might – which Mr. Timmons tells me may be in a little bit of dispute is I don't know how that's going to be done, what it requires, how high it's going to be, how low it's going to be, whether it needs a little bit of sloping around it to make more – to make it more effective or not, and what I would suggest is that Mr. Morgan and Mr. Garner rely on the engineer or the contractor that does it to make it as effective as possible." (Transcript of October 1 hearing, p. 5 L. 15-23, emphasis added)

(Transcript of October 1, 2018 p. 5, lines 8-13, 15-23) (emphasis added).

The language put on the record by Respondent's counsel demonstrates that there was no meeting of the minds as to essential elements of the agreement, such as who would do the work, or what the scope of work would be. "Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for

the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009), citing Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). As Respondent's attorney put this language on the record, it should be construed against Respondent. These suggestions, which contemplated disagreement and further decisions that could not be agreed to at the moment, were not sufficient to form an enforceable contract. The only statements by Appellant's counsel on the record at the time were that Appellant did not want his yard to be graded. He clearly stated that Appellant "did not want them to come in and do his yard." (Transcript of October 1, 2018 p. 5, line 25 – p. 6 line 1). In fact, there was no language presented to the trial court that the parties had agreed to fix any water runoff problem or that the Appellant agreed to do whatever was necessary to alleviate any problems of which Respondent complained. It is clear that there was an agreement to have some work performed in Appellant's yard, but the scope of the work was not clear and the person to perform the work was still to be decided.

At best, the language is ambiguous, and therefore the Court should consider parol evidence to determine the intentions of the parties. "[I]f a contract is ambiguous, parol evidence is admissible to ascertain the true meaning of the contract and the intent of the parties." Plantation A.D., LLC., supra, at 206, 687 S.E.2d at 718 (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977)). "The intentions of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Byrd at 243, 727 S.E.2d at 623, (quoting Wright v. Trask, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997). The actions by both parties also show that there was no meeting of the minds. They did not agree on the scope of the work to be done, the contractor to do the work, nor the ability to put the

settlement agreement in writing. They did not even agree on whether the ultimate goal of the alleged agreement was just to move the drain or to resolve the problems the Respondent complained of. They did not agree on whether there would be berms installed or grading performed. The communications between parties, counsel, and other parties included as exhibits to both parties' memoranda clearly show a lack of agreement on the main issued.

Because there was no meeting of the minds, as seen through the language put on the record and the actions of both parties, there was no enforceable contract. "Where there has been no meeting of the minds sufficient to form a complete settlement agreement, any partial performance of the settlement agreement must be rescinded and the case restored to the docket for trial." Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983), citing Wood v. Virginia Hauling Co., 528 F.2d 423, 425 (4th Cir. 1975). The parties and counsel's statements to Judge Kelly on October 1, 2018, make clear that there were material terms to which the parties had not agreed, and as such the Circuit Court erred in ruling otherwise.

II. BECAUSE IF A CONTRACT EXISTS, THE COURT CANNOT IMPOSE ADDITIONAL OR CHANGED TERMS

The Circuit Court erred in ordering that the Appellant was required to allow Respondent's engineers and contractors unfettered access to Appellant's private property to conduct inspections, prepare site plans, and conduct construction activity.

A. THE COURT CANNOT ALLTER THE TERMS OF THE CONTRACT BETWEEN PARTIES

If the Court does determine that an enforceable contract exists, the Court must only impose terms based on the clear intent by the parties. "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Ellie, Inc. v. Miccichi, 358 S.C.

78, 94, 594 S.E.2d 485, 494 (Ct. App. 2004), citing Blakely v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). In order to determine what terms were agreed upon, "the parties' intention must, in the first instance, be derived from the language of the contract." Id. at 93, 594 S.E.2d at 493.

In this case, the language put on the record in front of Judge Kelly on October 1, 2018 was that the parties agreed that both parties would have to agree on the contractor to review and perform the work. They also agreed that the work would include moving the drain. There was no agreement to retain an engineer to perform any site preparation or design. There was no agreement to any building of berms, grading of the Appellant's property, or construction of berms. Any work beyond the limited scope set forth on the record had not been agreed to and was not part of any settlement. Judge Knie's September 6, 2019, Order stated:

> "That Defendant Garner, is hereby ordered to make every effort to comply with the terms and conditions of the agreement by: allowing an engineer of Plaintiff's choosing access to the property to do an investigation, and an inspection, and present a proposed scope of repair; and by complying with the scope of repair drafted by the engineer; and giving the contractor access to his property to implement the scope of repair."

