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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY

The Honorable R. Lawton McIntosh
Court of Common Pleas
Trial Court Case No.: 2009-CP-37-00652

Appellate Case No.: 2022-001581

Paul W. Hund, III, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Stoneledge at Lake Keowee Owners' Association, Inc..... Respondents,

v.

IMK Development Co., LLC, Marick Home Builders, LLC, and Rick Thoennes….. Defendants,

Of whom Marick Home Builders, LLC and Rick Thoennes are Appellants.

MOTION TO CERTIFY CASE FOR REVIEW BY THE SOUTH CAROLINA SUPREME COURT

Pursuant to Rule 204(b), *SCACR*, Respondent Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Stoneledge HOA") respectfully moves this Court to certify this case for review before it is determined by the Court of Appeals. Appellants seek reversal of the Circuit Court's entry of a judgment, which this Court explicitly ordered in its recent opinion, *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 138, 866 S.E.2d 542, 558 (2021). Appellants' notice of appeal concerns a legal principle of major importance and an issue of public interest such that certification is warranted. This Court should grant certification

and dismiss the appeal. Stoneledge HOA also respectfully requests that this Court give the matter expedited consideration.

I. Introduction and Summary.

On December 8, 2021, this Court issued its opinion in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 138, 866 S.E.2d 542, 558 (2021). In conformance with the directive in that case, Stoneledge HOA filed a Motion for Entry of Judgment on April 27, 2022, Case No. 2009-CP-37-00652 (attached hereto as Exhibit A), asking the Circuit Court in Oconee County to enter judgment in the following amounts, which are precisely the amounts this Court ordered:

Judgment against Marick Home Builders LLC: Total $629,248.53:

$286,022.06 for breach of warranty (joint and several liability for prorated verdict after setoff) and $343,226.47 for negligence (40%) of prorated verdict after setoff).

Judgment against Rick Thoennes: Total $1,000,000:

$1,000,000 for breach of fiduciary duty (no setoff applied).

Judgment against Bostic Brothers Construction, Inc.: Total $943,872.79

$858,066.17 for negligence (joint and several liability for prorated verdict are setoff) and $85,806.62 for breach of warranty (30% of prorated verdict after setoff).

In response to Respondent's Motion for Entry of Judgment, Appellants filed a Petition for Post Judgment Settlement on June 10, 2022 (attached as Exhibit B, without the Remittitur, which consisted of the opinions of the Court of Appeals and this Court) in which Appellants objected to the entry of judgment, *as directed by this Court*, on the basis that the judgment against Thoennes had been released by agreement of the parties in 2016 (hereinafter "Agreement," attached hereto as Exhibit C). In effect, the Appellants asked the Circuit Court to modify or alter this Court's Order

in *Stoneledge,* based upon an argument that was never raised or presented to this or any other court for the last six years. The Circuit Court denied Appellants' argument and entered judgment as this Court directed (*see* Form 4 Order, attached as Exhibit D) and subsequently denied Appellant's Motion to Alter, Amend and/or Reconsider, filed September 29, 2022 (attached as Exhibit E) (*see* Form 4 Order, October 10, 2022, attached as Exhibit F). The Appellants have now appealed the Circuit Court's Order, which merely complied with this Court's Order.

II. Reasons for Certification.

Under Rule 204(b), *SCACR*, the South Carolina Supreme Court may, in its discretion, on motion of any party to the case, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes. For reasons discussed below, important legal principles and issues of public interest are implicated here.

This appeal involves two significant questions:

1) Is a Supreme Court order a final disposition of all matters that were or could have been addressed in an appealed matter, or may a party stockpile legal arguments and raise them *after* appeal to thwart an order of the Supreme Court, or concoct grounds for new appeals?

2) Does a Circuit Court have authority to disregard, alter or amend a Supreme Court order based on arguments that could have been but were not raised before the Supreme Court?

The facts of this appeal are quite simple, and this Court can conclude this case by ruling on the above legal issues, which this Court is uniquely able to do given that the Court of Appeals does not have authority to countermand, disregard or alter a ruling from this Court and is bound by this Court's *Stoneledge* Order. The exigencies of time, judicial economy, and fairness warrant the Court taking jurisdiction of this case rather than allowing the case to proceed in the lower courts. Furthermore, this Court's decision will inform the lower courts, and the legal community, that Supreme Court orders are final and cannot be arbitrarily and frivolously challenged or circumvented.

III. Stoneledge Is Entitled to Judgment Against Thoennes.

a. The Supreme Court Ordered that Judgment Be Entered Against Thoennes in the Amount of $1,000,000.

The Supreme Court's Order in *Stoneledge* is clear:

> After applying the correct setoff, the apportionment percentages determined by the jury, and the apportionment statute, we hold the resulting judgments to be entered are as follows:
>
> - Bostic: $858,066.17 for negligence (joint and several liability for prorated verdict after setoff) and $85,806.62 for breach of warranty (30% of prorated verdict after setoff)
> - Marick: $286,022.06 for breach of warranty (joint and several liability for prorated verdict after setoff) and $343,226.47 for negligence (40% of prorated verdict after setoff)
> - Thoennes: $1,000,000 for breach of fiduciary duty (no setoff applied)
>
> …

> *We remand this matter for final calculation and entry of judgment consistent with our opinion.*

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, 435 S.C. 109, at 137-138 866 S.E.2d 542, at 557-558 (2021) (emphasis added.)

That Order represented the conclusion of twelve (12) years of litigation between the parties in state court, eight (8) of which was spent in the appellate courts. The opinion, which was unanimous, was issued after voluminous briefing, a review of an exhaustive trial record, and oral arguments of counsel for all sides. Importantly, Appellants did not file a Petition for Reconsideration or Rehearing, pursuant to Rule 240, *SCACR*, and this Court's *Stoneledge* decision was, in all respects, final.

b. Appellants Waived Their Right to Assert that the Agreement Completely Released Any Judgment Against Thoennes.

In 2022, Appellants asked a Circuit Court to ignore this Court's Order and not to enter judgment against Thoennes as directed. The basis for that opposition to entry of judgment against Thoennes is that a 2016 Agreement, negotiated between Stoneledge HOA and counsel for the Thoennes' insurers, and which establishes the damages for Phase II and eliminated the need for a Phase II trial, is actually a complete release of the then existing judgment against Mr. Thoennes *for all purposes.* Thoennes now appeals the Circuit Court's Order rejecting that argument, effectively challenging this Court's Order for judgment against Thoennes in *Stoneledge*.

