RECEIVED
Apr 06 2023
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

R. Lawton McIntosh, Trial Court Judge

Civil Action No.: 2009-CP-37-0652

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.

INITIAL BRIEF OF APPELLANTS

Stacey P. Canaday (SC Bar No. 68805)
Erin D. Dean (SC Bar No. 65320)
TUPPER GRIMSLEY DEAN & CANADAY. PA
Post Office Box 2055
Beaufort, South Carolina 29901-2055
(843) 524-1116 - office
(843) 524-1463 – facsimile
staceycanaday@tgdcpa.com
erindean@tgdcpa.com
Attorneys for Appellants Marick Home Builders, LLC, and Rick Thoennes

April 6, 2023
Beaufort, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES - Continued

Statutes

STATEMENT OF THE ISSUES ON APPEAL

1. Did the Trial Court commit errors of law by failing to enforce the terms of the Settlement Agreement and Release of Judgment Lien as to Rick Thoennes Only?
2. Did the trial Court commit an error of law by failing to rule on the amount of set off to which Appellant Marick was entitled?

STATEMENT OF THE CASE

This case was originally tried to jury verdict in Oconee County in November of 2013. Multiple appeals were taken by multiple parties, including both Appellants and Respondents. During the pendency of the appeals, Respondent and Appellants entered a Settlement Agreement. As a result of the terms of the Settlement Agreement, Respondent filed a Release of Judgment Lien as to Rick Thoennes Only in the Oconee County Court of Common Pleas on October 31, 2016.

The Supreme Court of South Carolina issued its opinion, *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC* 435 S.C. 109, 866 S.E.2d 542 (2021), on December 8, 2021. Thereafter, the Respondent filed its Motion for Entry of Judgment on April 27, 2022. On June 1, 2022, a "CP Hearing Sheet" was filed in this case, indicating that judgment would be entered as directed by the Supreme Court. Judge Lawton McIntosh issued an Order of Judgment as to Bostic Brothers Construction, Inc., Marick Home Builders, LLC, and Rick Thoennes on June 2, 2022, though it appears it was not filed electronically until June 24, 2022. The Appellants filed their Petition for Post Judgment Settlement on June 10, 2022, seeking to enforce the terms of the Settlement Agreement. Judge McIntosh ultimately heard the Motion on September 16, 2022, and issued a Form 4 Order denying the relief sought on September 21, 2022. A Motion for Reconsideration was filed September 29, 2022, seeking rulings on specific issues. The Motion

was denied via a second Form 4 Order on October 10, 2022, without a formal hearing or additional briefing. The Notice of Appeal was then filed on November 8, 2022.

STANDARD OF REVIEW

The Petition for Post Judgment Settlement was filed pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure, and therefore essentially amounted to a motion to enforce a settlement. "Whether to grant or deny a motion under Rule 60(b) [, SCRCP], lies within the sound discretion of the judge. Our standard of review therefore is limited to determining whether there was an abuse of discretion." *May v. May*, 428 S.C. 131, 136 833 S.E.2d 78, 80 citing *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Kinghorn v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 749 (Ct.App. 2019) citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App. 2009). "An action to construe a contract is an action at law." *Kinghorn*, citing *Byrd v. Livingston*, 398 S.C. 247, 241, 727 S.E.2d 620, 622 (Ct.App. 2012). "In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Id*. "However, this court is free to decide questions of law with no particular deference to the trial court." *Id*. Therefore, this Court should review this case de novo. (See *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008)).

FACTS

This matter was tried in Oconee County in November of 2013, after which multiple appeals and cross appeals were filed by various parties regarding various trial issues. Two of the issues Appellants raised in their appeals were whether Marick was responsible for the breach of fiduciary duty verdict (which was rendered against Thoennes only) and then the amount of sett-off to which Marick and Thoennes were entitled for any verdict rendered against either party. At the same time the appeals were pending before the Court of Appeals, the parties were also litigating coverage actions in the United States District Court for the Fourth Circuit.

