IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY

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

RECEIVED
May 15 2023
SC Court of Appeals

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 THE RESPONDENTS

Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
1037 Chuck Dawley Blvd., Suite G-100
Mt. Pleasant, South Carolina 29464
843.577.7730
rtl@lylesfirm.com
Attorneys for Respondents

May 5, 2023
Mt. Pleasant, South Carolina

TABLE OF CONTENTS

TABLE OF CONTENTS....2

TABLE OF AUTHORITIES....3

STATEMENT OF ISSUES ON APPEAL....4

STATEMENT OF THE CASE....4

STANDARD OF REVIEW....5

ARGUMENTS....6

I. The Circuit Court Did Not Abuse its Discretion by Denying Appellants Rule 60 motion. 10
   a. There is nothing "just" about relieving Appellants of the Thoennes Judgment. 10
   b. There was no error of law, and the Circuit Court decision is supported by the facts. 12

II. The 60(b)(5) Motion Was Not Timely....16

III. Appellants Have Waived any argument they may have with regard to the 2016 Agreement. 17

IV. Public Policy Requires that Supreme Court Decisions Are Final....23

V. The Supreme Court's Order for Remittitur was a Final Judgment of the Matter and Ordered the Circuit Court to Enter Judgment. 24

VI. The Trial Court did Not Commit legal Error in Regard to the Amount of Setoff to Which Marick was Entitled. 24
   a. The Trial Court Stated in its Order that it Would Hear and Rule on Set-Off. .24
   b. The Settlement of Larry Lollis Cannot be Applied to the Negligence and Warranty judgments. 24

CONCLUSION....27

TABLE OF AUTHORITIES

Adoptive Couple v. Baby Girl, 404 S.C. 483, 487, 746 S.E.2d 51 (2013) 23

Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) 18

Hawkins v. Greenwood Dec. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) 12

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) ..... *6&11*

HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 23-24, 649 S.E.2d 181, 184 (Ct. App. 2007) 13

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001)..... 18 & 20

Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)..... 17

Lancaster v. Georgia-Pacific Corp., 403 S.C. 136, 742 S.E.2d 867 (2013)..... 16 & 21

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). *5*

Messer v. Messer, 359 S.C.614, 598 S.E.2d 310, 317 (Ct.App.2004) 12

N.Am. Rescue Prods., Inc. v. Richardson, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015)..... 12

State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) 18

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))..... 12

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).....

Stoneledge at Lake Keowee Owners' Association, Inc., v. Cincinnati Insurance Company; Builders Mutual Insurance Company, No. 19-2009 (4th Cir. Dec. 13, 2022)..... 10

Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co., 2022 U.S. Dist. Lexis 34292 (December 13, 2022) 10

Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co., 2018 U.S. Dist. Lexis 167792 (Dist. Ct. 4th Cir. Ct. Anderson/Greenwood Div., SC) 9

Rule 43, SCRCP..... 5

Rule 60(b), *SCRCP* *17*

Rule 60 (b)(5), *SCRCP* ..... *5&10*

STATEMENT OF THE ISSUES ON APPEAL

1. Did the Trial Court abuse his discretion by denying Appellants' Rule 60 motion to release the judgment against Thoennes?
2. Did the Appellants waive all arguments pertaining to the personal release of Thoennes?
3. 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

On December 8, 2021, the Supreme 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 which it ordered the entry of judgments against Appellants. In conformance with the directive in that case, the Respondents (hereinafter "HOA") filed a Motion for Entry of Judgment on April 27, 2022, Case No. 2009-CP-37-00652 (Designation of Matter, #3), asking the Circuit Court in Oconee County to enter judgment in the following amounts, which are precisely the amounts the Supreme 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[1]

$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 Respondents' Motion for Entry of Judgment, Appellants[2] filed a Petition for Post Judgment Settlement on June 10, 2022 (Designation of Matter, #7) in which Appellants objected to the

[1] Bostic is not a party to this appeal.