(Order of September 6, 2019 p. 8) (emphasis added).

In this Order, Judge Knie ordered the Appellant to comply with terms and conditions that clearly went well beyond the scope of what was discussed on the record on October 1, 2018. As set forth above, if the Court considers parol evidence to determine what, if any, evidence of a meeting of the minds exists, there is still no evidence that Appellant ever considered giving Respondent decision making authority over who would come onto his property and what work would be done on his property. In fact, counsel for Respondent acknowledged as such in court on October 1, 2018, when he stated, "[o]bviously, it's Mr. Garner's yard, so he wants some control over it and also obviously some culpability if things go wrong." (Transcript of October 1, 2018 p.

5, lines 5-7). In fact, for the purposes of parol evidence, there were occasions where Respondent wanted access to Appellant's property to speak with potential contractors and Appellant refused.

The available parol evidence does not support Judge Knie's order requiring Appellant to comply with terms dictated by Respondent and those individuals he hires.

B. COURTS CANNOT ORDER PRIVATE CITIZENS TO ALLOW OTHER PRIVATE CITIZENS ACCESS TO PRIVATE PROPERTY FOR THE BENEFIT OF THE NON-OWNER OF THE PROPERTY.

The Circuit Court's order essentially amounts to a taking by requiring Appellant to give control over certain aspects of his property, including control of who can enter his property and what construction work can be done on his property. "[P]rivate property shall not be taken for private use." S.C. Const. Ann. Art. I, § 13.

The Courts in this state have previously held that contracts that interfere with the free use of real property must be strictly construed. "It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property. . . . It follows, of course, that were the language of the restrictions is equally capable of two or more different constructions that the construction will be adopted which least restricts the use of the property." S.C. Dep't of Natural Res. V. Town of McClellanville, 345 S.C. 617, 622, 555 S.E.2d 299, 302 (2001).

Allowing the Circuit Court's order dated September 6, 2019, to stand would greatly interfere with Appellant's use of his property. He would lose all control over who would be working on his property, the scope of the work to be performed on his property, and the risk that it could drastically change the entire grade of the property. Considering that the Respondent's Complaint only asked for monetary damages, giving him access and control over aspects of

Appellant's private property would deprive Appellant of one of the most valued and cherished rights of this state and country, the right to control private property. Therefore, the Circuit Court clearly erred when ordering that the terms of the settlement allowed Respondent to dictate the terms of who would do any work on Appellant's property and what work would be done.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Circuit Court and remand the case for trial. The parties clearly did not have a meeting of the minds, and therefore the Circuit Court erred in holding there was an enforceable settlement agreement between them. The Circuit Court further erred in its determination of what the terms of the settlement agreement, if any, were and in depriving Appellant of his private property rights.

Respectfully submitted,

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June 22, 2020

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In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace G. Knie, Circuit Court Judge

Case No. 2016-CP-42-0727

William A Morgan		Respondent,
	v.	
Sterling Estates Homeowner's Association, Inc. and Paul Thomas Garner		Defendants.
	Of whom	
Paul Thomas Garner	is	Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal on William A Morgan by depositing a copy of it in the United States Mail, postage prepaid, and electronic mail on May 20, 2020, addressed to his attorney of record, Jason Imhoff, The Ward Law Firm, PA, 233 S. Pine St., P.O. Box 5663, Spartanburg, SC 29304.

June 22, 2020

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June 22, 2020

The Honorable Jenny Abbott Kitchings
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Re: William A. Morgan vs. Paul T. Garner et al.
Appellate case No.: 2019-002122
Claim No.: 0404806069; DOL: 39/2016
WJC&B File No.: 0222.00126

Dear Ms. Kitchings:

Enclosed please find the following for filing:

1. Initial Brief of Appellant
2. Appellant's Designation of Matter to be Included in the Record on Appeal

Also enclosed is a Certificate of Service upon opposing counsel.

Pursuant to the order regarding Operation of the Appellate Courts During the Coronavirus issued March 20, 2020, and amended on May 29, 2020, one copy of each document is being sent. Please advise if additional copies are needed.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

M. Kyle Thompson

MKT/jab

Enclosures

cc: Jason Imhoff, Esquire

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