During the pendency of the initial appeals, Respondent and Appellants entered a Settlement Agreement (hereinafter referred to as "Agreement")[1], improperly identified by Respondent as "Phase II Agreed Upon Judgment" (see Plaintiffs' Memorandum in Opposition to Defendants Marick Home Builders, LLC and Rick Thoennes' Petition for Post-Judgment Settlement, p. 4). Thereafter, Respondent filed the Release of Judgment Lien as to Rick Thoennes Only with the Oconee County Court of Common Pleas on October 31, 2016 (hereinafter "Release of Lien"). Ultimately, this Court issued its opinion, *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC* 435 S.C. 109, 866 S.E.2d 542 (2021), wherein it determined (among other issues) that the allocation of the jury's verdict among the various causes of action, as well as the set off, required correction. The Supreme Court was cognizant that other settlements may have occurred during the pendency of the appeal, and of which it was unaware, and therefore remitted the matter to the Trial Court, with instructions to enter the corrected judgments ("These figures do not take into account the HOA's monetary settlements (if any) with IMK, IK, Cox and Lollis

[1] This Settlement Agreement was drafted by Respondent's counsel, coverage counsel on behalf of Marick's insurance carriers, and approved by personal counsel for Mr. Thoennes.

during the pendency of this appeal." *Id*., at 138, S.E.2d at 558). The Trial Court, recognizing that the remittitur's directive was for "final calculation and entry of judgment consistent with our opinion" (see *Id*.), sent correspondence to then-counsel for Appellants and Respondent stating that Trial Court understood the issue was "simply one of mathematics" and requested the parties to confer and advise whether there was an agreement or whether a hearing was needed (correspondence from the Honorable Lawton McIntosh to Jason Imhoff, Esq. and Robert Lyles, Esq., dated January 10, 2022). Appellants and Respondent were unable to reach an agreement on the language of an order, and Respondent filed its Motion for Entry of Judgment on April 27, 2022. Appellants' counsel provided their position to Judge McIntosh via correspondence on May 2, 2022, and requested a hearing on Respondents' Motion. On June 24, 2022, Judge McIntosh filed the Order of Judgment as to Bostic Brothers Construction, Inc., Marick Home Builders, LLC, and Rick Thoennes. That Order indicates that the judgments were entered retroactively to November 8, 2013, and further that the judgment as to Thoennes may be subject to set-off or release. Notably, the Order of Judgment regarding breach of fiduciary duty was entered against Thoennes only. Thereafter, Appellants filed their Motion for Post-Judgment Settlement on June 10, 2022, seeking recognition by the Trial Court that the judgment against Thoennes had already been released by Release of Lien filed October 31, 2016. As discussed below, the Trial Court denied the requested relief, as well as the subsequent Motion to Alter, Amend and/or Reconsider. This Appeal followed.

ARGUMENT

Appellants assert the Trial Court's orders denying Appellants' Petition for Post Judgment Settlement and its Motion to Alter, Amend and/or Reconsider were controlled by errors of law. Specifically, Appellants maintain that the Trial Court erred in not construing both the Agreement

and Release of Judgment Lien in accordance with the documents' clear language. As a result, Appellants are entitled to a reversal of the Trial Court's denial of the requested relief and a finding that the previously entered judgment has been released or otherwise satisfied, consistent with the filed Release of Judgment Lien. Additionally, the Trial Court committed legal error in not ruling on the amount of setoff to which Marick was entitled.

I. The Trial Court committed errors of law by failing to enforce the terms of the Settlement Agreement and Release of Judgment Lien as to Rick Thoennes Only

A. The Agreement and Release of Lien are Clear and Unambiguous, and the Trial Court Committed Error in Failing to Enforce the Terms of Each

Appellants maintain that both the Agreement and Release of Lien were clear and unambiguous, and that the documents released Thoennes and satisfied the judgment lien against Thoennes with respect to Phase I. The Trial Court committed clear legal error in failing to enforce the terms of both documents, which amounts to an error of law.

"Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the contract." (*Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C.568, 577, 762 S.E.2d 696, 700 (2014) (quoting *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011)). (See also *Messer v. Messer*, 359 S.C.614, 598 S.E.2d 310, 317 (Ct.App.2004)). "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made rather than the subjective, after-the-fact meaning one party assigns to it." (*N.Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015), further citations omitted). "In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face." (*Messer*, at 621, 598 S.E.2d at 314, further citations omitted.)