[2] Appellants are, effectively, the insurers for Marick and Rick Thoennes. As the record abundantly reflects, Mr. Thoennes has been personally released from any judgments and no longer has any interest in this case and, as

entry of judgment, *which had been expressly directed by the Supreme Court*, on the basis that the judgment against Thoennes (the "Thoennes Judgment") had been released by an agreement between the HOA, Marick, Thoennes and their insurance carriers, in 2016 (hereinafter the "2016 Agreement") (Designation of Matter, #4a). Appellants also refer to an ancillary release of the Thoennes Judgment, (Designation of Matter, #4b) which accomplished the intention of the 2016 Agreement, which was to release Mr. Thoennes personally from the effects of the Thoennes Judgment). The Circuit Court denied Appellants' arguments and entered judgment as the Supreme Court had directed (Designation of Matter, #8) and subsequently denied Appellants' Motion to Alter, Amend and/or Reconsider, filed September 29, 2022 (Designation of Matter, #11) (Designation of Matter, #12). Appellants filed a Notice of Appeal on 11/8/22 (Designation of Matter, #14). Respondents filed a motion to certify the case for review by the South Carolina Supreme Court on December 15, 2022, (Designation of Matter, #15) which was denied on February 9, 2023 (Designation of Matter, #16) The Appellants filed their Initial Brief on or about April 6, 2023.

STANDARD OF REVIEW

The motion which is the subject of this appeal, Appellants' Petition for Post Judgment Settlement, was filed pursuant to Rule 60 (b)(5), South *Carolina Rules of Civil Procedure*. Appellants incorrectly state that motion was "essentially amounted to a motion to enforce a settlement" (Initial Br. Of Appellants, Appellate Case No.: 2022-001581, April 6, 2023). (A motion to enforce a settlement should be made pursuant to Rule 43, *SCRCP*.) Appellants' motion was one to relieve Thoennes from the judgment entered against him by the Supreme Court.

"Whether to grant or deny a motion under Rule 60(b)(5), *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

discussed below, coverage litigation has been pending between the insurers for Marick and Rick Thoennes since 2014.

factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

ARGUMENTS

This case has a unique and complicated factual history, which is directly relevant to the issues on appeal. The HOA filed this lawsuit 14 years ago, in 2009, concerning the development and construction of a community of waterfront townhomes on Lake Keowee, which began more than 20 years ago. The project, and ultimately the litigation, was divided into Phase I and Phase II. The first general contractor, Bostic Brothers Construction, began, but did not finish, Phase I. In 2005, IMK Development Company (comprised of Larry Lollis, William Cox and Marick Home Builders) purchased the project. Marick Home Builders, and its license holder and managing member, Rick Thoennes, were the second general contractors on the project (for the factual history, see, *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 114, 866 S.E.2d 542, 545 (2021)). Marick and Thoennes completed the unfinished units in Phase I, then began and completed Phase II of the project. The Trial Court bifurcated the case by phase, and a two-week trial of Phase I began in late 2013. Multiple defendants settled before trial. When the jury began deliberating, the remaining defendants were Bostic, Marick, IMK, IK, Thoennes, Cox and Lollis. The jury returned verdicts for the HOA against all of the defendants, but on three different causes of action: negligence, implied warranty and breach of fiduciary duty. The defendants against who the verdicts were rendered, and the amounts, are as follows: As to Bostic and Marick, $3,000,000 for negligence and $1,000,000 for implied warranty. As to Thoennes, Lollis, Cox, IMK and IK, $1,000,000 for breach of fiduciary duty. The jury also apportioned damages between Bostic and Marick for the Negligence, at 60% against Bostic and 40%; and against IMK/Marick and for the Breach of Warranty at 70% against IMK/Marick and 30% Bostic.

Post-trial, on January 21, 2015, the Trial Court re-allocated those verdicts, to include the full verdict amount, $5,000,000, as to each cause of action, making all defendants liable for the full verdict. The Trial Court also reduced the full verdict amount by the amount of applicable Phase I set-offs, to a total judgment, for each cause of action, and against all defendants, of $2,144,088.23. (Form 4 Order filed 1/22/2015.) Following the post-trial order, Marick and Thoennes filed an appeal of the 2013 Phase I judgment against them in favor of the HOA.[3]

Immediately after the verdict, while the post-trial motions were pending, in early 2014 the HOA filed two coverage actions in federal court. One action was filed against Cincinnati Insurance Company ("Cincinnati") and Builders Mutual Insurance Company, as the insurers for Marick and Thoennes, and another against Cincinnati and American International Group, Inc. d/b/a American Home Assurance Company, as the insurers for Bostic. (See civil action numbers 8:14-cv-01906-BHH and 8:14-cv-00293-JD, respectively.) In those actions, the HOA sought coverage for the verdict amounts against Marick, Thoennes and Bostic from the respective carriers.

