THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace G. Knie, Circuit Court Judge

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Case No. 2016-CP-42-0727

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William A Morgan — Respondent,

v.

Sterling Estates Homeowner's Association, Inc. and Paul Thomas Garner — Defendants.

Of whom

Paul Thomas Garner — is — Appellant.

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# INITIAL REPLY OF APPELLANT

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## 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?

## ARGUMENTS

### I. THERE IS NOT AN ENFORCEABLE SETTLEMENT AGREEMENT

As set forth in the Initial Brief of Appellant, South Carolina courts see settlement agreements as contracts. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). The short recitation of the framework of a settlement did not include key details and terms that can be enforced against Appellant.

In his brief, Appellee goes into significant detail as to what he believed to be unacceptable delay by Appellant and Appellant's counsel as to the consummation of the purported settlement. However, none of those allegations ultimately overcome the fact that there was no meeting of the minds with regard to essential and material terms between Appellant and Appellee.

South Carolina law is clear: if there is no meeting of the minds with regard to the terms of the settlement agreement, then the settlement agreement is not enforceable. In Ashfort Corp. v. Palmetto Constr. Group, 318 S.C. 492, 458 S.E.2d 533 (1995), two parties thought they had reached a settlement and notified the court regarding the same. However, a subsequent dispute arose over the terms of the settlement, and one of the parties moved to compel the other party to comply with what they believed was the settlement agreement. In that case, the Supreme Court did not enforce the settlement because it did not meet the requirements of Rule 43(k), S.C.R.C.P. In so holding, the Court pointed out that Rule 43(k) "is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." Id. at 493, 458 S.E.2d at 534. This is crucial because in the present case, despite presenting the trial court with a framework for a settlement, the terms of the settlement were not put on the record in their entirety, in part because they had not been determined and/or had not been agreed to.

In presenting the purported agreement to the Circuit Court, Respondent's counsel substituted his recommendations and opinions for the actual agreement of the parties. 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. Respondent's brief focuses repeatedly on the fact that Appellant would not agree to use Site Design, but that was never explicitly agreed to by the parties prior to putting the purported settlement on the record.

The conduct of the parties did not support the finding that there was a meeting of the minds and therefore an enforceable settlement. "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 v. Livingston, 398 S.C. 237, 243, 727 S.E.2d 620, 623 (Ct. App. 2012) (quoting Wright v. Trask, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997)). Appellant never agreed to the engineer proposed by Respondent in open court. Respondent asked the engineer proposed by Appellant to prepare a design involving berms and grading. (Appellant's Memorandum in Opposition to Motion to Enforce Settlement, Ex. B).

However, Respondent's counsel told the Circuit Court that "it's not our intention to re-grade his yard at all. (Transcript of October 1, 2018 p. 6, lines 21-22). It is clear that the conduct of the parties does not show an agreement on material terms that would be necessary to effectuate a settlement.

Respondent's Brief alleges that Appellant's counsel stated that "the only impediment to consummating the settlement agreement would be 'some catastrophic coming in and doing something crazy.'" (Initial Brief of Respondent, p. 13). Respondent tries to use this statement by Appellant's counsel to support some notion that Appellant agreed with settlement in that there were no other terms or issues to address. However, a reading of the statement in the context of the transcript itself shows that Appellant's counsel was focused on obtaining a release for Appellant for any of the existing issues and that the reference to "catastrophic" or "crazy" was not referenced as an impediment to a settlement agreement.

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. IF THERE IS AN ENFORCEABLE SETTLEMENT AGREEMENT, THEN THE COURT ERRED AND EXCEEDED ITS AUTHORITY

The Circuit Court greatly exceeded its authority by ordering that the appellant must allow the engineer of the Respondent's choosing on to Appellant's property to prepare a design and then

must allow any contractor of Respondent's choosing on to Appellant's property to implement the design of the engineer is selected by the Respondent.

Respondent relies in great part on Rock Smith Chevrolet, Inc., v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992) for the proposition that the Circuit Court has thirteenth-juror authority to see that justice is done in every case. Under Respondent's interpretation of this case, the Circuit Court can rewrite the terms of the agreement between the parties and order the Appellant to allow engineers and contractors of the Respondent's choosing on to Appellant's property. However, this reading goes far beyond the actual holding of the case, in which the Circuit Court vacated a settlement agreement that had been reached by the parties and their counsel. This is a far cry from the court ordering one party to comply with the purported settlement agreement and go so far as to extend the authority of the agreement between the parties.

Other cases in South Carolina state that courts cannot exercise discretion as to the contents of a settlement agreement or substitute its construction for an agreement entered into between parties. Courts cannot make up terms for contracts, and the interpretation of contracts and settlement agreements must not lead to absurd consequences for unjust results. See Bruce v. Blalock, 241 S.C. 155; 127 S.E.2d 439 (1962).

When the purported settlement was presented to the Circuit Court, counsel for Respondent 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). Respondent cannot now, with no case law to support him, argue that Appellant has relinquished control over his oven property by failing to go along with Respondent's interpretation of the alleged agreement.

## CONCLUSION

For the reasons stated both in the Appellant's Brief and in this Reply, 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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August 31, 2020

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| Paul Thomas Garner | is | Appellant. |

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PROOF OF SERVICE

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I certify that I have served the Initial Reply of Appellant on William A Morgan by depositing a copy of it in the United States Mail, postage prepaid, and electronic mail on August 31, 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.

August 31, 2020

s/ M. Kyle Thompson
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August 31, 2020

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211



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 Reply of Appellant

There are no changes to the 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, this document is being electronically filed with the South Carolina Court of Appeals, and service is being made on counsel by email.

With kindest regards,

**WILLSON JONES CARTER & BAXLEY, P.A.**

M. Kyle Thompson

MKT/
Enclosures

cc: Jason Imhoff, Esquire