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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.

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

Pursuant to Rule 240(f), *SCACR*, Respondent Stoneledge at Lake Keowee Owners' Association, Inc. (hereinafter "Stoneledge") respectfully submits this Reply to the Appellants' Return and moves this Court to certify this case for review immediately, rather than having it first 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 significant importance and an issue of public interest such that

disposition by this Court, rather than the Court of Appeals, is warranted. Stoneledge also respectfully requests that this Court give the matter expedited consideration and dismiss this appeal or affirm the decision by the Circuit Court, which was, in all respects, in compliance with this Court's prior order.

I. Introduction

In response to Stoneledge's Motion, Appellant¹ makes a number of arguments, which can be broken down into two primary categories. The first category are arguments related to Appellant's waiver of the legal arguments he asserted in the Circuit Court concerning the 2016 Agreement (previously defined as the "Agreement" in the Motion to Certify Case for review by the South Carolina Supreme Court filed by Stoneledge on December 15, 2022). The second category of arguments advanced by Appellant are those in support of his argument that the Circuit Court erred when it rejected Appellant's arguments and entered the judgment against Rick Thoennes, as directed by this Court in *Stoneledge*.

Stoneledge will address the arguments made by Appellant, which are set forth below, by category in bold.

II. Appellant's Arguments Relating to Waiver

Appellant justifies his failure to raise the Agreement, and its effect on the Thoennes Judgment, in two somewhat inconsistent arguments. First, Appellant falsely argues that the law did not allow him to raise that argument on appeal. Second, or alternatively, and equally as false, Appellant argues that the terms of the Agreement itself justified his failure to raise the issue while the matter was on appeal. As discussed below, neither of those arguments are valid. Appellant

¹ Marick Home Builders, LLC is included as an Appellant in this matter, but has no standing to appeal since the only issues in question involve only the judgment against Rick Thoennes.

then makes a number of arguments that attempt to shift the blame for Appellant's decision not to raise the Agreement on appeal onto Stoneledge.

A. Appellant Argues that Stoneledge Mischaracterizes or Misunderstands the Nature of the Appeal.

Stoneledge understands clearly what Appellant is seeking on appeal. The Appellant is asking this Court to review the Circuit Court's entry of judgment against Thoennes, as directed by this Court, and rejection of Appellant's argument that the Agreement and Release of Lien effectively voided the \$1,000,000 judgment against Thoennes (the "Thoennes Judgment"). Stoneledge is not seeking an unprecedented ruling as the Appellant claims. To the contrary, it is the Appellant who sought and seeks to collaterally attack this Court's ruling in *Stoneledge*, based upon legal arguments related to documents they had more than five years before that case was decided, and legal arguments Appellant chose not to make previously.

The Appellant characterizes this Court's *Stoneledge* decision as a remittitur that corrects mathematical errors. That is simply not all this Court did. This Court's *Stoneledge* ruling dealt with a number of complex issues on appeal, including the allocation of the jury verdict and right to set-off. Ultimately, this Court affirmed the Court of Appeals' reversal of the Trial Court on the issue of allocation and directed that the Circuit Court enter a specific judgment against Thoennes, among others.

The Appellant did not object to the entry of judgment against Thoennes by this Court and did not file a Petition for Rehearing. Instead, Appellant waited until the case was sent back to the circuit court to raise new arguments in an effort to collaterally attack the Thoennes Judgment, which was ultimately intended to furth delay the entry of that judgment and the completion of this and related coverage litigation. That is why Stoneledge has asked this Court to accept this appeal directly, since this Court is the only court with the authority to enforce the judgment it entered.

Appellant's efforts to oppose this Court's exercise of jurisdiction over this appeal, and to keep this appeal in the Court of Appeals, is further evidence of Appellant's actual objective, which is delay, not resolution.