The relevant language from the Agreement is quoted below:

"…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.**
…

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.**
…
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…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**.
….
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**.
…
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**.
…
7. Attorney's Fees and Costs. The parties acknowledge that 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 the 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." (Settlement Agreement, pp. 2, 4, 5, 6) (**Emphasis added**)

The Release of Lien, filed by Respondent on October 31, 2016, while the appeal was pending, reads as follows:

> "STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., (Stoneledge HOA") holder of a judgment lien against RICK THOENNES, which was entered against him in Case No. 2009-CP-37-0652, in the Trial Court of Oconee County, said judgment lien being recorded on November 8, 2013 as Judgment Roll No. 2009-CP-37-0652 and amended by Order dated January 21, 2015, **does**, for good and valuable consideration, the receipt of which is hereby acknowledged, **hereby release Rick Thoennes from the judgment lien.**
>
> PROVIDED, HOWEVER, that the judgment shall, in all other respects, be preserved and protected and **that the judgment lien, except as hereby released and discharged as to Rick Thoennes**, shall remain in full force and effect against Bostic Brother Construction, inc., Marick Home Builders, LLC, IMK Development Co., Integrys Keowee Development, LLC, William C. Cox and Larry Lollis." (Release of Lien)

Once Respondent filed the document, the judgment was marked satisfied and canceled. In fact, even after the remittitur that corrected the judgment amounts as to various parties, the judgment is still marked as satisfied and canceled (Oconee County Tenth Judicial District Public Index regarding Civil Action No. 2009-CP-37-0652, p. 7). Appellants submit that both documents plainly and clearly release Thoennes from the Phase I judgment, and required the Trial Court look no further than the four corners of each document.

"It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." (*Kinghorn v. Sakakini*, 426 S.C. 147, 152, 825 S.E.2d 748, 750 (Ct.App. 2019), citing *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct.App. 1992)). "[T]he Trial 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)).

As indicated, Respondent's counsel and counsel for Marick's insurers authored the Agreement; Appellants' trial counsel was not involved. Upon receipt of the Trial Court's entry of Order of Judgment, Appellants filed the Petition on June 10, 2022, and the hearing was set for September 16, 2022. Respondent filed its Memorandum in Opposition to the Petition on September 14, 2022, at approximately 5:20 pm. At the outset of the hearing, Appellants' then-counsel stated as follows:

> "**Mr. Imhoff**: …And so, if the Court is not convinced by the arguments and is inclined to either hear more or rule for the plaintiffs, I would ask that they [coverage counsel] be involved in it so they can respond to the allegations.
>
> **The Court**: Nope. We're gonna have it disposed, disposed of today. If they were gonna argue, they should be here, otherwise it's gonna be done today." (Transcript of Record, September 16, 2022, p. 4, lines 19-25).

Undeterred, Appellants' counsel set forth the basic background of the case, provided the Trial Court with the relevant documents (the Agreement and Release of Lien), and requested that (among other relief) the Trial Court confirm that the judgment against Rick Thoennes with respect to Phase I was satisfied, since the remittitur was retroactive to the original judgment that was satisfied on October 31, 2016. Appellants' counsel argued that the documents were clear and unambiguous, and that the Release of Lien was filed in accordance with the Agreement. The

Trial Court, however, determined, with no factual or legal support, that the language was not clear, and rather than Thoennes being released, the documents acted as a covenant:

> "**The Court**: Let me ask you this. Under this settlement agreement, as I read it, it looks like the plaintiff has agreed not—for it not to be a judgment lien against Mr. Thoennes. However, it remains in full force and effect against—in all regards otherwise.
>
> **Mr. Imhoff**: Your Honor, that—that's not what it says---
>
> **The Court**: Yes, it is what it says. It's exactly what it says. In fact, if you look at your Exhibit C, it says release of judgment lien as to Rick Thoennes and it says provided however the judgment shall in all respects be preserved and protected and the judgment lie acceptance hereby released and discharged as to Rick Thoennes shall remain in full force and effect against Bostic Brothers Construction, Inc., Marick Home Construction Builders, LLC, IMK Development Company, Integrys Keowee Development, LLC, William C. Cox and Larry Lollis. How more specific can you be?
>
> **Mr. Imhoff**: Well, Your Honor, Rick Thoennes isn't in there. It says it's dis—released and discharged as to Rick Thoennes---
>
> **The Court**: No. No.
>
> **Mr. Imhoff**: ---but shall remain in full force and effect against all the other parties. The judgment we're seeking to have settled is only against Rick Thoennes. That's the point. It's, it's released against Rick Thoennes and not against any of the other parties and here's the thing. None of those other parties have that million dollar fiduciary—breach of fiduciary judgment against them. It's only to Rick and that—
>
> **The Court**: Well, let me ask you this, Mr. Imhoff. Looking at the Stoneledge I, and, and then the Court—Supreme Court said the amount, million dollars breach of fiduciary duty, not subject to setoff, was against Thoennes. So---
>
> **Mr. Imhoff**: That's right.
>
> **The Court**: … So, although it's not a judgment lien as they signed and acknowledged, it doesn't go as a lien against his personal assets. What else are you asking me to do? Have you paid the money?
>
> **Mr. Imhoff**: That million dollars, your Honor?
>
> **The Court**: Yeah.
>
> **Mr. Imhoff**: No, Your Honor. That—it was released in 2016.
>
> **The Court**: No, it wasn't. No, it wasn't. It was---