The argument advanced by the Appellants is without merit. First, Stoneledge HOA vigorously denies Appellants' characterization of the Agreement, which was entered while the previous appeal was in process, and years after separate coverage litigation commenced between Stoneledge HOA and the carriers for Thoennes (*See* Sec'd. Am. Compl., March 03, 2014, Case No.: 8:14-CV-00293-MGL). As part of that Agreement, the insurers wanted to protect their insured, Mr. Thoennes, from the personal effects of the judgment against him, with those

judgments instead being satisfied only out of insurance coverage. As noted, the coverage litigation had been going on for years at the time the Agreement was signed.

Regardless of the merits of the arguments concerning the effect of the Agreement, the arguments now advanced by Thoennes were unequivocally waived because he failed to make the arguments until now. Even though they contend that the 2016 Agreement was a complete release of Thoennes, at no point in the prior appeal, from 2016 through the issuance of the *Stoneledge* Opinion in 2021, did Appellants *ever* argue that there was actually no judgment against Thoennes or that the judgment against Thoennes had been released.

To the contrary, after the Agreement was signed in 2016, counsel for Marick and Thoennes, Jason Imhoff, filed briefs and made arguments on behalf of Mr. Thoennes. Over the past six (6) years, since the Agreement was finalized, the Appellants have filed the following:

1. Petition for Rehearing of Appellants Marick Home Builders LLC and Rick Thoennes relative to Opinion No. 5600 filed with the South Carolina Court of Appeals on October 25, 2018 (Appellate Case Number 2015-000392);
2. Petition for Certiorari of Appellants Marick Home Builders LLC and Rick Thoennes filed with the South Carolina Supreme Court on January 14, 2019 (Supreme Court Case Number 2019-000038);
3. Motion for Extension of Time on behalf of Marick Home Builders LLC and Rick Thoennes filed with the Supreme Court of South Carolina on August 23, 2019 (Supreme Court Case Number 2019-000038);
4. Brief of Respondents-Petitioners Marick Home Builders LLC and Rick Thoennes filed with the Supreme Court of South Carolina on September 25, 2019 (Supreme Court Case Number 2019-000038);

5. Brief of Respondents Marick Home Builders LLC and Rick Thoennes filed with the Supreme Court of South Carolina on October 9, 2019 (Supreme Court Case Number 2019-000038);
6. Reply Brief of Respondents-Petitioners Marick Home Builders LLC and Rick Thoennes filed with the Supreme Court of South Carolina on November 7, 2019 (Supreme Court Case Number 2019-000038); and
7. Motion to File Out of Time by Marick Home Builders LLC and Rick Thoennes with the Supreme Court of South Carolina on November 14, 2019 (Supreme Court Case Number 2019-000038).

Even at oral argument, counsel for Thoennes expressly recognized that he represented Thoennes and that Thoennes had a judgment against him. (Video of oral argument is located at https://media.sccourts.org/videos/2019-000041.mp4 at 14:47; Video of oral argument is located at https://media.sccourts.org/videos/2019-000041.mp4 at 35:30).

Had Thoennes believed that the Agreement was a complete release of any judgment against him for all purposes, he would have raised that issue to the Court of Appeals or to this Court. He did not raise the issue because neither Thoennes, nor his lawyers, believed that the effect of the Agreement was a total release of those judgments for all purposes. That represents a waiver of that argument.

As further support for the argument that any issues relative to the Agreement have been waived, as previously noted, the Agreement was negotiated with counsel for the Thoennes insurance carriers, which, in 2016, were in the third year of coverage litigation, in which Respondent was seeking coverage for all the judgments, including the judgment against Thoennes (the "Coverage Litigation"). The insurers never raised an argument that the Agreement was a

release of the Thoennes judgment in the Coverage Litigation either, even in response to a Motion for Summary Judgment filed by Respondent seeking coverage for that very judgment, which was granted by District Judge Hendricks. *See Stoneledge at Lake Keowee Owners Ass'n, Inc. v. Cincinnati Ins. Co.*, No. 8:14-CV-01906-BHH, 2019 WL 3945518 (D.S.C Aug. 21, 2019.) The Thoennes insurers appealed that summary judgment order to the United States Court of Appeals for the Fourth Circuit and, as this motion was being prepared, the Fourth Circuit issued its *Per Curium* opinion affirming Judge Hendricks on December 13, 2022. In that opinion, *Stoneledge at Lake Keowee Owners' Association, Inc., v. Cincinnati Insurance Company; Builders Mutual Insurance Company*, No. 19-2009 (4th Cir. Dec. 13, 2022)(attached as Exhibit G), the Fourth Circuit stated:

> [O]ne issue arguably falls outside the *Harleysville* reservation of rights ambit. In their supplemental opening brief, the insurers raise for the first time the argument that the breach of fiduciary duty judgment against Thoennes has been extinguished, thereby precluding coverage entirely for that judgment. Even if that were true (we do not believe it is), the insurers have waived any such argument in this appeal. *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief . . . .").

As reflected in the Fourth Circuit opinion, the law is clear that arguments not raised and ruled upon are waived. Appellants cannot raise a new argument after the matter is concluded. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment). The same rule applies to appellate arguments as well:

> An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief. *See Animal Protection Society of Durham, Inc. v. State of North Carolina*, 95 N.C. App. 258, 382 S.E. (2d) 801 (1989) (a reply brief cannot be used to raise new matters); 5 C.J.S. *Appeal & Error* Sec. 1324(1) at 329 (1958) ("A matter raised for the first time in oral argument or in

> the reply brief will not be considered by the appellate court."); *cf. Gold Kist, Inc. v. Citizens and Southern National Bank of South Carolina*, 286 S.C. 272, 333 S.E. (2d) 67 (Ct. App. 1985) (exceptions not argued by the appellant in its brief are deemed abandoned on appeal).

Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The Supreme Court has declined to abandon this model. "We, therefore, decline to depart from our standard issue preservation rules . . . As Chief Judge Alex Sanders so aptly stated, "Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001).

Thoennes never asked the Court of Appeals, or this Court, to rule on the issue of whether or not the judgment against Thoennes was somehow extinguished by the Agreement. *Even after* this Court directed the entry of judgment against Thoennes, Thoennes never filed a Petition for Rehearing to raise the issue of the purported release in the Agreement, which itself would not have been timely. *See Kennedy v. S.C. Ret. Syst*., 349 S.C. at 532, 564 S.E.2 at 322 ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.").

