

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

Jasper County Case No. 2010-CP-27-252
Appellate Case No. 2014-002609

Jasper County,

Respondent,

v.

The Settings of Mackay Point,
LLC and Bond Safeguard
Insurance Company,

Defendants,

Of which Bond Safeguard
Insurance Company is

Appellant.

PETITION FOR REHEARING

Bond Safeguard Insurance Company asks a panel of this Court to reconsider a single judge's February 5, 2015 order granting Jasper County's motion to dismiss the appeal. Respectfully, the Court either overlooked important points of fact and law, misapprehended them, or a combination of both. Bond Safeguard is appealing an order that, under the unique circumstances in this case, effectively decided the merits of, and struck, defenses to a \$3 Million bond claim. Although the order certainly is appealable under two portions of South Carolina Code section 14-3-330, this Court, without explanation, reached the incorrect result. The panel should set aside that order and allow

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Bond Safeguard to proceed to the merits of its appeal. Further, because the appealability of interlocutory orders is an important issue for this Court's jurisdiction and for appellate procedure, the issues Jasper County and Bond Safeguard have raised in this motion warrant a more detailed explanation than what the Court provided in its short order of dismissal.

BACKGROUND AND PROCEDURAL HISTORY

This appeal arises from a dispute involving the development of a neighborhood along the Pocotaligo River. The Settings at Mackay Point, LLC ("Mackay Point, LLC") was the neighborhood's owner and developer. (Return Exhibit¹ A (Affidavit of Bruce Maas) at ¶ 6). In June 2006, Mackay Point, LLC and Jasper County entered into a development agreement for the project. (*See generally* Return Exhibit B (Development Agreement)). In that agreement, Mackay Point, LLC agreed to build infrastructure for the neighborhood's several phases, under a pace that was to be "dictated largely by market conditions." (*Id.* at p. 46).

Bond Safeguard was Mackay Point, LLC's surety for the project. It issued five bonds, each of which relates to a specific aspect of the project. For example, Bond No. 5025755 relates to infrastructure for Phase II West of the neighborhood. (*See* Return Exhibit C (Bond)). The amount covered by that bond is \$3,049,161.14. (*Id.*)

The development agreement initially had a ten-year term but provides ultimately that "[d]evelopment activity may occur faster or slower than the forecast schedule, as a matter of right, depending upon market conditions." (Devel. Agreement at p. 46). The market conditions turned out to be infamously poor. Following the collapse of the housing market in 2008, South Carolina's

¹ Bond Safeguard submitted a number of exhibits with its return to Jasper County's motion to dismiss the appeal. Rather than resubmitting those documents, Bond Safeguard hereby incorporates its return exhibits into this petition.

development industry fell into what the General Assembly described in 2010 and 2013 as “a state of economic emergency” that affected “none as severely as the state’s banking, real estate, and construction sectors.” (Return Exhibit E (Permit Extension Joint Resolution of 2013) at p. 1; Return Exhibit F (Permit Extension Joint Resolution of 2010) at p. 1). Mackay Point, LLC and the proposed neighborhood were not immune to the collapse. (*See* Maas Aff. at ¶¶ 8, 27). For example, Mackay Point, LLC sold only three of Phase II West’s 101 lots. (Return Exhibit H (Suppl. Mem. in Opp. to Summ. J. dated Nov. 23, 2013) at p. 2). The last of those sales took place in November 2007, and Bond Safeguard and Mackay Point, LLC later bought back the lots. (*Id.* at pp. 2-3 & n.1).

Jasper County’s Lawsuit

Unsatisfied with the progress in development, Jasper County eventually sued Bond Safeguard and Mackay Point, LLC. (*See generally* Return Exhibit F (Summons & Compl.)). The County alleged that Mackay Point, LLC breached its contractual obligations to develop the neighborhood and that as a result, Bond Safeguard must either pay the County the penal sums of the bonds or hire companies to perform the work covered by the bonds. (*See generally id.*). Bond Safeguard answered, denying liability.²

Bond Safeguard and Jasper County have diligently litigated the issues in the case and have resolved the majority of their dispute. They have mediated twice, and although Judge Ernest Kinard granted the County summary judgment at one point, he later vacated that ruling after Bond Safeguard filed a motion to alter or amend. The case now involves only the bond for Phase II West. (Maas Aff. at ¶ 25).

² Mackay Point, LLC did not appear in the case.

Lot 228

As to Phase II West, many of Bond Safeguard's defenses have turned on the factual premise that Bond Safeguard and Mackay Point, LLC own all the Phase II West lots, and thus there is no need for infrastructure there. Accordingly, Bond Safeguard has argued, neither it nor Mackay Point, LLC has any obligation to build infrastructure for Phase II West, and in any event, building the infrastructure for that phase would be wasteful and paying out the bond would give the County an unjustified windfall. *See Westchester Fire Ins. Co. v. City of Brooksville*, 731 F. Supp. 2d 1298 (M.D. Fla. 2010), *aff'd*, 465 F. App'x 851 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 546 (2012); *see also* Return Exhibit G (Mem. in Opp. to Summ. J. dated Aug. 9, 2012) at pp. 3-4; Suppl. Mem. in Opp. to Summ. J. at pp. 2-3; Return Exhibit I (Motion to Alter or Amend dated Dec. 20, 2013) at pp. 9, 12-14.

