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**Jun 05 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM OCONEE COUNTY

Court of Common Pleas

R. Lawton McIntosh, Trial Court Judge

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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.

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**REPLY BRIEF OF APPELLANTS**

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Appellants Marick Home Builders, LLC, and Rick Thoennes (hereinafter referred to collectively as “Appellants”), pursuant to Rule 208 (a)(3) of the South Carolina Appellate Court Rules, hereby issue their Reply to Respondent Stoneledge at Lake Keowee Owners’ Association, Inc.’s (hereinafter referred to as “Respondent”) Initial Brief.

## ARGUMENT

### **I. Respondent’s Issue Preservation and Waiver Arguments are without Merit**

Respondent’s arguments regarding issue preservation and waiver are red herrings, without merit and should be disregarded by this Court. As this Court is aware, the South Carolina Supreme Court remanded this case to the Trial Court in December 2021, with instructions for the Circuit Court to enter judgment in accordance with the Order. *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. IMK Dev. Co., LLC* 435 S.C. 109, 866 S.E.2d 542 (2021). The Supreme Court’s Order recognized that other settlements may have occurred, and of which it was unaware, and therefore remitted the matter to the Trial Court, with instructions to enter the corrected judgments. (see *Id.*, at 138, S.E.2d at 558). In accordance with that Order, the Trial Court issued an Order of Judgment as to Bostic Brothers Construction, Inc., Marick Home Builders, LLC, and Rick Thoennes, Individually, indicating that the judgments were entered **retroactively** to November 8, 2013, and further that the judgment as to Thoennes maybe subject to set-off or release (see Order of Judgment). Clearly, the Order of Judgment contemplated that the parties would be arguing for set off and/or release. In fact, Appellants did just that, and are now appealing the Orders from the Trial Court on the grounds that the Trial Court committed errors of law in reaching its decisions.

Respondent erroneously argues that Appellants have somehow waived both the ability to argue that the Settlement Agreement (“Agreement”) exists and to apprise themselves of the

protections of the same. The cases cited by Respondent simply do not support their position. For example, Respondent relies upon *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct.App. 1989), *Kiawah Prop. Owners Group v. PSC*, 359 S.C. 105, 597 S.E.2d 145 (2004), and *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811 (Ct.App. 1991), for the misplaced argument that Appellants have waived or otherwise abandoned the defense and protections of the Agreement. While these cases do hold that issues not raised to a trial court cannot be raised for the first time at the appellate level, these cases do not apply to the case at bar for the simple reason that the Trial Court here was presented with the very issues, documents and arguments—and was very clearly aware that it would be entertaining the same—that are now before this Court on appeal. Appellants are not raising any issues to this Court that were not first raised to the Trial Court. Thus, these cases are not relevant.

Appellants would point out that the *Kiawah Prop. Owners* case supports Appellants' position. One of the holdings there was that an issue cannot be raised for the first time on a motion for relief from judgment that could have been raised prior to the judgment being issued in the first place. Here, the Order of Judgment entered by the Trial Court at the direction of the Supreme Court was retroactive to November 2013. As argued in Appellants' Initial Brief, the Order of Judgment is not a new judgment, and it does not revive the original 2013 judgment; the Order of Judgment is simply a mathematical correction of previously entered and subsequently released judgment. The Agreement did not exist until 2016 and could not have been raised before then. Thus, Appellants were perfectly within their right to petition the Trial Court in 2022 to enforce the Agreement reached in 2016 because the judgment was not final until 2022 and was entered retroactively to 2013.

Other than Respondent's own self-serving statements, no valid arguments or case law have been presented to support Respondent's claims that Appellants are prevented from claiming the protections of the Agreement. Therefore, Respondent's arguments to these points should be disregarded.

## **II. Respondent Mischaracterizes and/or Misunderstands the Issues on Appeal**

Respondent at worst mischaracterizes and at best misunderstands the issues of which Appellants seek review. Contrary to Respondent's statements in its Initial Brief, Appellants recognize that the Supreme Court's remittitur resulted in a reallocation of the dollar figures against them, retroactive to the original judgement entered November 8, 2013. Appellants are not seeking a reversal of the entry of the new judgment amounts, but rather a review of the Trial Court's order declining to enforce both the Agreement and Release of Lien *after* the Supreme Court's order had been carried out. It is Respondent who is seeking an unprecedented ruling from this Court: that a remittitur from the Supreme Court correcting mathematical errors within an original jury verdict—the portion of which related to Appellant Thoennes was released and marked as satisfied/canceled in the Clerk of Court's office (see Oconee County Tenth Judicial Circuit Public Index)—equates to a new or "intervening" judgment that supplants, revives or otherwise reinvigorates said satisfied judgment, or otherwise voids a previously entered settlement agreement. Such a ruling would fly in the face of the policy of this State to encourage settlement in lieu of litigation (see *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct.App. 1992)), permit parties to evade the South Carolina Appellate Court and Supreme Court Rules, as discussed in its Initial Brief, and further act as an aberration of the law regarding judgments.