B. Appellant Argues That He Did Not Waive Protection of Agreement or Release of Lien.

The premise of Appellant's argument is that the 2016 Agreement forever extinguished the only judgment entered at trial against Thoennes, for all purposes. In support, they also argue that the language of the Agreement is clear and unambiguous on that point, such that it was an abuse of discretion for the Circuit Court not to enforce it. To be clear, the premise itself is false, but the Appellant's purported belief in it is directly relevant.

Appellant contends that from its execution, in *2016*, the clear and unambiguous Agreement rendered the judgment against Thoennes a nullity. According to Appellant, that judgment, which was the only issue tying Thoennes to the prior appeal, no longer existed as of the date(s) of the Agreement and the Release of Lien. Notwithstanding that, the attorneys for Thoennes, hired by his insurance companies, continued to make legal arguments on his behalf, concerning 1) the viability of that judgment (because they contended the incorrect law was charged); 2) the effect of the Thoennes Judgment relative to the verdict allocation; and, 3) how that judgment was affected by set-off.

In making those arguments, for over five years of active appellate litigation, counsel never raised the existence of the Agreement or the Release of Lien, or their purported effect on the Thoennes Judgment, to the Court of Appeals or to this Court. Not in a statement of the facts. Not in an oral argument. Not in a footnote. Not even in a petition for rehearing after this Court directed that the Thoennes Judgment be entered by the Circuit Court.

The Appellant argues in his Return that he could not request enforcement of the Agreement or Release of Lien until the entire matter was remitted to the Circuit Court, which is an argument made out of whole cloth, without any legal support whatsoever. (Importantly, this argument, while erroneous, establishes that the decision not to raise the Agreement was willfully made by Appellant.) Nothing in the law prevented Appellant from alerting the Court of Appeals or this Court (or Stoneledge, for that matter) of their belief that one of the three judgments directly in issue in the appeal no longer existed because of the Agreement.

The only law cited by the Appellant in support of its position is *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013), which turns on Rule 205, SCACR, which states that, "... upon service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal...[and] retains jurisdiction until the remittitur is sent to the lower court." *Id.*, at 137, S.E.2d at 868. That point is not in dispute. Nothing about *Lancaster* supports an argument that a party on appeal cannot make legal arguments based upon a settlement agreement which entirely removes a party, or a judgment, from an active appeal. If the Appellant truly believed, or even thought that he had an argument that the Agreement was a full release of the Thoennes Judgment, he not only could have, but was obligated to raise the issue in the Court of Appeals and before this Court and to give those courts, and Stoneledge, the benefit of their position with respect to the Agreement in a timely fashion.

The falsity of Appellant's position on this issue is clearly illustrated by the fact that another Breach of Fiduciary Duty judgment debtor, Larry Lollis, settled during the appeal process. By agreement, the judgment against Mr. Lollis was actually released, in full, in exchange for a substantial monetary payment. As a result, the Lollis judgment was not an issue in the appeal, a

fact noted by this Court in *Stoneledge. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, at 138 866 S.E.2d 542, at 558 n.4 (2021).

Appellant waived or is estopped from making any argument he had about the Agreement or Lien Release rendering the Thoennes Judgment a nullity.

III. Appellant's Estoppel Arguments.

Appellant next makes a series of arguments in which Appellant contends that Stoneledge is estopped from asserting waiver. A predicate to the Appellant's arguments concerning estoppel is that Stoneledge knew all along that the Agreement was a release of the Thoennes Judgment *entirely*. Again, that is unequivocally false and without even a scintilla of factual support. Stoneledge has set forth its position and belief about the intent and effect of the Agreement in its filings in the Circuit Court, its Motion before this Court and in the Fourth Circuit. It is preposterous to argue that, by signing the Agreement and the Release of Lien, Stoneledge knew what Appellant would later purport to believe and assert about the effect of the Agreement.

