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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2024-001424

Fenwick Commons Homeowners Association, Inc.,

Plaintiff, Respondent

-vs-

Portrait Homes - South Carolina, LLC; Portrait Homes-Fenwick Commons, LLC; D.R. Horton, Inc.; Samuel Glover d/b/a Glover's Brickworks; Glover's Brickworks, Inc.; JJA Construction, Inc. d/b/a JJA Framing; JJA Construction, Inc. d/b/a JJA Framing Company; Jose Castillo d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing Company; International Construction Services, Inc.; International Construction Services, Inc., d/b/a International Construction; United Siding Specialists, Inc.; Old Charleston Builders, LLC; Heritage Construction Consultants, Inc.; Robert H. Yarnall d/b/a Heritage Construction Consultants, Inc.; PNL Construction, LLC; Clear Choice Group, LLC; Built Right Construction, LLC; Alfonso Villavicencio d/b/a Alfonso's Painting; Alfonso Painting & Drywall, Inc.; Diria Tawi Painting, Inc.; Juan Luis Sanchez d/b/a Sanchez Brothers Painting; Sanchez Brothers Painting, Inc.; Windward Shutters, LLC, d/b/a Windward Hurricane Shutters, LLC;84 Lumber Company; **Builders Firstsource - Southeast Group, LLC;** Americo Roofing Concepts, f/k/a Americo Roofing Concepts, f/k/a Americo Roofing Concepts Enterprises, Inc.; Americo Roofing Concepts, Inc. f/k/a American Roofing Concepts; Archer Exteriors, Inc.; and Professional Exteriors, LLC; Luciano Dias Gomes d/b/a Prestige Home Construction; Geraldo Da Cunha; Pablo Rojas Franco; Charles Gunter; Henry A. Palmer; Julio C. Crespo; Brasilican Contracting, LLC; Charles Bowser d/b/a CWB Services; Levi Arruda; Jose Geraldo Dos Reis; Leandro De. Paulo Araujo; Helio A. De Rezende; Vinivius Araujo De Freitas a/k/a Vinicius Araujo; Robert M. Hughes d/b/a Robert's Vinyl Siding; Lucas Rodrigues Barcelos a/k/a Lucas Rodriguez Barcelos; Karla Bazerra; Rodrigo B. Vasconcelos; Rondinelly G. Da Silva; Marcio Nunes Da Silva; W&M Vinyl Siding, LLC; Bar Contractors, Inc.; William Construction Services, LLC; and Donald Lee d/b/a Vinyl Siding Specialists, Defendants,

of which Builders FirstSource - Southeast Group, LLC is the Appellant.

RETURN OF APPELLANT TO RESPONDENT MOTION TO DISMISS

RETURN

Respondent submits two flawed arguments for why the appeal should be dismissed: 1) the order denied summary judgment and 2) while the order granted summary judgment, it did not involve the merits and did not affect a substantial right of BFS.[1] Respondent's second argument (that the order *granted* summary judgment) contradicts its first argument (that the order *denied* summary judgment) and underscores why this appeal must not be dismissed. Respondent acknowledges that the order on appeal *granted* BFS summary judgment for Fenwick HOA claims at certain townhomes. Further, Respondent quotes relevant case law for the notion that orders *granting* partial summary judgment are generally immediately appealable if they 'involve the merits' or affect 'substantial rights' of a party.

As explained below, the August 1, 2024 Order granting BFS summary judgment is immediately appealable because it involves the merits as it finally determines substantial matters forming part of the causes of action and the defenses. See S.C. Code Section 14-3-330(1) and *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

[1] Repeatedly, throughout its motion to dismiss, Respondent relies upon its assertion that HOA counsel stipulated that it was not pursuing claims against BFS for installation of window screens. This is simply not correct. A brief review of the pleadings submitted by the parties for the lower court's consideration and the subsequently issued orders on appeal proves that HOA counsel made no such stipulation. See Appellant Exhibit 1 - Fenwick HOA Memorandum in Opposition to BFS Motion for Summary Judgment, Respondent Exhibit 2 – August 1, 2024 Order granting BFS summary judgment, Respondent Exhibit 3 - BFS Motion to Reconsider, and Respondent Exhibit 4 – August 2, 2024 Order denying BFS Motion to Reconsider. It is important to note that the August 1, 2024 Order granting BFS summary judgment was prepared exclusively by Respondent / HOA counsel and adopted and signed by the lower court without any revision made thereto. IF Respondent / HOA counsel stipulated as it now argues, this begs the question why counsel did not include the stipulation in its proposed order? The **only** stipulation that HOA counsel put in writing was that Fenwick HOA was not pursuing claims against BFS for BFS supply of trusses to Portrait Homes. See Exhibit 2 Order. Conversely, IF Appellant is mistaken, Respondent's argument only emphasizes the fact that the lower court made another error and signed an Order that did not accurately reflect the actions of the parties.