Mr. Imhoff: Okay.

The Court: ---as to the judgment lien against Mr. Thoennes but it was not released.

Mr. Imhoff: Yes. But, Your Honor, that's the only thing here we're talking about. It's the judgment for the one million-dollars…

The Court: The only thing they're 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?

Mr. Imhoff: Because that's the problem because they knew it wasn't covered. I don't know. But, Your Honor, in, in the settlement agreement---

The Court: I think your argument's fairly specious, Jason. I'll be quite frank with you. The clear intent of this agreement was that it not work as a judgment against Mr. Thoennes personally. But it remain in full force and effect and you hadn't---and has any money been paid towards it whatsoever?

Mr. Imhoff: I don't, I don't think so, Your Honor.

The Court: Well, then obviously that's not the intent.

Mr. Imhoff: Your, Your Honor—

The Court: There's no way.

Mr. Imhoff: May I say one other thing?

The Court: You certainly may.

Mr. Imhoff: Your Honor, if they wanted to do a covenant not to execute, in other words, have no execution against Mr. Thoennes himself, the could of done that and they did do that in Section D.

The Court: I think he wanted it to be clear that it was not gonna be a judgment against—it was gonna be released. You could have made it clearer yourself. The obvious intent of these documents is that the---we're not gonna go after Mr. Thoennes personally. We're not gonna make it be a judgment lien against him personally. But we're going after coverage. That's the whole point of it.

Mr. Imhoff: Well, that's right, Your Honor, and that's what he did in phase two. He did a covenant not to execute against Thoennes in phase two. He did a settlement agreement and release and satisfaction in Section B. He did two different things. He released Thoennes from the phase one judgment and he kept his insurance claim against

Thoennes in phase two. It's set out here. They're separated. They're two different things. It was negotiating---I, I wasn't involved in negotiating this. But it was obviously negotiated and gone back and forth. They're two separate things, Your Honor. If it was only the one thing, if it was only one where it was a covenant not to execute, then there's no reason to have B and D separately.

The Court: Say that again please.

Mr. Imhoff: If it was only the one, it was only that he was preserving his right for the insurance company---coverage on phase one and phase two, then why are there two different sections releasing or having a covenant not to execute against Mr. Thoennes? It—there's no reason to have two. It's very clear that B is a release in phase one and D is a covenant not to execute in phase two.

The Court: It is not clear and I disagree with you distinctly. Mr. Lyles, I'll be glad to hear from you. You need to unmute please, sir.

Mr. Lyles: All right. Your Honor, you, you understand our arguments perfectly well. This, this was a—this was a vehicle to make sure that we preserved our coverage rights our or our rights to, to satisfy these judgments with coverage but to release Mr. Thoennes personally. And, and, and that's what we did, and, and that's why---

The Court: You received—now a the time you entered into this, this settlement agreement, you had already received—you'd already obtained a verdict in phase one in litigation, correct?

Mr. Lyles: Correct.

The Court: And you were negotiating an amount for phase two that everybody could agree upon instead of having to go litigate that and then go fight the insurance coverage?

Mr. Lyles: Correct.

The Court: Right?

….

The Court: Have you been paid any monies from the phase one verdict on this fiduciary?

Mr. Lyles: Not from Mr. Thoennes or his insurance companies, no, sir. We, we did get some money from Mr. Lollis which is also the subject of this petition.

…

The Court: …So, as far as you were—you agreed, the way I read it, is that you agreed that Thoennes wasn't gonna have to personally pay this. But you were gonna collect it however else you could.