In 2016, while the federal court declaratory actions and the appeals of the Phase I verdict were winding through the South Carolina Court of Appeals, the circuit court in Oconee County set a Phase II trial date for May 2016. (Settlement Agreement, Case No. 2009-37-0652, December 2016). At that point, the HOA and the Insurers for Marick and Thoennes negotiated an agreement setting forth agreed upon damages for a Phase II trial, given that a jury had already heard and decided the Phase I trial, which involved similar parties and issues.[4] That agreement, which manifested itself in the 2016 Agreement, hereinafter set the Phase II damages as to Marick and Thoennes, so coverage could be determined in the pending coverage action, while preserving the Insurers' rights to continue the appeal of the judgments for Phase I. Also, to protect the Insurers

[3] Bostic filed a separate appeal of the judgment against it.
[4] Bostic was not implicated in Phase II at Stoneledge and was not a participant in that trial or the 2016 Agreement.

from any bad faith exposure, it was agreed that Mr. Thoennes would be relieved of personal exposure for the Thoennes Judgment (the HOA was content to pursue recovery of that judgment in the coverage action). The 2016 Agreement was not intended to relieve the Insurers of responsibility for the Thoennes Judgment, which was, at that point, directly at issue in the pending declaratory judgment action against the Insurers for Thoennes and Marick. To facilitate this intent, and with the 2016 Agreement and the coverage action in place, the HOA also agreed to release Mr. Thoennes personally from the Thoennes Judgment.

Ultimately, with the Supreme Court's *Stoneledge* decision, the judgments against all defendants were affirmed. However, this Court and the Supreme Court reversed the Trial Court's decision to reallocate the jury verdict. Instead, the Supreme Court affirmed this Court's finding that the jury had awarded three separate verdicts; one for Negligence against Bostic and Marick in the amount of $3,000,000, one for Breach of Warranty against Bostic and Marick; and one for Breach of Fiduciary Duty against Thoennes for $1,000,000. Critically, the Supreme Court found that no pre-trial, Phase I set-off applied to the Thoennes Judgment, and applied all of the pre-trial, Phase I set-offs to the Negligence and Breach of Warranty judgments against Bostic and Marick, reducing those judgments substantially.

Additionally, during the appeal process, and also in 2016, defendant Larry Lollis settled with the HOA for the breach of fiduciary duty judgment against himself, Cox and IMK (Lollis and Cox had only been sued for Breach of Fiduciary Duty). For that reason, as the appellate opinions reflect, neither Lollis, Cox or IMK was the subject of any appellate court decision. However, aware of that settlement, the Supreme Court specifically stated, with respect to the judgments it ordered, "These 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…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, 132, 866 S.E.2d 542, 555 (2021).

Meanwhile, back in the district court…, during the pendency of the state court appeal, the HOA was granted summary judgment against Cincinnati and Builders Mutual in connection with its action for coverage for the judgments against Marick and Thoennes. *See Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co.*, 2018 U.S. Dist. Lexis 167792 (Dist. Ct. 4th Cir. Ct. Anderson/Greenwood Div., SC). In that order, the District Court found that Cincinnati and Builders Mutual had coverage for all of the judgments issued in the Phase I trial against Marick and Thoennes, including the Thoennes Judgment, as well as for the amounts for Phase II set forth in the 2016 Agreement. After their Rule 59 motion was denied[5], Cincinnati and Builders Mutual appealed that decision, fully briefing all of their arguments with respect to coverage for the judgments against Marick and Thoennes, in 2020 (see Opening Br. of Appellants, Doc. 16, Case No. 19-2009 (March 3, 2020); Reply Br. of Appellants, Doc. 23, Case No. 19-2009 (June 1, 2020). Then, two years after fully briefing the issues on appeal, for the first time in any federal court, the insurers for Thoennes and Marick filed another brief (see Supp. Opening Br. Of Appellants, Doc. 41, Case No. 19-2009 (May 20, 2022)), in which they argued, for the very first time, that the Thoennes Judgment had in fact been released by the 2016 Agreement. The HOA responded (See Supp. Response Br. Of Appellee, Doc. 44, Case No. 19-2009 (June 20, 2022)) and argued that the insurers had waived any right to argue that the 2016 Agreement released the Thoennes Judgment, and that the 2016 Agreement was not and was never intended to be a release of the Thoennes Judgment for all purposes.

[5] *See Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co.*, 2019 U.S. Dist. Lexis 141652 (Dist. Ct. 4th Cir. Ct. Anderson/Greenwood Div., SC)

On December 13, 2022, the Fourth Circuit Court of Appeals affirmed the grant of summary judgment in favor of the HOA for, among other things, the Thoennes Judgment and the sums owed as part of the 2016 Agreement. *Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co.*, 2022 U.S. Dist. Lexis 34292 (December 13, 2022). That federal court opinion is directly relevant to this matter. As noted by the Fourth Circuit Court of Appeals in its opinion:

> [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 . . . .").