That Thoennes' appeal is frivolous can be inferred from *when* Thoennes and his attorneys chose to raise the issue of the Agreement as a release for all purposes. The issue was not raised when it could have been raised, or when it should have been raised, which was while the matter was pending on appeal. Rather, Thoennes and his attorneys waited to raise the issue for the first time only after the matter had been remanded to the Circuit Court for the entry of judgment, then used the Circuit Court's correct denial of their objection to create an issue for yet another appeal,

all in an effort to again delay the finality of the judgments originally obtained in 2013 and ordered by this Court in *Stoneledge* in 2021.

Any issues regarding the Agreement have been waived since it was not raised in the more than five (5) years of litigation following the execution of the Agreement. Therefore, this Court should dismiss the Appellants' pending appeal and affirm the Circuit Court's Order to enter judgment against Thoennes, in accordance with *Stoneledge*.

c. Allowing the Issue to be Raised at this Time is Unduly Burdensome on the Victims and is Against Public Interest.

If, after an appeal is final, parties are allowed to raise issues that could have been raised during an appeal in an effort to relitigate a Supreme Court order in a lower court, the door opens to never-ending appeals and no judgment is ever final. When the Supreme Court makes a ruling, a large majority of the public understands that to mean a final decision has been reached *and that must be so*. *See Adoptive Couple v. Baby Girl*, 404 S.C. 483, 487, 746 S.E.2d 51 (2013) ("We find the clear import of the Supreme Court's majority opinion to foreclose successive petitions, for litigation must have finality…"). Allowing for frivolous appeals and stalling tactics would fly directly in the face of achieving that confidence.

Here, after eight years of appeals, the Supreme Court entered judgment against Thoennes in the amount of $1,000,000. That judgment is final and cannot be subsequently voided, changed, or ignored by the Circuit Court, by Thoennes, his counsel or his insurance companies, no matter how much they do not like it.

IV. Request for Expedited Consideration.

Because of the need for this matter to be resolved quickly as it has already been litigated for more than a decade, we respectfully request that this Court expedite consideration of this case.

Discovery should not be necessary, and the case may be decided based upon filings by the parties and any briefing requested by the Court.

CONCLUSION

By this motion, Stoneledge HOA asks this Court to assert its authority and decide this appeal itself. Accordingly, Stoneledge HOA respectfully requests that this Court order the following relief:

1. Grant this motion and expedite consideration of this case; and

2. Dismiss the appeal.

Respectfully Submitted,

s/Robert T. Lyles, Jr.

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Attorneys for Respondent

December 14, 2022.

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE	)	CASE NUMBER: 2009-CP-37-00652
Stoneledge at Lake Keowee Owners' Association, Inc., et al.,	)	
Plaintiffs,	)	**MOTION FOR ENTRY OF JUDGMENT AS TO BOSTIC BROTHERS CONSTRUCTION, INC.; MARICK HOME BUILDERS, LLC; AND RICK THOENNES**
vs.	)	
IMK Development Co., LLC, et al.,	)	
Defendants.	)	

Please take notice that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Plaintiffs, by and through its counsel, will move before the Presiding Judge of the Tenth Judicial Circuit, for an Order altering or amending a judgment of the court pursuant to Rule 58 of the South Carolina Rules of Civil Procedure ("*SCRCP*"). The grounds for this motion are stated below.

This matter comes before the Court on Remittitur from the South Carolina Supreme Court dated January 4, 2022. The Remittiturs followed the entry of Supreme Court Opinion Numbers 28070 and 28071, which are attached hereto (Exhibits A and B), and which resulted in judgments in the following amounts against the named Defendants:

> **Judgment against Bostic Brothers Construction, Inc.** in the amount of **$943,872.79** (comprised of $858,066.17 for the negligence claim and $85,806.62 for the implied warranty claim);
>
> **Judgment against Marick Home Builders, LLC** in the amount of **$629,248.53** (comprised of $286,022.06 for the negligence claims and $343,226.47 for the implied warranty claim);
>
> **Judgment against Rick Thoennes** in the amount of $**1,000,000.00**

Based upon the forgoing orders of the South Carolina Supreme Court, the judgments should be entered as reflected and made effective as of November 8, 2013.

s/Robert T. Lyles, Jr.
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April 27, 2022

EXHIBIT B

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	CASE NUMBER: 2009-CP-37-00652
Stoneledge at Lake Keowee Owners' Association, Inc., et al.,)	
Plaintiffs,)	**DEFENDANTS MARICK HOME BUILDERS, LLC AND RICK THOENNES' PETITION FOR POST JUDGMENT SETTLEMENT**
vs.)	
IMK Development Co., LLC, et al.,)	
Defendants.)	

PLEASE TAKE NOTICE, Defendants, Marick Home Builders, LLC and Rick Thoennes (collectively the "Defendants"), hereby submit this petition under South Carolina Rules of Civil Procedure 59 and 60 to amend the judgment following Remittitur from the South Carolina Supreme Court dated January 4, 2022. The Remittiturs followed the entry of Supreme Court Opinion Numbers 28070 and 28071, which are attached herewith as **Exhibit A**. This Petition is based on the following together with such other evidence, affidavits, or materials which have been, or which may hereafter be furnished to the Court:

1. The purpose of this petition is to seek a post judgment release and satisfaction of any Judgment against Rick Thoennes.

2. The entry of a Judgment against Rick Thoennes was released by Plaintiffs.

3. After the Phase I trial and during the appeal, the parties negotiated and executed a settlement agreement.

4. In that settlement agreement, Plaintiff released the judgment obtained against Thoennes in regard to Phase I. That agreement was memorialized in a "Settlement Agreement" in 2016 (attached **Exhibit B).**

5. Plaintiff's release of the Phase I Judgment against Rick Thoennes in Paragraph 4.b. while the appeal was proceeding cannot be disputed:

> "4. Furthermore, in consideration of the above-referenced stipulation of damages, the Parties also agree:
>
> b. The only effect this Settlement Agreement will have on the Phase I Judgment is that the Plaintiff will release the judgment obtained against Thoennes in regard to Phase I."

6. The judgment released was the same Judgment Plaintiff now requests entered.

7. That judgment against Thoennes in the amount of $2,144,088.23 as of November 8, 2013, was marked satisfied and cancelled at Plaintiff's request on October 31, 2016, in compliance with and after the execution of the Settlement Agreement (attached **Exhibit C**).

8. Any Judgment was completely released, marked satisfied, and cancelled pursuant to agreement.

9. Following the remittitur, the Hon. R. Lawton McIntosh sought guidance from the parties as to the handling of the "mathematics" of the case. See the January 10, 2022, e-mail of the Hon. R. Lawton McIntosh attached hereto and incorporated herein as **Exhibit D**.