Mr. Lyles: Correct.

The Court: And you've not been paid a penny?

Mr. Lyles: No, sir.

The Court: All right. Mr. Imhoff, I'm just not buying what you're selling, buddy." (Transcript of Record, pp.7-13).

There are only two ways the Trial Court could have reached the conclusions it did, both of which amount to errors of law: 1) the Court misconstrued the very clear language of the Agreement and Release of Lien, or 2) or determined (erroneously) that the documents were ambiguous and considered only the parol evidence (oral arguments and documents) submitted by Respondent's counsel while completely discounting the language of the Agreement and Release of Lien as well as arguments by Appellants then counsel.

"It is a question of law for the court whether the language of a contract is ambiguous." (*Silver v. Aabstract Pools & Spas, Inc.,* 376 S.C. 585 (Ct.App. 2008), citing, *S.C. Dep't of Natural Res. V. Town of McCLellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)). "In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." (*Silver*, citing *McPherson v. J.E. Sirrine & Co.,* 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). "In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered." (*Ecclesiastes Prod Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct.App. 2007)). "The parol evidence rule prevents the introduction of extrinsic evidence of

agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary[,] or explain the written instrument." (*Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990), citing *Iseman v. Hobbs*, 290 S.C. 482, 351 S.E.2d 351 (Ct.App. 1986)) (See also *Curry v. Carolina Ins. Grp. Of SC, Inc*., 428 S.C. 60, 832 S.E.2d 760 (Ct.App. 2019), *Bluffton Town Ctr., LLC v. Gilleland-Prince*, 412 SC 554, 571, 772 SE2d 882, 891 (Ct.App. 2015)). "This is especially true when the written instrument contains a merger or integration clause." (*Gilliland*, citing *United States Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct.App. 1988)). "When a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties." (*Curry, Id.,* citing *Bluffton Town Ctr., Id.)*

The Trial Court erroneously interpreted the documents as a covenant not to execute and not as an agreement to release the judgment lien against Thoennes. A covenant not to execute is "a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into agreement." (*Wade v. Berkley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), citing *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 SE2d 888, 890 (1987)). The Agreement does not contemplate a reservation by Respondent of any rights to pursue collection of the Phase I judgment against Thoennes or his carrier; rather, it plainly states that the judgment will be released, in exchange for (among other items) an agreement upon the amount of damages for Phase II. The document goes further to clarify that it does not release Bostic, Marick, or anyone other than Thoennes. There is no reservation to pursue any purported coverage for the breach of fiduciary duty claim against Thoennes. In fact, paragraph 5 of the Agreement specifically states in part that the parties "**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."** (Agreement, p. 6). Rather, it appears that the Trial Court relied upon Respondent's counsel's argument that the intentions of the parties were something other than what the documents themselves clearly conveyed.

"Where parties reduce an agreement to writing, it is presumed that the sole agreement of the parties and the extent of the undertaking was included therein, and parol evidence cannot be introduced to contradict it." (*Sanders v. Allis Chalmers Mfg. Co*., 237 S.C. 133, 138, 115 S.E.2d 793, 795 (1960)). "A party cannot avoid the parol evidence rule simply by claiming he thought the contract he signed meant something other than what it said." (*Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017)). Appellants contend that the Trial Court erroneously ignored the language of the Agreement in favor of improper parol evidence from Respondent.

In similar fashion, the Trial Court focused almost exclusively on the portion of the Release of Lien that indicated no other judgment was being released against any of the other enumerated parties and determined that that specific clause applied to Thoennes. This construction of the Release of Lien is simply not supported by the document itself. "The parties' intention must be gathered from the contents of the **entire** agreement and not from any particular clause therefrom." (**Emphasis added**) (*Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC* 374 S.C. 483, 498, 649 S.E.2d at 502 (Ct.App. 2007), citing *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977)). "It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable

meaning." (*Ecclesiastes Prod. Ministries* 374 S.C. at 498-499, 649 S.E.2d at 502 (Ct.App. 2007), citing *Brady v. Brady*, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952)).