Stoneledge at Lake Keowee Owners' Association, Inc., v. Cincinnati Insurance Company; Builders Mutual Insurance Company, No. 19-2009 (4th Cir. Dec. 13, 2022) (Designation of Matter #18)

The insurers Petition for rehearing was denied on January 10, 2023. (Ct. Or. Denying petition for rehearing, Doc. 63, Case No. 20-2009; 8:14-cv-01906-BHH (January 10, 2023)).

I. The Circuit Court Did Not Abuse its Discretion by Denying Appellants Rule 60 motion.

In denying the Appellants' Rule 60 motion, the Circuit Court did not abuse its discretion. That decision was not guided by a misapplication of the law and is fully supported by the evidence. Rule 60(b)(5), *SCRCP*, states, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons… the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

A. There is nothing "just" about relieving Appellants of the Thoennes Judgment.

The Circuit Court was right to deny the Appellants' motion and did not misapply the law. The first issue, then, is whether or not the requested relief from Thoennes Judgment would be "just." Effectively, the Appellants asked the Circuit Court to conclude that it would be "just" to hold that the Thoennes judgment, *just affirmed by the Supreme Court of South Carolina*, should be released because of an agreement from six years before 2016. In doing so, the Appellants asked the Circuit Court to invalidate and disregard a Supreme Court order, even though they had not requested that the Supreme Court reconsider its own order.

The court looked at the matter through the correct lens of a 60(b)(5) motion and determined that it would not be just to disregard the Supreme Courts clear order. That conclusion is fully supported by the evidence given that the Circuit Court took the entire agreement into consideration when making their determination. The Court stated:

There is nothing "just" about the relief the Appellants sought. As the discussion below makes clear, Appellants themselves never intended that the Thoennes Judgment to be released for all purposes. Additionally, it would have been *unjust* to allow Appellants to remain silent about what they now say the effect of the 2016 Agreement was, then lose appeals in the South Carolina appellate courts, the federal district court, and the Fourth Circuit Court of Appeals, and then allow them to be relieved of ultimate responsibility for the Thoennes Judgment.

It is clear that the Court reviewed all of the documents before it and understood what the language meant and how that was to be applied. Additionally, the Circuit Court was well aware of the order of the Supreme Court and followed it directly. There is no evidence whatsoever of an abuse of discretion in the Circuit Court finding that the 2016 agreement was a personal release only and entering judgment. The Circuit Court Correctly took into consideration all relevant evidence and documentation and made a sound decision. Keeping line with *May* and *Historic*

Charleston Holdings, this Court should only disturb the Circuit Courts ruling if there was an abuse of discretion, which there was not.

B. There was no error of law, and the Circuit Court decision is supported by the facts.

The Appellants do not contend that the Circuit Court's decision was controlled by an error of law. Rather, they essentially argue that the Circuit Court misapplied the language of the 2016 Agreement. In other words, they do not point to legal error, but only to a result that they do not like. However, the terms of the 2016 Agreement and the transcript of the hearing make it abundantly clear that the Circuit Court made the correct decision and there is no abuse of discretion.

"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.) "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." *Hawkins v. Greenwood Dec. Corp.*, 328 S.C. 585, 592, 493

S.E.2d 875, 878 (Ct. App. 1997). "Where a contract is unclear or is ambiguous and capable of more than one construction, the parties' intentions are matters of fact…if a contact is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23-24, 649 S.E.2d 181, 184 (Ct. App. 2007). In this matter, the circuit court found that the language was clear and unambiguous and that it was only a release of Mr. Thoennes personally.

In support of their argument, Appellants cite language from the 2016 Agreement, and argue that that language compelled a finding that the 2016 Agreement and associate release of judgment, from 2016, meant that the Thoennes Judgment was forever, and for all purposes, released as of 2016. To the contrary, the language Appellants' cite does not support their position and factually supports the ruling of the circuit court. The first text cited by Appellants 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 the HOA, not the Appellants. 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 even say that all of Rick Thoennes' obligations are released. The agreement stated that the parties agree to proceed with the coverage litigation and there is no indication that the Thoennes Judgment would be removed from that action. Instead, the import of the 2016 Agreement, and this language, is that the HOA was willing to pursue satisfaction of the Thoennes Judgment from insurance, which was already directly at issue in pending coverage litigation, a fact also referenced in the 2016 Agreement.