10. Based on the foregoing, Defendants, Marick Home Builders, LLC and Rick Thoennes, respectfully request the Court issue its findings and/or otherwise make a ruling that: (i) Rick Thoennes's liability and judgment were released by Plaintiffs on the Phase I judgment; (ii) The Phase I judgment against Rick Thoennes was marked satisfied; (iii) any judgment against Rick Thonennes as directed by the Supreme Court be marked satisfied; and (iv) the $500,000.00 settlement of IMK and Larry Lollis reduce the total judgment by $500,000.00 as 75% to Negligence and 25% to Warranty.

This Petition may be further supported by the pleadings in the case, transcript of trial, South Carolina Law, and such other memoranda and affidavits submitted in support hereof.

Respectfully submitted this 10th day of June, 2022.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff
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Counsel for Defendants Marick Home Builders, LLC and Rick Thoennes

EXHIBIT C

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	CASE NUMBER: 2009-CP-37-0652
Stoneledge at Lake Keowee Owners' Association, Inc., *et al.*)	
)	**SETTLEMENT AGREEMENT**
Plaintiffs,)	
v.)	
)	
IMK Development Co., LLC, Bradford D. Seckinger, Larry D. Lollis, William C. Cox Integrys Keowee Development, LLC, Marick Home Builders, LLC, Rick Thoennes,)	
)	
Defendants.)	

This Settlement Agreement is made and entered into by and among Stoneledge at Lake Keowee Owners' Association, Inc. ("Plaintiff"), Marick Home Builders, LLC and Rick Thoennes ("Marick" and "Thoennes" and collectively "Defendants"), and Cincinnati Insurance Company and Builders Mutual Insurance Company ("Cincinnati" and "Builders Mutual" and collectively "Insurers"). The Plaintiff, Defendants and Insurers are collectively referred to hereinafter as the "Parties."

RECITALS

WHEREAS, In above-captioned lawsuit ("Underlying Lawsuit"), the Plaintiff brought claims for negligence, breach of warranty and breach of fiduciary duty against Defendants alleging construction defects the Plaintiff sustained arising out of the development and construction of the Stoneledge Townhomes located on Lake Keowee, South Carolina (hereinafter "Stoneledge"); and

WHEREAS, Cincinnati issued policy number CPP 364 95 24 to Marick and Builders Mutual issued policy number CPP 0022751 to Marick, and Plaintiff contends both policies

provide coverage for the damages Plaintiff sustained and sought against Defendants in the Underlying Lawsuit; and

WHEREAS, the Insurers have provided a defense to the Defendants in the Underlying Lawsuit under a reservation of rights; and

WHEREAS, The Stoneledge development was constructed in two phases. Likewise, the Underlying Lawsuit was divided for trial into two separate actions, Phase I and Phase II; and

WHEREAS Plaintiff obtained a judgment against Defendants for Phase I on November 8, 2013, which was subsequently amended by order of the court dated January 30, 2015, in the net amount, after credit for set-offs, of $2,144,088.23, which is accruing interest at the judgment rate (the Phase I Judgment); and

WHEREAS, In anticipation of the trial of Phase II against the Defendants, the Parties have agreed to compromise certain aspects of this claim in the form of a stipulation of damages, as more fully set below, and to release certain obligations of Rick Thoennes altogether.

NOW, THEREFORE, IN CONSIDERATION of the promises, covenants and agreements herein contained, the parties hereto agree as follows:

Scope of this Settlement Agreement. This Settlement Agreement, unless otherwise noted, only applies to the resolution of all claims asserted by Plaintiff against Defendants arising out of Phase II. Nothing in this Settlement Agreement, except to the extent expressly stated herein, will affect the Phase I Judgment or the appeal from that judgment taken by the Defendants.

1. For good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Parties agree that the damages sustained by the Plaintiff in connection with Phase II, as more fully set forth in the Underlying Lawsuit, are approximately and may exceed the sum of Five Million Six Hundred Thousand ($5,600,000.00) Dollars. Furthermore, the

Defendants and Insurers are entitled to an offset of approximately Three Million Six Hundred Thousand and ($3,600,000.00) Dollars, representing amounts the Plaintiff has received from other sources. Therefore, the Parties stipulate that the damages which Plaintiff would otherwise be entitled to recover from the Defendants, subject to the terms of this Settlement Agreement and to resolution of all coverage issues currently pending, is Two Million ($2,000,000.00) Dollars (hereinafter "Plaintiff's Total Phase II Damages"). Accordingly, trial for the sole purpose of establishing the exact amount of the Plaintiff's damages for Phase II is unnecessary.

2. The Plaintiff and Insurers agree to proceed with a declaratory judgment action for a determination of coverage under the policies issued by Cincinnati and Builders Mutual referenced above. Insurers will pay to Plaintiff the total sum of "covered damages," as defined herein. The parties agree that "covered damages" means the amount of Plaintiff's Total Phase II Damages that are covered for purposes of indemnification under the above-referenced Cincinnati and Builders Mutual policies, as determined by a final judgment in the above-referenced declaratory judgment action, after exhaustion of any appeals, up to a maximum of Two Million ($2,000,000.00) Dollars (hereinafter "the Phase II Covered Damages"). This is not intended to be and does not limit the right of Plaintiff to also pursue recovery of sums related to the Phase I Judgment, except as expressly provided for herein, and subject to Defendants' appeal of the Phase I Judgment.

3. The Parties further agree that Insurers will pay post-judgment interest, at the legal rate, on the Phase II Covered Damages, which will accrue from the date of the execution of this Agreement until the date the Insurers pay the Phase II Covered Damages to the Plaintiff. The Phase II Covered Damages and post-judgment interest on the Phase II Covered Damages (collectively hereinafter "the Total Phase II Covered Damages") shall be payable to Plaintiff. No

other amounts, including but not limited to attorneys' fees, shall be payable to Plaintiff related to the Phase II Judgment.