Additionally, it appears the Trial Court was looking beyond the four corners of the clear language of both documents to reach its conclusion. However, the Trial Court made no outward finding that the documents (one, either or both) were ambiguous, such that review of and/or reliance upon parol evidence would have been appropriate. The Trial Court seems to have relied entirely upon Respondent's counsel's narrative of the genesis of the Agreement as well as the intent of the parties at the time the document was prepared (Respondent did not even acknowledge the existence of the Release of Lien, nor was he asked to explain why it was filed or how he planned to execute upon a satisfied judgment) even though that explanation was in contrast to the words on the pages.

Here, the language of both the Agreement and Release of Lien were clear, their meaning was not susceptible of more than one interpretation, and the Trial Court erred when it assigned an intent to the verbiage that was not otherwise contained within the four corners of each document. (See *Ecclesiastes Prod. Ministries*, 374 S.C. at 500, 649 S.E.2d at 503 (Ct.App. 2007): "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Appellants maintain that the Trial 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 documents were drafted, executed and filed. Further, the Trial Court specifically denied a valid request by Appellants' then counsel to have the co-authors of the Agreement provide comment upon the parties' intentions in drafting that document (again, Appellants' trial counsel, Jason Imhoff, did not participate in the drafting of the Agreement, though Respondent's counsel did

participate). The Trial Court abused its discretion by not permitting Appellants to submit additional information regarding the circumstances of the drafting of the Agreement while at the same time permitting Respondent to submit oral and written arguments of their perception of the intention of the parties. As such, the Appellants are entitled to their requested relief.

B. A Remittitur Does Not Create a New Judgment nor Revive a Previously Satisfied Judgment

The Trial Court erroneously failed to recognize that the Agreement and Release of Lien operated to relieve Thoennes from the judgment lien. By not enforcing and/or recognizing the terms of the Agreement or the Release of Lien, the Trial Court essentially created a new judgment against the Appellant Thoennes. However, Appellants contend that a remittitur does not create a new judgment or reinstate one that has been previously satisfied, and that the Trial Court's failure to apply the Agreement and/or Release of Lien amounted to legal error.

In determining that a remittitur to correct a mathematical error within an original judgment does not equate to a new judgment, it is important to address judgments in general. In South Carolina, judgments are valid for ten years from the date of entry, and the time limit cannot be extended or tolled for any purpose (S.C. Code Sections 15-35-810 and 15-39-30. See also *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173 (2018)).

Here, the original judgment was entered November 8, 2013, and entered as judgment roll number 2009-CP-37-0652 (Form 4 Judgment dated November 8, 2013). It is this same judgment that was amended by the trial court in 2015, and the Supreme Court in 2021. The remittitur from the Supreme Court on January 4, 2022, indicated that the judgment amount was to be corrected and the Trial Court entered it as such on June 2, 2022, retroactive to November 8, 2013 (Form 4 Order filed June 24, 2022). At no time was a new judgment roll number assigned. The Release of Lien filed October 31, 2016, specifically identifies the applicable judgment roll number as

2009-CP-37-0652. It is, therefore, the Appellants' position that the judgment—regardless of its amount—was released as to Thoennes only, effective October 31, 2016. Indeed, the Oconee County Tenth Judicial Circuit Public Index regarding Civil Action Number 2009-CP-37-0652 (page 7 of 9) indicates that this judgment is marked "satisfied/canceled". Appellant has found no case law to indicate that a remittitur that corrects a mathematical error in a judgment amount equates to a new judgment, or that a remittitur allows a party to evade a properly filed Release of Lien. Thus, with no "new judgment" having been created, Appellant maintains that the judgment against Rick Thoennes is, in fact, satisfied. The Trial Court's failure to apply the Release of Lien to the retroactive judgment was clear error and should be reversed.

C. Appellants did not waive protections of Agreement or Release of Lien

Because Respondent has no other legal support for its assertion that the Release of Lien is invalid, it asserts the tenuous argument that the protections provided by both the Release of Lien and Agreement were waived. Respondent argues that Appellants waived the protections by failing to adv either the Court of Appeals or this Court of the existence of either the Release of Lien or Agreement during the pendency of the appeals. Because of this alleged "omission", according to Respondent, not only are Appellants precluded from asserting the protections of either the Release of Lien or Agreement, but the very documents themselves (as well as their contents) must be treated as if they do not now nor ever did exist. Respondent further fails to acknowledge that its counsel assisted in the drafting of the Agreement and Release of Lien, filed the Release of Lien, and also never once mentioned the existence of either to any Court with appellate jurisdiction.