Next, the Appellants cites 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 referenced 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 Appellants contend that there was no judgment to seek coverage for as of 2016. Also, the HOA 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 insurers pending coverage action, a fact the HOA was cognizant of and respected.

Appellants argue that the Circuit Court erred in his interpretation of the 2016 Agreement because the language was clear and unambiguous. The evidence, in the form of the language of the 2016 Agreement, in fact supports the Circuit Court's ruling.

One term, for which the Circuit Court found no evidence of in the 2016 Agreement, was consideration received by the HOA for the ostensible release of the Thoennes Judgment for all purposes. The Circuit Court stated that, "The only thing we are talking about, Jason [counsel for Appellants], 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?" (Trial Transcript pp. 7-13.) The Circuit Court goes on to say, "The clear intent of this agreement was that it not work as a judgment against Mr. Thoennes personally." (Trial Transcript pp. 7-13.) That conclusion is amply supported by the terms of the 2016 Agreement, thus there was no abuse of discretion.

Appellants alternatively claim that the Circuit Court erroneously looked beyond the four corners of the 2016 Agreement to infer a meaning that did not reflect the intentions of the parties at the time the document was drafted, arguing that the Circuit Court considered only the parol evidence of oral arguments and documents submitted by the HOA's counsel while discounting the language of the agreement. As made clear above, the language of the 2016 Agreement itself supports the position of the HOA. To the extent the Circuit Court considered arguments of counsel, it did so from both counsel, giving counsel for Appellants. The below is a clear indication of the Circuit Court's consideration of the arguments of Appellants' counsel and his interpretation of the 2016 Agreement:

> "**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?...
>
> **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.
>
> (Transcript of Record, pp. 7-10)

There was no abuse of discretion with respect to the Circuit Court's denial of Appellants' Rule 60 motion. There was no error of law, and the holding is amply supported by the evidence. Additionally, there would be nothing "just" about allowing the Appellants to escape the effects of the Thoennes Judgment they actively litigated for six full years after signing the 2016 Agreement and never raised or mentioned to any of the many courts they appeared before.

II. The 60(b)(5) Motion Was Not Timely.

Rule 60(b), *SCRCP*, further states "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." Given that this was a 60(b)(5) motion, it is subject to the reasonable time requirement. Appellants argue now, and to the Circuit Court in 2022, that an agreement from 2016 was a full release of the Thoennes Judgement. As indicated below, Appellants failed to raise the issue of the 2016 Agreement at any time, or at any place, until they raised it at the 11th hour in the Fourth Circuit Court of Appeals, and then raised it, on cur, in this matter in June, 2022. They never raised it in the Circuit Court, never raised it on appeal, to either this Court or the Supreme Court, did not raise it in the United States District Court, even in response to a motion for summary judgment on that very judgment, and did not raise in the first two years of the appeal in the Fourth Circuit Court of Appeals. If the Appellants believed that the 2016 agreement was a full release of the Thoennes Judgment for all purposes, they were duty bound to mention that argument to somebody, somewhere, before the expiration of six years and the expenditure of thousands of hours of time litigating the numerous appeals filed by the Appellants themselves. If there is any limitation at all to the "reasonable" time requirement of Rule 60, it expired before June, 2022, when Appellants filed their Rule 60 motion.

In fact, the *Lancaster* case specifically requires the Appellants to have brought the issue to the Lower Courts attention much sooner. Appellants falsely contend that they could not raise the

issue relating to the 2016 Agreement until after the case was remanded. In truth, nothing prevented Appellants from alerting the appellate courts (and the HOA for that matter), that they believed the Thoennes Judgment had been fully released. They cite no law in support of their belief that the Court of Appeals or Supreme Court were unable to here *or even know* of that position.

III. Appellants Have Waived any argument they may have with regard to the 2016 Agreement.

Between 2016 and December 2021, with the release of *Stoneledge,* Appellants never raised any issue regarding the 2016 Agreement, to this Court or the Supreme Court. Yet on June 10, 2022, using Rule 60, *SCRCP*, Appellants asked a Circuit Court to ignore the Supreme Court's *Stoneledge* opinion and not to enter judgment against Thoennes as the Supreme Court had expressly directed. The basis for that opposition to entry of the Thoennes Judgment is the 2016 Agreement. As they had in the Fourth Circuit in May of 2022, Appellants contended, for the first time in any South Carolina Court, that the 2016 Agreement is actually a complete release of the Thoennes Judgment *for all purposes.* Thoennes now appeals the Circuit Court's Order rejecting that argument, directly challenging, in Circuit Court, the Supreme Court's *Stoneledge* ruling.