4. Furthermore, in consideration of the above-referenced stipulation of damages, the Parties also agree:

a. The appeal of the Phase I Judgment against Marick and others will continue at the discretion of appellants and their appeals. Plaintiff and Insurers reserve their rights to contest coverage for any final judgment that may result as to Phase I.

b. The only effect this Settlement Agreement will have on the Phase I Judgment is that Plaintiff will release the judgment obtained against Thoennes in regard to Phase I.

c. Marick will dismiss its cross-claims, including any related appeals and petitions, against any subcontractors for any claims related to Phase II.

d. Plaintiff covenants that it will not execute any judgment or pursue any recovery from Thoennes on account of the Phase II Judgment above or by virtue of any other provision of this Settlement Agreement.

e. This Settlement Agreement will not constitute an additional ground to deny or defeat coverage under the policies issued by Insurers; nor will the fact that the parties have stipulated to damages bar any party from establishing the facts necessary to make coverage determinations as to what amount, if any, of the damages are covered during a declaratory judgment action.

f. The Parties agree that a declaratory judgment action regarding coverage for Phase II can proceed. Plaintiff acknowledges it will not assert any claim for bad faith or extra contractual damages against Insurers arising out of the judgments obtained in Phase I or for any matter related to Phase II including but not limited to the terms of this Settlement Agreement.

g. It is expressly understood and agreed that this Settlement Agreement, including the stipulation of damages, is the compromise of a disputed claim against Defendants. The parties expressly understand and agree that nothing in this Settlement Agreement shall be construed as an admission of coverage or of any damages sustained by Plaintiff or any allegation contained in the pending declaratory judgment action.

5. Entire Agreement. The Parties agree that no promise or inducement has been offered with respect to this Settlement Agreement, the Underlying Lawsuit, or the judgments arising out of Phase I and further acknowledge that this Settlement Agreement is executed without reliance on any statement or representation by any Party or their representatives or their attorneys concerning the nature and extent of the damages and/or coverage that may be applicable. The Parties have relied wholly upon their own judgment, after consultation with counsel, and have not relied upon any representation or inducement not contained herein.

6. Governing Law. This Settlement Agreement shall be governed by the laws of the State of South Carolina.

7. Attorney's Fees and Costs. The Parties acknowledge and agree that they shall bear all of their own attorney's fees, costs and expenses in connection with the claims released herein and/or the continuation of the declaratory judgment action between the Plaintiff and Insurers.

8. Understanding and Severability. The Parties hereby declare that the terms of this Settlement Agreement have been completely read, fully understood and voluntarily accepted for the purpose of making a compromise stipulation of damages in full resolution of Phase II of the Underlying Lawsuit and such additional resolution of the claims and other issues above mentioned. If any provision, or any part of any provision of this Settlement Agreement shall for

any reason be held to be invalid, unenforceable or contrary to public policy or any law, then the remainder of the Settlement Agreement shall not be affected thereby.

WITNESS our hands and seals this _____ day of _____, 2016.

Raymond Pacetta President

Authorized Representative of
Stoneledge at Lake Keowee Owners' Association, Inc.

with permission from Dan Mullen

Authorized Representative of Cincinnati Insurance Company

Authorized Representative of Builders Mutual Insurance Company

Rick Thoennes

Authorized Representative of Marick Home Builders, LLC

any reason be held to be invalid, unenforceable or contrary to public policy or any law, then the remainder of the Settlement Agreement shall not be affected thereby.

WITNESS our hands and seals this _____ day of _____, 2016.

Raymond Martha President

Authorized Representative of
Stoneledge at Lake Keowee Owners' Association, Inc.

Authorized Representative of Cincinnati Insurance Company

Authorized Representative of Builders Mutual Insurance Company

Joy M. Thoennes

Rick Thoennes

Joy M. Thoennes

Authorized Representative of Marick Home Builders, LLC

FORM 4

EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

PAUL W. HUND III ET, AL.
PLAINTIFF(S)

IMK DEVELOPMENT CO. LLC. ET, AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

DEFENDANTS MARICK HOME BUILDERS, LLC & RICH THOENNES' PETITION FOR POST JUDGMENT SETTLEMENT IS DENIED AS TO THE RELEASE OF MR. THOENNES FROM LIABILITY IN THE PHASE I JUDGMENT. FURTHER, DEFENDANTS ARE NOT ENTITLED TO SETOFF FOR ANY MONIES PAID AS TO THE FIDUCIARY DUTY CLAIM. PER JUDGE MCINTOSH'S INSTRUCTION, COUNSEL WILL DISCUSS SETOFF AS TO IMK AND LARRY LILLIS BASED ON THE RELEASES PROVIDED TO DEFENSE COUNSEL BY PLAINTIFF'S COUNSEL. IF THE PARTIES CANNOT COME TO AN AGREEMENT ON IMK'S AND LARRY LILLIS'S LIABILITY, THEY WILL BRING THE MATTER BEFORE THE COURT FOR AN ADDITIONAL HEARING. MR. ROBERT T. LYLES JR. WILL PREPARE A FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2155 Judge Code	9-21-22 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter:

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ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE	)	CASE NO. 2009-CP-37-0652
	)	
Stoneledge at Lake Keowee Owners' Association, Inc., et al.,	)	**Defendants Marick Home Builders, LLC's and Rick Thoennes' Motion to Alter, Amend and/or Reconsider the Court's Order Denying their Petition for Post Judgment Settlement**
Plaintiffs,	)	
v.	)	
IMK Development Co., LLC, Marick Home Builders, LLC, et al.	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT the Defendants Marick Home Builders, LLC and Rick Thoennes (collectively the "Defendants"), by and through their undersigned counsel, hereby move the Court to reconsider, alter, or amend the Form 4 Order entered by the Honorable R. Lawton McIntosh on September 21, 2022, denying the Defendants' Petition for Post Judgment Settlement. This motion is brought pursuant to Rules 52, 59(e), 60, and all other Rules of the South Carolina Rules of Civil Procedure.

Defendants' Petition for Post Judgment Settlement was originally heard by the Honorable R. Lawton McIntosh on September 16, 2022. On or about September 21, 2022, the parties received notice of entry of Judge McIntosh's Form 4 Order denying Defendants' Petition, which had been filed with the Clerk of Court's office on or about September 21, 2022 (copy of order attached as Exhibit A). Accordingly, this Motion to Alter, Amend and/or Reconsider is timely filed, pursuant to Rules 52(b), 59(e) and 60 of the South Carolina Rules of Civil Procedure.[1]

[1] Although the Form 4 Order references a formal order to be prepared by Robert T. Lyles, counsel for Plaintiffs, the same has not yet been received and this motion is filed out of an abundance of caution.