With respect to the Trial Court's error in improperly interpreting the Release and Settlement Agreement, Appellants would simply reiterate the arguments set forth in its Initial Brief. Further, Appellants would point out that the case of *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997), cited by Respondent supports Appellants' position. Specifically, the *Hawkins* case states in part: "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. ... Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact for the jury." (*Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878, 879, internal citations omitted). As previously indicated, Respondent's counsel and counsel for Marick's insurers authored the Agreement; Appellants' trial counsel was not involved. Appellants maintain that the Agreement language was clear and unambiguous and that the Trial Court committed reversible errors of law in applying his own interpretation of the Agreement, in relying solely upon the Respondent's version of the genesis of the document, and by refusing to permit Appellants' coverage counsel to rebut Respondent's arguments (Transcript of Record, September 16, 2022, p. 4, lines 19-25). As set forth in Appellants' Initial Brief, the Agreement uses the term "release"; it does not reference a covenant, which is not the same as a release. Respondent did draft and enter a covenant with other parties to the underlying litigation, and could have done so with Appellants, but chose not to. Instead, Respondent released Appellant Thoennes by the very language of the document, and then took the further step to file the Release of Judgment Lien as to Rick Thoennes Only.

Respondent, in an obvious effort to re-cast the Agreement as something other than the release that it is, points out that the Agreement states that it will “...release *certain* obligations of Rick Thoennes altogether.” (Initial Brief of Respondent, p. 13. Emphasis placed by Respondent, not contained in the original Agreement.) Inexplicably, Respondent interprets this language to mean that Appellant Thoennes not only has multiple obligations related to the judgment but that they are also not all released. The only judgment rendered against Appellant Thoennes was for breach of fiduciary duty. Thus, the “certain obligations” could only be referring to that particular judgment. Nevertheless, Respondent posits its explanation as the only correct and logical one, which is completely without merit.

There is no room for interpretation in either of these documents, and for the Trial Court to have imposed its own interpretation, to have looked beyond the four corners of the document for explanation, and to have received explanations of the parties’ “true intent” only from Respondent (without first finding the documents were ambiguous) was clearly legal error that requires reversal.

**III. The Court should disregard Respondent’s references to arguments presented to the U.S District Court and any briefs, materials, or orders cited or presented as part of the Record on Appeal**

Respondent has made repeated references to arguments, briefs, and orders submitted or presented to or issued by the U.S. District Court regarding the coverage action Respondent filed against the Appellants’ carriers. Appellants move to strike any references to these arguments, briefs or orders, because the same are inapplicable to the case currently before this Court, and because they were not presented to the Trial Court for consideration: “...The Record shall not, however, include matter that was not presented to the lower court or tribunal.” (Rule 210(c) of the SCACR). Whether Respondent released Appellant Thoennes from any judgment (regardless

of when entered) is mutually exclusive of whether coverage exists for that same judgment and is irrelevant for purposes of this appeal.

**IV. Set Off Must Still Be Decided**

Appellants assert that they are still entitled to a determination of set off, and requests that this Court remand, at the very least, this issue to the Trial Court for a determination of the same. Specifically, the Trial Court must be provided the opportunity to hear from both Appellants and Respondent with regard to this issue. Although Respondent has indicated that the monies paid by Defendant Cox were for a particular cause of action, that argument has not been considered, reviewed or ruled upon by the Trial Court (hence the need to remand for a determination of this issue).

**V. Respondent's Remaining Arguments are without Merit**

Respondent has asserted various other arguments that are without merit, and are addressed either in Appellants' Initial Brief or below.

1. The 60(b)(5) Motion was not Timely

Respondent incorrectly states that Appellants' Rule 60(b)(5) motion was untimely. Appellants' motion was filed on June 10, 2022, technically before the formal Order of Judgment was filed on June 24, 2022, but approximately eight days after the Trial Court signed the Order. Since the case had been on appeal the judgment was not yet final until the Supreme Court directed the Trial Court to enter the corrected judgment retroactive to November 2013, which it did on June 24, 2022. Therefore, Respondent's argument with respect to timeliness fails because the petition was filed well within the one-year timeframe.

2. Appellants had no duty to notify any court of the existence of the Agreement

Respondent's additional argument that Appellants were "duty-bound" to notify any Court of the existence of the Agreement also fails. Respondent has cited no case law that supports its position. However, Respondent was a party to the Agreement—indeed, assisted in drafting it—and certainly had the same duty as did Appellants, if a duty even existed. Appellants do not believe a duty existed; indeed, Appellants have cited case law within their Initial Brief that support their position that the Agreement could not be enforced until the appeal was either dismissed or otherwise resolved. See *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013). Therefore, this argument also fails and should be disregarded.

#### 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,

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**PROOF OF SERVICE**

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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 5th day of June 2023, a true and accurate copy of this **Reply Brief** was served via electronic mail using the email addresses listed in the Attorney Information System as follows:

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