As discussed below, the argument advanced by the Appellants is without merit. First, the HOA vigorously denies Appellants' characterization of the 2016 Agreement. However, regardless of the merits of the arguments concerning the effect of the 2016 Agreement, the arguments now advanced by Appellants have been unequivocally waived because at no point in the prior appeal, from 2016 through the issuance of the *Stoneledge* Opinion in 2021, did Appellants *ever* argue, in any court, that there was actually no Thoennes Judgment, since it had been released by the 2016 Agreement.

As noted by the Fourth Circuit, legal arguments are waived if not presented to appellate courts. Appellants cannot raise a new argument after a 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).

Here, Appellants never raised or even mentioned to this Court or the Supreme Court that the Thoennes Judgment, the validity of and amount of which, was a central issue in the pending appeals, did not even exist. To the contrary, after the 2016 Agreement was signed in 2016, counsel for Marick and Thoennes, Jason Imhoff, repeatedly filed briefs and made arguments *on behalf of Mr. Thoennes*. Between 2016, after the 2016 Agreement was signed, and 2021, the Appellants have filed the following in South Carolina appellate courts:

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).

At oral argument before this Court in December of 2017, and in the Supreme Court, 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).

Even after the Supreme Court directed the entry of the Thoennes Judgment, Appellants did not file a Petition for Rehearing to raise the issue of the purported release of that judgment resulting from the 2016 Agreement (which, though untimely, would have at least created some record that Appellants believed a mistake had been made and a major legal defense to a $1,000,000 judgment had been overlooked). *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.")

Had Appellants believed that the 2016 Agreement was a complete release of the Thoennes Judgment, for all purposes, they would have raised that issue to this Court and to the Supreme Court, *and were required to do so to preserve that argument*. They did not raise the issue because neither Appellants, nor their lawyers, believed that the effect of the 2016 Agreement was a total release of the Thoennes Judgment for all purposes.

In response to the waiver argument, Appellants raise a laundry list of nonsensical and red herring arguments about the fact that the HOA participated in drafting the 2016 Agreement and that the HOA failed to bring to the appellate courts' attention that the Thoennes Judgment had been released. 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 Mot. To Certify, Appellate Case No. 2022-001581, December 28, 2022). As noted in the HOA's Supreme Court filing, the HOA did not bring to any court's attention that the

Thoennes Judgment has been released, *because it was not released*. It would have been as wrong and as disingenuous for the HOA to say it as it is for the Appellants to say it. Again, as noted, a predicate to the Appellant's arguments is that the HOA knew that the Appellant believed the 2016 Agreement to be a complete release of the Thoennes Judgment, which is not even remotely true.

Next, Appellants falsely contend that they could not raise the issue relating to the 2016 Agreement until after the case was remanded. In truth, nothing prevented Appellants from alerting the appellate courts (and the HOA for that matter), that they believed the Thoennes Judgment had been fully released. An appellate court clearly can recognize the validity of a true settlement agreement affecting an appeal. This is obvious given that neither this Court nor the Supreme Court entered any judgments against Lollis, Cox, or IMK, or ruled on their appeals, since the judgment against Lollis and Cox had actually settled during the appeals process, which rendered their appellate issues moot. If it were true that the Thoennes Judgment had been completely released, the Appellants could have notified this Court and the Supreme Court of that fact, and neither would have ruled on Thoennes's appeals.

In support of their position, Appellants cite, and misconstrue, *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013). However, as noted by Appellants brief, the *Lancaster* court stated:

> 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. Thus, if Appellants believed that the 2016 Agreement was a release of the Thoennes Judgment, for all purposes, and for some reason believed that they could not breathe a word of that to the appellate courts, the could have done just what

Lancaster, *mandates*; they could have, and should have of they truly believed this agreement to be a complete release, filed a motion with the circuit court and then moved to remand the matter for a determination of that issue.

In this case, during the earlier appeal, Appellants did not submit anything to the lower court regarding the 2016 Agreement, nor did Appellants seek a remand of the matter to the lower court so that a decision could be made by the lower court regarding the effect of the 2016 Agreement. As they did in the appellate courts, for six years, Appellants remained completely mum and utterly silent regarding their hidden belief that the 2016 Agreement was a release of the Thoennes Judgment for all purposes. Filing a 60(b)(5) motion with the Circuit Court in 2022 was completely untimely and should have been denied on that basis, along with the basis that the agreement in questions was not a complete release.

