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Jun 29 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, Circuit 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.

**APPELLANTS' MOTION TO STRIKE PORTIONS OF
RESPONDENTS' DESIGNATION OF MATTER AND
FOR EXTENSION TO FILE RECORD ON APPEAL AND FINAL BRIEFS**

Appellants Marick Home Builders, LLC, and Rick Thoennes (hereinafter referred to collectively as "Appellants"), pursuant to the South Carolina Rules of Appellate Procedure 209, 210(c), and 240, hereby respectfully move this Court for an Order striking certain documents and materials from Respondents' Designation of Matter to be included within the Record on Appeal.

The bases for this Motion are as follows:

1. Appellants' Petition for Post Judgment Settlement was heard by Judge Lawton McIntosh on September 16, 2021.
2. The order denying that Petition was filed September 21, 2022.
3. Appellants filed a Motion to Reconsider on September 29, 2022.
4. The Order denying that Motion was filed October 10, 2022.
5. Appellants filed and served their Notice of Appeal of both of the above-referenced Orders on November 8, 2022.
6. Appellants filed and served their Initial Brief and Designation of Matter on April 6, 2023.
7. Respondents filed and served their Designation of Matter to be included in the Record on Appeal on May 15, 2023.
8. Items 1-14 of the Respondents' Designation of Matter to be included on the Record on Appeal are identical to those items identified by Appellants in their own Designation of Matter.
9. Items 15-18 of Respondents' Designation of Matter are detailed as follows:
 - a. Item 15—Respondents' Motion to Certify Case for Review by the South Carolina Supreme Court, filed 12/15/22;
 - b. Item 16—Order filed 2/9/2023. This order is the South Carolina Supreme Court's Order denying Respondent's Motion to Certify Case for Review;
 - c. Item 17—Form 4 Order, filed 1/22/2015 (2009-CP-37-0652). This is an order from the original Trial Court Judge, Judge Alexander McCauley, who has since retired.
 - d. Item 18—USCA4 Order, argued October 28, 2022, filed December 13, 2022. This is an unpublished decision of the United States Court of Appeals for the Fourth Circuit

Court regarding a declaratory judgment action between Respondents and two insurers for the Appellants.

10. Appellants object to the inclusion of items 15-18 of the Respondents' Designation of Matter on the grounds that they are both irrelevant and were not presented to the Circuit Court for review.

11. Rule 209(b) of the South Carolina Appellate Court Rules reads as follows:

“(b) Content. The Designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. **A party shall not include any matter in his Designation which is not relevant to the appeal.**” (Emphasis added)

12. Rule 210(c) of the South Carolina Appellate Court Rules reads, in pertinent part, as follows:

“(c) Content. The Record on Appeal shall include all matter designated to be included in the Record on Appeal by any party under Rule 209 and shall comply with the requirements of Rule 267. **The Record shall not, however, include matter which was not presented to the lower court or tribunal. ...**” (Emphasis added).

13. Appellants assert that items 15-18 of the Respondents' Designation of Matter are improperly designated to be included as part of the Record on Appeal because they were not presented to the lower court or tribunal. In fact, items 15, 16, and 18 postdate the Notice of Appeal. Thus, there was no opportunity for any of these items to have been

considered by the Circuit Court. Item 17, though it is an Order that was issued by Judge McCauley after he presided over the trial of this matter, was not a document or matter considered by Judge Lawton McIntosh in issuing the Orders that are the subject of this Appeal.

14. Item 18, as discussed above, is an unpublished order issued by the United States Court of Appeals for the Fourth Circuit in a declaratory judgment matter that was pending between Respondents and two insurance carriers of Appellants. Appellants' current counsel were and are not involved in that matter and did not participate in any aspect of that case. The subject matter of the declaratory judgment case is not germane to the subject matter of the appeal before this Court. Further, the case was argued in October of 2022, approximately one month after the September 2022 hearing on Appellants' Petition for Post-Trial Settlement, and the opinion was not issued until after Appellants filed their Notice of Appeal. Item 18 is therefore irrelevant to this Appeal, because it was did not exist at the time Judge McIntosh heard arguments leading to the Orders that are the subject of this Appeal, and certainly could not have been considered by him.
15. Based upon the above, Appellants respectfully request this Court issue an Order striking items 15-18 of the Respondents' Designation of Matter, extending the deadline for Appellants to file and serve the Record on Appeal, and extending the deadline for both Appellants and Respondents to file and serve their respective Final Briefs.
16. Alternatively, should this Court permit items 15-18 of the Respondents' Designation of Matter to remain therein, Appellants request they be afforded an opportunity to supplement their own Designation of Matter to be included in the Record on Appeal to

include their Return to Motion to Certify Case for Review by the South Carolina Supreme Court, and reiterate their request for an extension of the current deadlines for filing and serving both the Record on Appeal and Final Briefs.

Respectfully submitted,

By: *s/ Stacey P. Canaday*

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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 19th day of December 2022, a true and accurate copy of this *Appellants' Motion to Strike Portion of Respondents' Designation of Matter* was served via electronic mail using the email addresses listed in the Attorney Information System as follows:

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