Appellants maintain that they are not precluded or otherwise estopped from requesting the Trial Court or this Court to apply the clear terms of both the Agreement and filed Release of

Lien to the reallocated judgment as to Thoennes, because they could not request enforcement of the Agreement or Release of Lien until the entire matter was remitted to the Trial Court. See *Lancaster v. Georgia-Pacific Corp*., 403 S.C. 136, 742 S.E.2d 867 (2013). There, Georgia-Pacific ("GP") petitioned this Court for a writ of certiorari to review the Court of Appeals' dismissal of underlying appeals. Del-Web, another petitioner, sought and received an extension of time to serve and file a petition of writ. In the meantime, the parties reached a settlement and submitted a joint motion to stay all deadlines and proceedings until the settlement documents could be submitted and approved by the trial court. This Court turned to Rule 205 of the SCACR, which states that, "…upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court." (*Id*., at 137, S.E.2d at 868). The remittitur had not been sent to the lower court due to GP's petition for writ and Del-Web's motion for extension of time to file petition for writ of certiorari. In finding that the trial court had no jurisdiction to undertake settlement approval until the matter was remitted, this Court relied upon Rule 221 SCACR, which reads "Where a petition for rehearing has been denied, the Court of Appeals shall not sent (sic) the remittitur to the lower court …until the time to petition for a writ of certiorari under Rule 242(c) has expired." (*Id*., at 137, S.E.2d at 868). This Court went on to state: "Finally, because the issue of parties submitting agreements to the lower court while the matter is pending before this Court has arisen with increasing frequency of late, we hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court. The parties must first seek to have the matter remanded to the lower court." (*Lancaster* 403 S.C. at 138, 742 S.E.2d at 868).

The case currently before this Court was in a similar posture, where the parties had reached a partial settlement during the pendency of the appeal. And, like *Lancaster,* the matter was not remitted to the lower court with finality until the Supreme Court did so via its opinion in *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC* 435 S.C. 109, 866 S.E.2d 542 (2021), remitted to the Trial Court January 4, 2022. It was not until that time that Appellants could request the Trial Court to enforce the agreement reached pending the appeal. Further support of Appellants' position is the footnote contained within the Order of Judgment as to Bostic Brothers Construction, Inc., Marick Home Builders, LLC, and Rick Thoennes, which reads "The judgment against Thoennes may or may not be subject to set-off or release, which may be the subject of argument after entry of the judgment." Thus, Respondent's argument that the Appellants somehow waived their ability to invoke the protections of the previously reached settlement is without merit and is wholly unsupported by the record.

Respondents' waiver argument also fails based upon a plain reading of the Agreement, which clearly contemplates that the parties are entering the agreement with full knowledge that appeals are pending: "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***." (Agreement, p. 2). Next, Respondent agreed in paragraph 4b of the Agreement (p. 4) that the appeals would continue, with Respondent itself also preserving the right to pursue appeals (paragraph 4a of Agreement, p. 4). Thus, it would appear that all parties were aware that the Release of Lien as it related to Thoennes for Phase I would not impact the progression of the remainder of the Appeals, and therefore no mention was required.

Respondent also cannot avoid the repercussions of having filed the Release of Lien. Respondent was the one that prepared and filed the Release of Lien in 2016, in accordance with

the terms of the Agreement. "Evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached." (*Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct.App. 2008), citing *Conner v. City of Forest Acres*, 363 S.C. 460, 473, 611 S.E.2d 905, 912 (2005)). "Parties [to a contract] are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Silver,* citing *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct.App. 2007). "Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it." *Silver* citing *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct.App. 1984). 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. Respondent is attempting, through misplaced and disingenuous arguments, to have this Court ignore or otherwise set aside the Agreement and Release of Lien. (See *Silver,* 376 S.C. at 593, 658 S.E.2d at 543, where the Court of Appeals stated that homeowner was not permitted to reinterpret written contract terms midstream because he was unhappy with the contract he executed.)

