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Jul 10 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.

RESPONDENTS' RETURN TO APPELLANTS' MOTION TO STRIKE

Respondents, pursuant to the South Carolina Rules of Appellate Procedure 209, 210(c), and 240, hereby issue their Return to Appellants' Motion to Strike Portions of Respondents' Designation of Matter to be included in the Record on Appeal. Respondents reply as follows:

This Court has stated that "trial court[s] should have included material that threw light upon the question involved on appeal and was necessary to a proper understanding and disposition of the question." *Mauro v. Clabaugh*, 299 S.C. 184, 187, 383 S.E.2d 244, 246 (S.C. App. Ct. 1989) (citing *Grant v. Osgood*, 241 S.C. 140, 127 S.E.2d (S.C. App. Ct. 1962)). That same line of thinking applies here in that all material that sheds light on the question at hand should be included in the

Court's review. The only restrictions on what can be included in a designation of matter comes from Rule 209 which states "a party shall not include any matter in his Designation which is not relevant to the appeal." *SCACR*. All documents that the Respondents have included in their Designation are relevant and important.

Items 15 and 16 are the procedural history of *this* appeal, and are, therefore, directly relevant to the appeal to give the Court a full view of the case.

Item 17, the Order of Judge Macauley, is also directly relevant to the appeal in that it was the Order from which the appeal of the underlying matter arose, which resulted 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).

Finally, as for Item 18, and *Stoneledge at Lake Keowee Owners Ass'n v. Cincinnati Ins. Co.*, 2022 U.S. Dist. Lexis 34292 (December 13, 2022), it is a decision of the Fourth Circuit Court of Appeals that bears directly on the issues pending before this Court. Counsel objects to the inclusion of that opinion on the basis that counsel was not "involved" in the Fourth Circuit case, which is certainly true, but counsel's involvement, or lack of involvement, is not at issue. Counsel was not "involved" in the underlying trial, any of the exhaustive appeals of that matter, negotiations concerning the 2016 Agreement, or filing the Motion to Enforce Settlement either (all of which were attended by Jason Imhoff, who was prior counsel for Appellants), which counsel surely must concede are relevant to this appeal.

The relevance of the Fourth Circuit decision is clear. In the Fourth Circuit appeal, the insurers for Marick and Thoennes¹, which retained and are directing current counsel, raised the

¹ In the 2016 Agreement, Respondents agreed not to pursue recovery of any judgment against Mr. Thoennes personally. Further, that the insurers have coverage for the judgments against both Marick and Thoennes has been determined with finality by the 4th Circuit. As a result, Marick and Thoennes, as Appellants, are nominal parties only. It is the insurers who seek to minimize their own exposure to those judgments.

issue of the 2016 Agreement in an attempt to argue that the Thoennes Judgment was extinguished by the 2016 Agreement, and that the District Court's finding of coverage for that judgment was in error. The Fourth Circuit rejected the argument.

Having lost that argument in the Fourth Circuit, through current counsel in this appeal, the insurers are making the same argument in this appeal. In response, Stoneledge has argued that the argument lacks merit and was waived. While the Fourth Circuit's conclusion that the argument about the 2016 Agreement both lacked merit and was waived is not binding on this Court, it is certainly relevant to this appeal and is something this Court should know about and consider.

The proposed exhibits also complete the record. Appellants' effort to hide from and prevent this Court from considering procedural and directly related matters is itself instructive. The Appellants' appeal, which is another chapter in a decade long effort to avoid accountability for a jury verdict rendered in 2013, is "smoke and mirrors." It is an appeal from an order of the Circuit Court which complied, in every respect, with a direct order from the South Carolina Supreme Court. It is predicated on an argument concerning the 2016 Agreement which Appellants now contend voided a judgment against Rick Thoennes in 2016, which Appellants inexplicably continued to appeal to completion without ever suggesting to anyone, or any tribunal, that the judgment was ostensibly voided in 2016. Appellants' Motion to Strike is an effort to preclude this Court from knowing and understanding the complete history of this appeal or the underlying case.

Respondents request that the items at issue be included in the Record on Appeal and that the Court of Appeals, in its wisdom consider those items and give them whatever weight the Court of Appeals wishes to afford them.

s/Robert T. Lyles, Jr.

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY

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

Appellate Case No.: 2022-001581

Paul W. Hund, III, Joan W. Davenport, Michael Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso, Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix, Ruth E. Isaac, Michael D. Plourde, Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette J. Taylor, Robert White, Stoneledge at Lake Keowee Owners' Association, Inc..... Respondents,

v.

IMK Development Co., LLC, Marick Home Builders, LLC, and Rick Thoennes..... Defendants,

Of whom Marick Home Builders, LLC and Rick Thoennes are Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the Respondents Return to Appellants' Motion to Strike on counsel for the Appellants by electronic mail on this 10th day of July 2023, addressed to the following:

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