The Defendants respectfully request this Court to clarify the grounds upon which it denied the Petition and/or reconsider its Order Denying Defendants' Petition for Post Judgment Settlement on the following grounds:

1. That the Court committed errors of law in its interpretation of the Settlement Agreement and Release of Judgment Lien as to Rick Thoennes Only ("[T]he circuit court's role in determining the actual terms of the settlement agreement between the parties is similar to the court's role in interpreting the terms of a contract. In interpreting contracts, the court should ascertain and give legal effect to the parties' intentions. Where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary, and popular sense." *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634 (Ct.App. 2007) (internal citations omitted). "[W]here an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Patricia Grand*, citing *Messer v. Messer*, 359 S.C.614, 598 S.E.2d 310, 317 (Ct.App.2004). "In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face." *Id.* at 621, 598 S.E.2d at 314, further citations omitted.)
2. That the Court committed errors of law in considering parol evidence and argument of counsel in interpreting the Settlement Agreement and Release of Judgment Lien as to Rick Thoennes Only.
3. That the Court exceeded its mandate to the extent its Order was intended to reinstate a previously released and satisfied judgment.
4. That the Defendants were not provided a full and fair opportunity to address the allegations and arguments set forth within the Plaintiffs' opposition to the Petition.

5. Further, Defendants request this Court to i) issue a ruling on whether the Phase I judgment against Rick Thoennes was marked satisfied pursuant to the terms set forth in the Release of Judgment Lien as to Rick Thoennes Only; and ii) issue a ruling on whether the judgment against Rick Thoennes was released pursuant to the terms set forth in the Settlement Agreement.
6. Alternatively, the Defendants request this Court grant relief from the judgment due to the previously entered Settlement Agreement and Release of Judgment Lien as to Rick Thoennes Only.
7. Defendants will assert additional grounds for reconsideration within its supporting memorandum.

This motion shall be further based upon the statutory and common laws of the State of South Carolina, the South Carolina Rules of Civil Procedure, the pleadings heretofore filed, and any and all affidavits, memorandums and supporting material which may be served prior to a hearing upon this Motion.

Respectfully submitted,

TUPPER, GRIMSLEY, DEAN & CANADAY, P.A.

By: s/Stacey P. Canaday
Stacey P. Canaday
SC Bar No. 68805
Erin D. Dean
SC Bar No. 65320
611 Bay Street
Beaufort, South Carolina 29902
(843) 524-1116
staceycanaday@tgdcpa.com
erindean@tgdcpa.com

Beaufort, South Carolina
September 29, 2022

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

PAUL W. HUND III ET, AL.
PLAINTIFF(S)

IMK DEVELOPMENT CO. LLC. ET, AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

DEFENDANTS MARICK HOME BUILDERS, LLC & RICH THOENNES' PETITION FOR POST JUDGMENT SETTLEMENT IS DENIED AS TO THE RELEASE OF MR. THOENNES FROM LIABILITY IN THE PHASE I JUDGMENT. FURTHER, DEFENDANTS ARE NOT ENTITLED TO SETOFF FOR ANY MONIES PAID AS TO THE FIDUCIARY DUTY CLAIM. PER JUDGE MCINTOSH'S INSTRUCTION, COUNSEL WILL DISCUSS SETOFF AS TO IMK AND LARRY LILLIS BASED ON THE RELEASES PROVIDED TO DEFENSE COUNSEL BY PLAINTIFF'S COUNSEL. IF THE PARTIES CANNOT COME TO AN AGREEMENT ON IMK'S AND LARRY LILLIS'S LIABILITY, THEY WILL BRING THE MATTER BEFORE THE COURT FOR AN ADDITIONAL HEARING. MR. ROBERT T. LYLES JR. WILL PREPARE A FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

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Circuit Court Judge	2155 Judge Code	9-21-22 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter:

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ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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FORM 4

EXHIBIT F

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., ET, AL
PLAINTIFF(S)

IMK DEVELOPMENT CO., LLC, MARICK HOME BUILDERS, LLC., ET, AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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ORDER INFORMATION

DEFENDANT MOTION TO RECONSIDER IS DENIED WITHOUT THE NECESSITY OF A FORMAL HEARING. NO FORMAL ORDER IS REQUESTED UNLESS REQUESTED BY COUNSEL.

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Oconee Common Pleas

Case Caption: Paul W Hund III , plaintiff, et al VS IMK Development Co LLC , defendant, et al

Case Number: 2009CP3700652

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

FORM 4

EXHIBIT F

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-37-00652

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., ET, AL
PLAINTIFF(S)

IMK DEVELOPMENT CO., LLC, MARICK HOME BUILDERS, LLC., ET, AL.
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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Case Number: 2009CP3700652

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

EXHIBIT G

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2009

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC.,

Plaintiff – Appellee,

v.

CINCINNATI INSURANCE COMPANY; BUILDERS MUTUAL INSURANCE COMPANY,

Defendants – Appellants.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Bruce H. Hendricks, District Judge. (8:14-cv-01906-BHH)

Argued: October 28, 2022 Decided: December 13, 2022

Before WYNN and RUSHING, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: John Robert Murphy, MURPHY & GRANTLAND, PA, Columbia, South Carolina, for Appellants. Robert Thomas Lyles, Jr., LYLES & ASSOCIATES, LLC, Mt. Pleasant, South Carolina, for Appellee. **ON BRIEF:** Timothy J. Newton, MURPHY & GRANTLAND, PA, Columbia, South Carolina, for Appellants.

PER CURIAM:

In this diversity case, Stoneledge at Lake Keowee Owners' Association, Inc. ("Stoneledge") seeks a declaratory judgment against Cincinnati Insurance Company ("Cincinnati") and Builders Mutual Insurance Company ("Builders Mutual") to collect damages arising out of a construction-defect lawsuit.[1] This appeal turns on the adequacy of the insurers' reservation of rights letters, which in turn determines insurance coverage for judgments Stoneledge obtained from Cincinnati's and Builders Mutual's insureds. Applying controlling South Carolina law, we hold that the reservations of rights here do not provide a basis for denial of coverage. Accordingly, we affirm the judgment of the district court.

I.

Stoneledge, a homeowners association, manages a community of 80 townhomes on Lake Keowee in South Carolina. Construction of the Stoneledge townhomes proceeded in two phases. Phase I consisted of the first 37 units, built initially by a different general contractor and then by Marick Home Builders, LLC ("Marick") and Marick's managing member, Rick Thoennes ("Thoennes"). Phase II consisted of the remaining units, all built by Marick and Thoennes. In 2009, Stoneledge brought suit against Marick and Thoennes, among other defendants, alleging construction defects in the townhomes that resulted in water intrusion and other physical damage.

[1] Previously, we placed this case in abeyance pending the Supreme Court of South Carolina's final disposition of the underlying construction-defect litigation.