A. Appellant Argues that the Language of the Agreement Precluded Them from Raising the Agreement in the Appeals Courts.

Knowing that any arguments they have about the effect of the Agreement on the Thoennes Judgment were waived, Appellant desperately attempts to blame Stoneledge for that waiver. In support, Appellant cites to the language of the Agreement, which states: "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." Appellant argues that this language compelled them not to raise the issue in the appellate courts, however, that language does not support Appellant's argument at all. Instead, that language supports the position that the intent of the parties to the agreement (Stoneledge, the carriers for Thoennes, and Thoennes himself) understood that the judgment would remain in effect for all purposes, including appeal and the

pending insurance coverage action, though Thoennes would no longer be personally liable for the payment of that judgment (which Stoneledge was pursuing in the pending coverage litigation).

The context of the litigation existing at the time of the Agreement is important. The insurance carriers for Appellant had filed appeals arguing that the Thoennes Judgment was not valid and should be reversed. (See Final Brief of Appellants Marick Home Builders, LLC and Rick Thoennes, Case No.: 2015-00392, Aug. 12, 2016.) Alternatively, they argued that the amount of the judgment, set at \$2,144,088 by the Trial Court, was in error and should be reduced to \$1,000,000.). Both of those arguments would have eliminated or reduced the carriers' exposure in the parallel coverage litigation, which was filed in 2013 and was pending when the Agreement was signed.

Stoneledge recognized and accepted the carriers' effort to eliminate or reduce the Thoennes Judgment on appeal. In fact, since the Appellant (and his carriers) were able to continue to attack that judgment on appeal, the carriers benefitted since the judgment was reduced from the judgment that the original Trial Court ordered, \$2,144,088.23, to \$1,000,000, which was ordered by this Court.

So, the importance of ensuring that the appeal would proceed in spite of the Agreement was for the benefit of Appellant's carriers. Once they finally lost their legal arguments to eliminate the Thoennes Judgment entirely, however, they pivoted to the argument they now make, which is that there really was no Thoennes Judgment as of 2016.

Appellant's contention that the Agreement prevented them from raising the issue (and making false arguments to both the Court of Appeals and the Supreme Court about a judgment they now say they believed did not even exist), is a meritless argument. Furthermore, the actions of the carriers in the coverage litigation reinforce this.

As previously noted, Stoneledge and the carriers had already been in coverage litigation for three years when the Agreement was negotiated and executed in 2016. *See Stoneledge at Lake Keowee Owners Ass'n, Inc. v. Cincinnati Ins. Co.* Compl. 2013-CP-37-00847 (Dec. 2, 2013). The Agreement says nothing about whether or not it can be disclosed in the pending coverage litigation. In that litigation, among other things, Stoneledge sought payment for the Thoennes Judgment from the Thoennes insurance carriers (which was granted by the District Court and as previously noted was recently affirmed by the United States Fourth Circuit Court of Appeals. *See Stoneledge at Lake Keowee Owners' Association, Inc., v. Cincinnati Insurance Company; Builders Mutual Insurance Company, No. 19-2009 (4th Cir. Dec. 13, 2022).*

As noted in the Motion, in that coverage litigation, just like in the state court appeals prior to 2022, the carriers did not mention the Agreement or the Release or their purported effect on the Thoennes Judgment, even in the face of a Motion for Summary Judgment *seeking the payment of that very judgment*. That motion was granted in 2018. *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 Sep 28, 2018). In response, the carriers filed a Motion to Reconsider, which also failed to mention the Agreement or Release, and which was denied by 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).

Instead, the carriers in the coverage litigation waited until 2022 to raise the issue in the Fourth Circuit and the Court should note the timing of the birth of the argument Appellant now advances about the Agreement. In the coverage litigation, the insurance carriers raised the issue of the Agreement for the first time on May 20, 2022, in a supplemental brief filed in the Fourth Circuit, more than six years after the Agreement was executed and four years after Stoneledge had

gotten summary judgment against the carriers for coverage for the Thoennes Judgment. Not coincidentally, the Appellant in this case raised it for the first time just three weeks later, on June 10, 2022, in response to the Motion for Entry of Judgment.