Additionally, the August 1, 2024 Order ends the case for certain townhomes. Moreover, the August 1, 2024 Order substantially affected the rights of BFS by allowing claims to proceed where Plaintiff lacks standing.

The question of whether an order is immediately appealable is determined on a case-by-case basis. *Stone*, 426 S.C. 291, 295 (2019)(*citing Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537–38, 773 S.E.2d 144, 146 (2015)).

Under S.C. Code Ann. Section 14-3-330(1), this Court may review an intermediate order that involves the merits of the action. An order 'involves the merits' when it finally determines some substantial matter forming the whole or part of a cause of action or defense. *Stone*, 426 S.C. 291, 294–95 (2019)(*citing Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

In *Stone*, the parties disputed whether or not they were married under common-law. After reviewing the evidence presented by the parties, the lower court determined the parties were married. *Stone*, 426 S.C. 291, 294 (2019). The lower court's marriage order did not end the case as the parties' divorce and equitable distribution claims were still pending. *Id.* Nevertheless, Thompson appealed the marriage order and Stone moved to dismiss the appeal arguing that the order was interlocutory and not immediately appealable under Section 14-3-330. *Id.* The Supreme Court held that the order was immediately appealable because it involved the merits of the case. *Id.* at 296. The Supreme Court explained that actions for divorce and equitable distribution require a determination that the parties are married and such determination is substantial, not only as a part of the causes of action, but also in terms of the consequences of marriage and how such a determination affects other areas of law. *Id.* at 295. The Supreme Court also

noted that one of the primary defenses to the causes of action was that the parties were not married. *Id.* For these reasons, the Supreme Court believed the text of subsection (1) and South Carolina jurisprudence compelled the conclusion that the order was appealable. *Id.* Paramount to the *Stone* holding was that the lower court weighed the evidence and determined – that the parties being married was a substantial matter– that formed part of Stone's causes of action, as well as Thompson's defense.

Turning to our case, the parties performed extensive discovery over the course of nearly six (6) years. At the summary judgment hearing, the lower court heard multiple arguments of the parties, reviewed the records submitted, and determined that there was no evidence to support Fenwick HOA's claims against BFS for certain townhomes. The lower court's determination that there is no evidence should end the case. The problem with the lower court's determination, and Order, is that it makes summary judgment contingent on the non-moving party's consent. Moreover, the lower court made its limited and contingent summary judgment ruling despite Fenwick HOA failing to present any relevant, admissible evidence that created a genuine issue of material fact for trial against BFS. Additionally, the lower court erroneously determined that Fenwick HOA has standing to pursue claims against BFS for damages allegedly resulting from installation of the windows despite the plain language of the governing document for the community that expressly excludes the duty to maintain the windows from Fenwick HOA. See Appellant Exhibit 2, Exhibit A, p. 10 to BFS Memorandum in Support – "exterior maintenance shall not include glass surfaces."

The Appellant firmly believes that the August 1, 2024 Order of the lower court granting summary judgment is immediately appealable. However, if this Court

determines that the August 1, 2024 Order is not immediately appealable, Appellant would respectfully request that the Court allow this appeal to proceed as it has done in other appeals. See *Hite v. Thomas & Howard Co.,* 305 S.C. 358, 409 S.E.2d 340 (1991); *Ferguson v. Charleston Lincoln Mercury, Inc.,* 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002); *Watson v. Underwood*, 407 S.C. 443, 459–60, 756 S.E.2d 155, 163–64 (Ct. App. 2014). As set forth above and in more detail in Appellant's Initial Brief, this appeal proceeding will avoid unnecessary litigation between the parties as Fenwick HOA lacks standing and has no relevant admissible evidence that would create a genuine issue of material fact for trial against BFS.

CONCLUSION

Because the lower court granted summary judgment contingent on the non-moving party's consent and because the lower court ignored the plain language of the governing documents, Appellant hereby requests that this Court deny Respondent's motion to dismiss and REVERSE the August 1, 2024 Order and GRANT summary judgment to BFS. Alternatively, the Appellant requests that this Court REVERSE the August 1, 2024 Order and REMAND for a new hearing.

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