Appellants also note that the 2016 Agreement provides that it will not have effect on the pending appeals. This argument is facially ridiculous. If the 2016 Agreement was a full release of the Thoennes Judgment *for all purposes*, as Appellants now argue, there would not have been any point to any appeal with respect to that judgment, or the breach of fiduciary duty claim, unless the Appellants intent with the 2016 Agreement was to burden this Court and the Supreme Court with a completely meaningless appeal.

That the Appellants' arguments are frivolous is a charge that is supported not only by the lack of merit, but also by the actions taken in the federal court declaratory judgment actions. Nothing about *Lancaster,* or any Appellate Court Rule, could possibly be construed to have prevented the insurers from raising the 2016 Agreement as a total release of the Thoennes Judgment in the declaratory judgment action. Even in response to a motion for summary judgment filed by the HOA *seeking coverage for the Thoennes Judgment in 2018*, granted by District Court

Judge Hendricks, the Insurers did not say that the Thoennes Judgment had actually been released two years before. *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.) As noted previously, they did not raise it in the Fourth Circuit appeal until 2022 when it was rejected by the Fourth Circuit.

IV. Public Policy Requires that Supreme Court Decisions Are Final.

As noted, the Appellants have appealed the Circuit Court's entry of a judgment that was directed by the Supreme Court in a final decision. Appellants' efforts are against public policy and amount to a collateral attack on a Supreme Court order based on documents, evidence and legal arguments that were available to them during the pendency of the appeal.

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 six years of appeals, the Supreme Court ruled upon the Thoennes Judgment. 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. A Supreme Court order cannot be collaterally attacked based on a document or legal arguments that existed but were not raised before the final Order. All that does it provide for an endless supply of stalling tactics for Appellants and undermines the Supreme Courts authority.

V. The Supreme Court's Order for Remittitur was a Final Judgment of the Matter and Ordered the Circuit Court to Enter Judgment.

Appellants characterize the Supreme Court's decision as a remittitur to correct mathematical errors. Rather, the Supreme Court issued a final decision on the validity of the Thoennes Judgment, declared the amount of that judgment and ruled that the set-off of the pre-trial Phase I settlements did not apply to it. It also ordered entry of that judgment and it was the Circuit Courts job to enforce those judgements, which it properly did.

VI. The Trial Court did Not Commit legal Error in Regard to the Amount of Setoff to Which Marick was Entitled.

A. The Trial Court Stated in its Order that it Would Hear and Rule on Set-Off.

The Appellants contend that the Trial Court committed legal error by failing to rule on the amount of setoff to which Marick was entitled. To the contrary, in its order, the Circuit Court held that "[t]he judgment against Thoennes may or may not be subject to set-off or release, which may be subject of argument after entry of judgment." Ct. Order, June 24, 2022, 2009-CP-37-00652. The only reason that no ruling was made with respect to setoff is that Appellants filed this appeal before the Circuit Court had the opportunity to schedule a hearing allowing for briefs on the issue of set-off. The only one to blame for there not being a ruling on the set-off are the Appellants themselves.

B. The Settlement of Larry Lollis Cannot be Applied to the Negligence and Warranty judgments.

Though it was not ruled on by the Circuit court, since Appellants raised the issue of set-off, the HOA will address it here. Appellants argue that money paid by Lollis ($500,000.00) to settle the Breach of fiduciary duty judgment against him should be applied to the judgments for negligence and breach of implied warranty against Marick. The only judgment against Larry Lollis (or Cox) was on the breach of fiduciary judgment cause of action for $1,000,000.

As reflected above, after the jury verdict, which allocated separate awards for the three separate causes of action, the HOA asked the Trial Court to re-allocated that verdict and apply the total amount of the judgments, $5,000,000, to each of the causes of action, and to equally apply the set-ff from the pre-trial settlements. The trial court complied with that request, giving all defendants the benefit of the set-off.

The Appellants, Marick in particular, appealed that re-allocation by the trial court and successfully argued that there were actually three, separate judgments, one for each cause of action, as delivered by the jury. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, LLC, 435 S.C. 109, 132, 866 S.E.2d 542, 555 (2021) ("we affirm the court of appeals' holding that the three verdicts must stand as delivered by the jury.") Ultimately, Marick was only deemed partially responsible for the judgments for negligence and breach of implied warranty. Marick has no obligation with respect to the judgment for breach of fiduciary duty as to Lollis or Thoennes.