The point, of course, is that in both the state appellate courts and in the coverage action, the carriers elected not to argue what they now contend is obvious about the effect of the Agreement, and that decision, made in both pieces of litigation, had nothing to do with appellate court rules or terms of the Agreement. As Appellant demands that this Court recognize how obvious, clear and unambiguous the language of the Agreement is, they cannot plausibly explain why they, and the carriers in the separate coverage litigation, failed to tell anyone about it *when it mattered*. The reason is obvious; neither Appellant nor his insurance carriers believed that the Agreement or Release mean what they now say it means. Instead, the event that led to the birth of their new argument was this Court's *Stoneledge* opinion, in which the Thoennes Judgment, while reduced in amount, was affirmed. That opinion was issued in late 2021 and the arguments about the Agreement were advanced for the first time, almost simultaneously in Circuit Court and the Fourth Circuit, in early 2022.

The decision not to raise the argument about the agreement was based upon the fact that it is a meritless argument, which was known to Appellant and his counsel as well as his carriers. The decision to raise it was made in both the state court and in the Fourth Circuit to delay and postpone the finality of both of those cases.

B. The Appellant Argues that due to Stoneledge's Part in Drafting the Agreement, Stoneledge is Estopped from Asserting Waiver.

The Appellant next claims that because Stoneledge took part in drafting the Agreement, it is somehow estopped from making the arguments for waiver. The Appellant states that "if Respondent did not believe it was required to file the Release of Judgment Lien in favor of

Thoennes, it certainly should not have filed it.” (See Appellants’ Return to Motion to Certify filed December 23, 2022.) Again, as noted, a predicate to this argument is that Stoneledge knew that Appellant believed that the Agreement was a complete release of the Thoennes Judgment, and agreed, neither of which is remotely true.

C. Appellant Argues that Stoneledge is Estopped From Asserting Waiver Because Stoneledge Didn’t Raise the Agreement in the Lower Courts.

Finally, the Appellant claims that Stoneledge is estopped from asserting the issue of waiver because it, like the Appellant, never raised the issue of the Agreement or Release during the appeals process. To be clear: Stoneledge never raised the argument that the Agreement or the Release, for which it received no consideration, was a full and final final release of the \$2,144,088 judgment against Mr. Thoennes *for all purposes* because that argument would have been completely false, just as it is when made by Appellant.

IV. Appellant’s Arguments Concerning the Merits of the Appeal.

The only matter pending before the Court is Stoneledge’s Motion to Certify Case for Review by the South Carolina Supreme Court. If that is granted, this Court will take up the merits of the appeal. However, in light of Appellant’s arguments, Stoneledge will address them here.

A. Appellant Argues That Thoennes was Unequivocally Released from Judgment.

The Appellant continues to push the false narrative that the judgment against Thoennes was released entirely and unequivocally and no longer existed after 2016. They quote from the agreement as evidence for their position, none of which support their position.

The first text in which the Appellants quote is as follows: “...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.**”

This text supports the position of Stoneledge, not the Appellant. The language clearly states that it is a “release of *certain* obligations of Rick Thoennes.” It does not say that the Thoennes Judgment is forever released and no longer exists. It does not say even say that all of Thoennes’ obligations are released. There is no reference to any effect on the pending coverage action, or indication that the Thoennes Judgment would be removed from that action. Instead, the import of the Agreement, and this language, is that Stoneledge was willing to pursue satisfaction of the Thoennes Judgment from insurance. That intent was clearly manifested by the actions of Stoneledge and the carriers and attorneys for Thoennes, until they decided in 2022, to make specious arguments about that Agreement and its effect.

The Appellant quotes the following sections of the Agreement:

Scope of this Settlement Agreement. This Settlement Agreement, unless otherwise noted, only applies to the resolution of all acclaims asserted by Plaintiff against Defendant 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.**

...

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.**

The language manifests an intent to release Thoennes personally and nothing more. The language, “*Plaintiff [Stoneledge/Respondent] and Insurers reserve their rights to contest coverage for any final judgment that may result as to Phase I*” could hardly be more clear, though now Appellant contends that there was no judgment to seek coverage for as of 2016. To be clear,

Stoneledge has never claimed that the appeals process should not have continued. The validity of the Thoennes Judgment, the amount of that judgment, and the effect of set-off on that judgment were all essential to the pending coverage action.