Marick and Thoennes held commercial general-liability policies through Cincinnati and Builders Mutual covering, in relevant part, "property damage" as defined by the policies. Builders Mutual issued policies covering the period from January 30, 2004 to October 20, 2007, and Cincinnati issued policies covering the period from April 1, 2008 to April 1, 2012. After Marick notified the insurers of the underlying action, Builders Mutual sent Marick two reservation of rights letters, one in May 2009 and one in July 2009. Cincinnati sent Marick one reservation of rights letter in March 2010.

As with the construction, the underlying construction-defect action was divided into two phases with separate trials set for Phase I and Phase II. Stoneledge prevailed in the Phase I trial, becoming a judgment creditor of the insureds. After a series of appeals, the Supreme Court of South Carolina clarified the value of Stoneledge's judgments for Phase I: $286,022.06 against Marick for breach of warranty, $343,226.47 against Marick for negligence, and $1,000,000 against Thoennes for breach of fiduciary duty. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, 866 S.E.2d 542, 557–58 (S.C. 2021).

After the Phase I trial, in March 2014, Stoneledge brought a declaratory-judgment action against Cincinnati in state court, seeking coverage for the Phase I judgment in the underlying action. The insurers removed the case to federal court, and in September 2016, Stoneledge amended its complaint, adding Builders Mutual as a defendant and seeking coverage for $2,000,000 in Phase II damages pursuant to a settlement agreement entered into by Stoneledge, Marick, Thoennes, and the insurers before the Phase II trial was set to take place. The parties cross-moved for summary judgment.

The district court granted Stoneledge's motion for summary judgment, primarily on the ground that the insurers failed to reserve the right to contest coverage. After the district court denied the insurers' motion to reconsider, the insurers filed this appeal.

II.

We review the district court's grant of summary judgment de novo. *DENC, LLC v. Phila. Indem. Ins. Co.*, 32 F.4th 38, 46 (4th Cir. 2022). The parties agree that, because this case arises under our diversity jurisdiction, South Carolina law governs. And where the Supreme Court of South Carolina has spoken directly or indirectly on the issue before us, we apply its jurisprudence. *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002).

In this case, the Supreme Court of South Carolina's decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 803 S.E.2d 288 (S.C. 2017), controls. Relying on the "axiomatic" principle that "an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage," *Harleysville* held that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) is not sufficient." 803 S.E.2d at 297. Lodging a litany of grievances with the rationale in *Harleysville*, and attempting to cast its holding as highly fact-specific, the insurers ask us to look elsewhere for a rule governing coverage in this case. It is, however, not for us to second-guess a decision of the Supreme Court of South Carolina on a matter of South Carolina law.

The insurers first attempt to limit *Harleysville* to its particular context. They argue that *Harleysville* stemmed from a unique posture: Applying a deferential standard of review, the *Harleysville* court adopted the findings, including on the inadequacy of the reservation of rights, made by a special referee after an evidentiary hearing. But the *Harleysville* court never limited its holding to the posture or facts of the case before it, and the insurers do not point to any subsequent cases that limit *Harleysville*'s holding in the way they urge here. Rather, subsequent cases applying South Carolina law indicate that *Harleysville*'s holding applies broadly to cases assessing the sufficiency of an insurer's reservation of rights. *See, e.g.*, *Am. Serv. Ins. Co. v. OnTime Transp., LLC*, No. 5:17-cv-01120-JMC, 2019 WL 3972820, at *12 (D.S.C. Aug. 22, 2019); *State Nat'l Ins. Co. v. Eastwood Constr. LLC*, No. 6:16-cv-02607-AMQ, 2018 WL 8787543, at *20 (D.S.C. Sept. 5, 2018) (Quattlebaum, J.).

In a variation on their theme of limiting *Harleysville* to its facts, the insurers also argue that the case at hand is distinguishable because, as to the Phase II damages, the settlement agreement supplemented the reservation of rights letters. Even accepting that contention, the settlement agreement sets forth a no more specific reservation of rights. Rather, any reservation the settlement agreement does contain is of the general, "we will let you know later" variety that *Harleysville* found inadequate. *See Harleysville*, 803 S.E.2d at 299. Simply agreeing to litigate coverage in a subsequent declaratory-judgment action does not in itself create an adequate reservation of rights under *Harleysville*.

Moreover, we agree with the district court that if the reservation of rights letters are deficient as to Phase I, they are similarly deficient as to Phase II. The insurers received

notice of the underlying action in 2009 and of the third amended complaint in 2012, when the action had not yet been bifurcated. This thus provided the insurers ample opportunity to set forth an adequate reservation of rights that would apply to both Phase I and Phase II damages. They did not do so. That the parties later entered into a settlement agreement for Phase II does not absolve the insurers of their obligation to set forth sufficiently specific reservations of rights.

Next, the insurers challenge the retroactive application of *Harleysville* to the reservation of rights letters in this case, which were issued years before *Harleysville* was decided. But *Harleysville* itself held that, except as to one specific coverage defense, a reservation of rights letter issued years prior to the court's decision was inadequate. 803 S.E.2d at 298.

The insurers maintain, however, that the *Harleysville* court's retroactive application of its holding to the reservation of rights letter in that case resulted from the insurer's failure to raise a timely argument that waiver cannot create coverage under *Laidlaw Environmental Services (TOC), Inc. v. Aetna Casualty & Surety Co. of Illinois*, 524 S.E.2d 847, 852 (S.C. Ct. App. 1999). But three years later, in *Ex parte Builders Mutual Insurance Company*, the Supreme Court of South Carolina characterized its opinion in *Harleysville* as concluding that an inadequate reservation of rights letter "constituted an implied waiver" and therefore that the insurer could not deny coverage *even though* it disputed whether there was an occurrence of property damage to create coverage in the first place. 847 S.E.2d 87, 94 (S.C. 2020). To the extent the Court of Appeals of South Carolina's waiver rule in *Laidlaw* conflicts with *Harleysville* and *Ex parte Builders Mutual*, we apply

Harleysville, the holdings of the Supreme Court of South Carolina, and so controlling South Carolina law.

Finally, the insurers argue that *Ex parte Builders Mutual* dilutes some of the duties of notice insurers have under *Harleysville*. If *Ex parte Builders Mutual* overruled any part of *Harleysville*, it was only with respect to the special referee's suggestion in that case that insurers could not seek to allocate coverage in subsequent declaratory-judgment actions. *Ex parte Builders Mutual*, 847 S.E.2d at 95 n.8 (citing *Harleysville*, 803 S.E.2d at 294). Moreover, even if *Ex parte Builders Mutual* had diluted some of insurers' duties to notify insureds of potential conflicts of interest or the need for an allocated verdict, that has little bearing on the reservation of rights issue. Rather, as Stoneledge argues, *Ex parte Builders Mutual* did not overrule, but in fact reaffirmed, the holding of *Harleysville* concerning reservations of rights. *Id.* at 94.