After separating the three judgments, the Supreme Court then took into consideration the amounts paid in settlement for Phase I before trial and held that only the judgments for negligence and breach of implied warranty were entitled to set-off, and ordered the entry of judgment against Bostic and Marick as follows:

> Judgment Amounts
>
> > The jury awarded $3,000,000 for negligence; $1,000,000 for breach of the implied warranty of workmanlike service; and $1,000,000 for breach of fiduciary duty, for a total award of $5,000,000. The HOA received $2,855,911.77 in settlements from other Phase I defendants. Had the jury been instructed to return one consistent verdict of actual damages, the application of setoff and the calculation of the net judgments after apportionment would have been simple. However, we find it appropriate to apply a pro rata allocation of the $2,855,911.77 setoff to the negligence and breach of warranty verdicts. Of course, we must also take into account the apportionment percentages rendered by the jury.
>
> > The court of appeals correctly held—but, as discussed above, for the incorrect reason—that the breach of fiduciary duty verdict against Thoennes was not subject

> to setoff. *Stoneledge I*, 425 S.C. at 302-03, 821 S.E.2d at 523. The court of appeals also correctly held the $4,000,000 in combined verdicts against Bostic and Marick were subject to setoff in the amount of $2,855,911.77. *Id.* However, the court of appeals mistakenly concluded this calculation would leave a $2,144,088.23 net judgment to be allocated between the negligence and breach of warranty verdicts. *Id.* The correct figure is $1,144,088.23. The court of appeals correctly held "it would be proper to allocate three-fourths of the remaining judgment to the negligence cause of action and the remaining one-fourth to the [breach of warranty] cause of action." *Id.*
>
> As noted above, during the apportionment phase, the jury found Bostic was 60% responsible for the negligence award, Marick was 40% responsible for the negligence award, Marick was 70% responsible for the breach of warranty award, and Bostic was 30% responsible for the breach of warranty award. Under subsection 15-38-15(A) of the Act, a defendant whose conduct is found to be less than fifty percent of the total fault is liable for only that percentage of the damages determined by the fact finder. Joint and several liability is assigned to defendants found liable for fifty percent or more of the damages. 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)
>
> These 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.

Stoneledge, at 138.

As the Supreme Court made clear, neither Bostic nor Marick is responsible for or connected to the $1,000,000 breach of fiduciary judgment at all, and neither Lollis, Cox, nor Thoennes received the benefit of any pre-trial Phase I settlements. With that background and facing the full $1,000,000 against him (plus interest that had accrued at that time) Lollis settled the judgment against him for $500,000.00.

Now, having successfully argued for separate judgments, thereby eliminating any exposure Marick had for any part of the breach of fiduciary duty judgment, and having received all of the value of the pre-trial settlement set-offs (to the exclusion of Lollis, Cox and Thoennes), Marick wants credit for what Lollis paid to settle the breach of fiduciary judgment against him.

The three judgments are separate, just as Bostic and Marick wanted them to be. They are not liable or responsible for satisfying any part of the breach of fiduciary duty judgment and the HOA has no right to pursue recovery of the breach of fiduciary duty judgment from either Bostic or Marick. Thus, neither Bostic nor Marick have any right, legal or equitable, to a set-off for sums paid for the breach of fiduciary judgment. Rather, any money paid on the breach of fiduciary duty judgment could only be applied as a set-off with respect to the fiduciary duty judgment, which would help Rick Thoennes. However, as counsel for Thoennes himself successfully (and curiously) argued to the Supreme Court, set-off cannot be applied to a breach of fiduciary duty judgment. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 135, 866 S.E.2d 542, 556 (2021) ("Therefore, we hold the $1,000,000 breach of fiduciary duty award against Thoennes is not subject to setoff.")

Marick (and Bostic) cannot have their cake and eat it too. They cannot avoid responsibility for the breach of fiduciary duty judgment against Lollis, and at the same time receive the benefit of what Lollis paid to settle that judgment.

CONCLUSION

For the forgoing reasons, the order entered by the Circuit Court, in full compliance with the Supreme Court Order, was proper in all respects and was not an abuse of discretion. Further, Appellants have waived all of their arguments with regard to the 2016 Agreement and associated

release. Finally, Appellants efforts to void and collaterally attack a Supreme Court order in Circuit Court, should be rejected on the basis of public policy.

s/Robert T. Lyles, Jr.

Robert T. Lyles, Jr., Esquire (SC Bar #10299)
Lyles & Associates, LLC
1037 Chuck Dawley Blvd., Suite G-100
Mt. Pleasant, SC 29464
843.577.7730
Attorneys for Respondents

Mt. Pleasant, South Carolina
May 15, 2023