The Appellant also argues that Stoneledge takes the position that a trial court lacks authority to interpret contracts. That is a misstatement of the Stoneledge's argument, which, instead, was that the Circuit Court did not have authority to countermand, alter or disregard a Supreme Court order. Stoneledge recognizes that a trial court has the authority to interpret a contract in a case in which it has jurisdiction, which, of course, is black letter law. As it happens, in this case, the Circuit Court *did* read and interpret the Agreement and Release and rejected Appellant's argument about its effect on the Thoennes Judgment. (The Circuit Court did not address the waiver issue, which the Stoneledge HOA raised and argued.)

B. Appellants Argues A Remittitur Does Not Create a New Judgment.

The Appellant claims that Stoneledge argued that the remittitur has created a new judgment against the Appellant. They further claim that Stoneledge argued that the Circuit Court was without the authority to enforce the Agreement or recognize the Release. Neither of these arguments are true. These arguments are just repeating the arguments they made at the beginning of their Return and are not new. At no point has Stoneledge claimed that this Court's decision was a new judgment, but, rather, Stoneledge asserts that it was a final judgment of the matter and represented *a clear and unambiguous order* for the Circuit Court to enter that Judgment. At issue in the Motion filed by Stoneledge is whether this Court's decision and order are final or whether Appellant can raise new arguments to collaterally attack this Court's order.

C. Appellant Argues the Circuit Court's Orders were Controlled by Errors of Law.

The Appellant argues that Circuit Court erred in his interpretation of the Agreement and Release because the language was clear and unambiguous. “[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.” *Patricia Grand Hotel, LLC v. Macguire Enters*, 372 S.C. 634 (Ct. App. 2007). Determining the intentions of the parties in this matter is exactly what Judge McIntosh did. Based on the transcript from the hearing, it was clear to the Circuit Court that there is absolutely no reason Stoneledge would have agreed to release the Thoennes Judgment, which at the time was for \$2,144,088 (plus three years of interest) in exchange for exactly \$-0-. There was nothing to gain from doing so.

The Circuit Court even stated that “The only thing we are talking about, Jason, is the fact that it was not gonna be a personal judgment against Mr. Thoennes. But they weren’t giving up these monies. That would be ridiculous. Why would they give it up if you haven’t paid any money anyway?” (See Transcript pp. 7-13, which is Exhibit 8 to Appellant’s Return to Motion to Certify.) The Circuit Court made it clear that there appeared to be a complete lack of consideration on the part of the Appellant for this to be a complete release of Mr. Thoennes. It is law school 101 that when a contract is created there must be consideration. If this Agreement was construed to be a full release, there is no consideration given by the Appellant that would make sense for Stoneledge to accept that agreement. Circuit Court goes on to say, “The clear intent of this agreement was that it not work as a judgment against Mr. Thoennes personally.” (See Transcript pp. 7-13, which is Exhibit 8 to Appellant’s Return to Motion to Certify.)

Appellant continues to claim that the Circuit Court was looking beyond the four corners of the document and that the Court assigned or inferred a meaning within the language of the

Agreement and Release of Lien that did not reflect the intentions of the parties at the time the document was drafted. On one hand the Appellant claims that the Circuit Court misunderstood the plain language of the document and misapplied it. On the other hand, the Appellant is claiming that he disregarded the clear language of the document and looked outside of the document at the parties' intentions. These two theories can't both be true. Rather, it is clear from the transcript that the Circuit Court found the documents to be clear and to clearly not release Mr. Thoennes completely. The lack of consideration on the part of the Appellant is just another logical way to determine this was never intended, or drafted, to be a full release.

CONCLUSION

By our original motion, Stoneledge asks this Court to assert its authority and decide this appeal itself. Accordingly, Stoneledge 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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