In sum, the insurers' attempts to skirt *Harleysville*'s application in this case fail. We therefore proceed to evaluate the reservation of rights letters sent here under the standard set out in *Harleysville*.

III.

In *Harleysville*, the court found the reservation of rights letter insufficient because the insurer merely "identif[ied] the policy numbers and policy periods for policies that potentially provided coverage" and "incorporated a nine- or ten-page excerpt of various policy terms, including . . . numerous policy exclusions and definitions." 803 S.E.2d at 298–99. Specifically, the insurer failed to reserve its rights as to the following issues: "whether any damages resulted from acts meeting the definition of occurrence, whether

any damages occurred during the applicable policy periods, and what damages were attributable to non-covered faulty workmanship [e.g., the your-work exclusion]." *Id.* at 300. These are some of the coverage defenses the insurers raise here but did *not* set forth in their reservation of rights letters.

Harleysville not only deemed a general reservation of rights without these defenses insufficient, it also provides guidance as to what might constitute an adequate reservation of rights. At the very least, an insurer should "discuss[] [its] position as to the various provisions" and "expla[in] . . . its reasons for potentially denying coverage." *Id.* If the insurer's reservation of rights is ambiguous, a court must construe the reservation "strictly against the insurer and liberally in favor of the insured." 14A Steven Plitt, Daniel Maldonado, Joshua D. Rogers & Jordan R. Plitt, Couch on Insurance § 202:48 (3d ed. 2021) (citing *Harleysville*, 803 S.E.2d at 298). With those guiding principles in mind, we turn to the reservation of rights letters before us now. The letters here, like the letter in *Harleysville*, fail to inform the insureds that the insurers intend to litigate coverage issues and do not apprise the insureds of potential conflicts of interest. Both insurers agreed to defend the claim. And for almost all of the coverage issues here, the reservation of rights is of the *Harleysville* "we will let you know later" variety. *See* 803 S.E.2d at 299.

Builders Mutual's May 2009 reservation of rights letter merely refers the insured to certain policy exclusions and summarizes the general nature of those exclusions. That is exactly the sort of general reservation of rights that *Harleysville* deemed insufficient. Builders Mutual's July 2009 reservation of rights letter, in similar fashion, refers to "coverage issues" generally and then advises the insured that "your work product is not

covered," again directing the insured to consult exclusions in the policy. J.A. 365. Under *Harleysville*, simply stating a policy exclusion — without more — does not constitute a sufficient reservation of rights.

Cincinnati's March 2010 reservation of rights letter presents a closer question. The letter lists certain policy exclusions and notes that "coverage may be limited by several other exclusions and endorsements." J.A. 360–62. Applying *Harleysville*, that is still insufficient to reserve the right to dispute coverage as to the policy exclusions. However, the Cincinnati letter continues, with respect to whether coverage is triggered in the first place, stating that "[i]t is doubtful that the claim alleges the happening of an 'occurrence'" or that the "claim alleges 'property damage' within the policy definition," and if there is no "occurrence" or "property damage" as defined by the policy, there is "no coverage." *Id.*

In assessing whether this is a sufficient reservation of rights under *Harleysville*, we look to the punitive-damages provision in *Harleysville* itself, for which the court found an adequate reservation of rights. There, the letter stated that the insurer "reserves the right to disclaim coverage for [punitive damages]" *because* "under all of your policies, they would not arise from an 'occurrence,' do not fit the definition of 'bodily injury or property damage,' and/or were 'expected and intended' within the meaning of exclusions in the policies." *Harleysville*, 803 S.E.2d at 299. Unlike the reservation of rights as to punitive damages in *Harleysville*, Cincinnati's letter is devoid of any explanation for *why* Cincinnati finds it "doubtful" that there is an "occurrence" or "property damage" within the meaning of the policy. At best, Cincinnati's purported reservation is ambiguous. And so, although

Cincinnati's letter fares slightly better than the other challenged reservation of rights letters, it still fails to meet *Harleysville*'s standard for a sufficient reservation of rights.

Undeterred, the insurers raise other coverage defenses with respect to the breach of fiduciary duty cause of action, the applicable policy periods, and the known-loss exclusion. However, these appear to be reservation of rights issues in a new guise,[2] and as we concluded above, the insurers' reservation of rights letters here were inadequate. Therefore, we find no reversible error in the district court's application of *Harleysville* to the reservation of rights letters in this case.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

[2] One issue arguably falls outside the *Harleysville* reservation of rights ambit. In their supplemental opening brief, the insurers raise for the first time the argument that the breach of fiduciary duty judgment against Thoennes has been extinguished, thereby precluding coverage entirely for that judgment. Even if that were true (we do not believe it is), the insurers have waived any such argument in this appeal. *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief . . . .").

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY

The Honorable R. Lawton McIntosh
Court of Common Pleas
Trial Court Case No.: 2009-CP-37-00652

Appellate Case No.: 2022-001581

Paul W. Hund, III, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Stoneledge at Lake Keowee Owners' Association, Inc..... Respondents,

v.

IMK Development Co., LLC, Marick Home Builders, LLC, and Rick Thoennes….. Defendants,

Of whom Marick Home Builders, LLC and Rick Thoennes are Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent Stoneledge at Lake Keowee Owners' Association, Inc.'s Motion to Certify Case For Review By The South Carolina Supreme Court on counsel for the Appellants by electronic mail on this 14th day of December, 2022, addressed to the following:

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December 14, 2022.

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Dec 15 2022
SC Court of Appeals

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December 14, 2022

Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Stoneledge, et al., Respondents v. Marick Home Builders, LLC and Rick Thoennes*
Appellate Case Number: 2022-001581

Dear Ms. Howard:

Enclosed please find this firm's check in the amount of $50.00 made payable to the Supreme Court of South Carolina for the motion fee relative to Respondent Stoneledge at Lake Keowee Owners' Association, Inc.'s Motion to Certify Case For Review By The South Carolina Supreme Court which was submitted for e-filing on today's date (December 14, 2022).

Please let me know if you have any questions or need additional information.

Thank you and with kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw
Enclosures
cc: Clerk, South Carolina Court of Appeals
Stacey P. Canaday, Esquire
Erin D. Dean, Esquire