Finally, Respondent's arguments asserting issue waiver and/or voiding of the documents in their entirety are invalid because Respondents conducted themselves in the same manner as Appellants. Specifically, Respondent is claiming that because Appellants did not mention the existence of either the Agreement or Release of Lien the Appellants are now precluded from asserting the protections offered by both documents. Respondent also suggests that the same conduct by Appellants fully extinguishes the very existence of the Agreement and the Release of

Lien, but only as to offering protection for Appellants. Respondent believes it is entitled to take advantage of any benefits conferred upon it pursuant to both documents. However, using its own logic, since it did not call the Court of Appeals' or this Court's attention to the existence of either the Agreement or the Release of Lien, then Respondent cannot use the same document to his benefit. To allow otherwise would result in a profoundly unfair advantage for the Respondent and reward it for the same behavior of which it accuses the Appellants.

II. The Trial Court committed legal error by failing to rule on the amount of setoff to which Marick was entitled

Appellant Marick asserts that it is entitled to a determination of the amount of setoff to be applied to any judgment against it for the causes of action of negligence and breach of implied warranty as a result of any and all settlements previously reached between the Respondent and any other parties to the suit. The Supreme Court held that "…there can be only one satisfaction for an injury or wrong." *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC*, 435 S.C. 109, 133, 866 S.E.2d 542, 555 (2021). Further, "[t]he HOA concedes it seeks recovery for a single element of damage—the cost to repair Phase I construction. No one disputes that point." *Id*. at 127, 866 S.E.2d at 552. The setoff arises by operation of law if the settlement is for the same injury. *Id*.

The Supreme Court recognized when it rendered its opinion and recalculated the judgment amounts that "[t]hese figures do not take into account the HOA's monetary settlements (if any) with IMK, IK, Cox, and Lollis during the pendency of this appeal." *Id*. Not until this case was remitted to the Trial Court did Appellants learn the amount of the settlement reached between Respondents and IMK, IK, Cox and Lollis (hereinafter referred to collectively as "IMK defendants").

Respondent argued to the Trial Court that Appellant Marick was not entitled to a setoff of any portion of the settlement Respondent reached with the IMK defendants, which is inconsistent with the Supreme Court's ruling. Because the IMK settlement was for the same injury, it must be set off against the amounts Marick and Bostic owe for Phase I. At a minimum, Appellants are entitled for this issue to be remanded to the Trial Court for the parties to be given the opportunity to fully brief and argue the matter.

CONCLUSION

Appellants respectfully request this Court reverse the Trial Court's denial of Appellants' Petition for Post Judgment Settlement and grant Appellants the relief requested therein: a finding that the judgment lien as to Appellant Thoennes is satisfied and released. Further, Appellants request that this Court find that Appellant Marick is entitled to a setoff of the settlement amounts paid by the IMK defendants, the amount to be determined by the Trial Court upon remand.

Respectfully Submitted,

s/ Stacey P. Canaday
Stacey P. Canaday (SC Bar No. 68805)
Erin D. Dean (SC Bar No. 65320)
TUPPER GRIMSLEY DEAN & CANADAY. PA
Post Office Box 2055
Beaufort, South Carolina 29901-2055
(843) 524-1116 - office
(843) 524-1463 – facsimile
staceycanaday@tgdcpa.com
erindean@tgdcpa.com
Attorneys for Appellants Marick Home Builders, LLC, and Rick Thoennes

April 6, 2023
Beaufort, South Carolina

RECEIVED
Apr 06 2023
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

R. Lawton McIntosh, Trial Court Judge

Civil Action No.: 2009-CP-37-0652

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

The undersigned, Stacey P. Canaday of Tupper Grimsley Dean & Canaday, PA, Attorney for Appellants ***Marick Home Builders, LLC, and Rick Thoennes***, hereby avers that on the 6th day of April 2023, a true and accurate copy of this **Initial Brief of Appellants** was served via electronic mail using the email addresses listed in the Attorney Information System as follows:

Mr. Robert T. Lyles, Jr.
Lyles & Associates, LLC
1037 Chuck Dawley Blvd.
Suite G-100
Mt. Pleasant, SC 29464
rtl@lylesfirm.com
(843) 577-7730
Attorney for 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.

By: *s/ Stacey P. Canaday*
Stacey P. Canaday (SC Bar No. 68805)
Erin D. Dean (SC Bar No. 65320)
TUPPER GRIMSLEY DEAN & CANADAY. PA
Post Office Box 2055
Beaufort, South Carolina 29901-2055
(843) 524-1116 - office
(843) 524-1463 – facsimile
staceycanaday@tgdcpa.com
Attorney for Appellants Marick Home Builders, LLC and Rick Thoennes

April 6, 2023
Beaufort, South Carolina