Lot 228 is a lot in Phase II West. In 2014, Bond Safeguard learned that a deed had been filed in the Jasper County Register of Deeds' office purporting to show that in September 2013—while Jasper County's summary judgment motion was pending—Mackay Point, LLC sold Lot 228 to a company called Consolidated Ventures, LLC. (Maas Aff. at ¶ 29; Return Exhibit J (Deed)). Bond Safeguard conferred with Mackay Point, LLC, whose representative denied that any such transfer had occurred or that anyone authorized to sign a deed on the company's behalf had done so. (*See* Return Exhibit K (Affidavit of James Cate) at ¶¶ 8-14).

Bond Safeguard investigated the deed. It learned that Consolidated Ventures is an entity controlled by Robert Wolfson. (*See* Maas Aff. at ¶¶ 29, 31 & Ex. I). While Jasper County's case was pending, Wolfson became the assignee of a mortgage on the land for the neighborhood. (*Id.* at ¶¶ 18, 35). Moreover, at Jasper County's request, Wolfson attended one of the mediations between

the County and Bond Safeguard, in which the parties discussed Bond Safeguard's position regarding Phase II West. (*See id.* at ¶¶ 19-21). That mediation took place before the purported sale of Lot 228 to Consolidated Ventures. (*Compare id.* at ¶ 19 (stating mediation took place June 13, 2013) *with* Deed (dated September 11, 2013)).

Bond Safeguard and Mackay Point, LLC concluded that Consolidated Ventures' deed was invalid and appeared to be the product of a fraudulent conveyance aimed at undermining Bond Safeguard's position in the County's lawsuit. (*See* Maas Aff. at Introduction, ¶¶ 35-43; Cate Aff. at ¶¶ 13, 18). In order for Mackay Point, LLC to protect its property rights to Lot 228, and for Bond Safeguard to remedy an apparent manipulation of the evidence in the County's lawsuit, they filed a complaint against Consolidated Ventures, Wolfson, and others on November 14, 2014 (the "Lot 228 Lawsuit"). (*See generally* Return Exhibit L (Lot 228 Lawsuit Summons & Compl.)). Among other things, the complaint in the Lot 228 Lawsuit asks the circuit court to set aside the deed to Consolidated Ventures and declare Mackay Point, LLC the sole owner of Lot 228. (*See id.* at Prayer for Relief).

Bond Safeguard's Motion to Stay

In June 2014, the County filed a second motion for summary judgment. Judge Maité Murphy held a hearing on that motion on November 18. Wolfson appeared at the hearing. At the hearing, Bond Safeguard made a motion to stay the case. Counsel for Bond Safeguard explained that the ownership of Lot 228 is a question whose answer is crucial to defending Bond Safeguard in Jasper County's lawsuit. (Return Exhibit M (Affidavit of Cordes Ford) at ¶ 11). Counsel further explained that Bond Safeguard had only recently completed its investigation into the deed purporting to convey Lot 228 to Consolidated Ventures and that Bond Safeguard and Mackay Point, LLC had filed the Lot

228 Lawsuit in order to restore Mackay Point, LLC's ownership. (*Id.* at ¶ 10).

On December 1, 2014, the circuit court summarily denied Jasper County's summary judgment motion and Bond Safeguard's motion for stay. (Return Exhibit N (Email from Judge Murphy's chambers dated Dec. 1, 2014)). The court set the case for trial Wednesday, December 10. (*Id.*) Bond Safeguard appealed the circuit court's denial of stay on December 4, 2014.

Proceedings on Appeal

Before merits briefing began, Jasper County filed a motion to dismiss the appeal. It argued the circuit court's order is not immediately appealable. Bond Safeguard filed a return. On February 5, 2015, the Honorable Stephanie McDonald granted Jasper County's motion. In a terse order, Judge McDonald found the circuit court's order was not immediately appealable because it did not involve the merits or strike an answer or any pleading.

ARGUMENT

The profound impact that the circuit court's order had on the merits of the case places the order squarely within two provisions of section 14-3-330. Respectfully, the Court either overlooked or misapprehended that impact, and it may well have employed the wrong analysis to rule on Jasper County's motion. Those errors require rehearing and reinstatement of the appeal.

I. This Court Has Jurisdiction Under Subsection 14-3-330(1).

This Court has jurisdiction to review "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas." S.C. Code Ann. § 14-3-330(1) (1976 & Supp. 2014). "An order 'involves the merits' when it finally determines a substantial matter forming the whole or a part of some cause of action or defense." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011).

As discussed above, the keystone of certain of Bond Safeguard's defenses is that all of the Phase II West lots are owned by either Bond Safeguard or Mackay Point, LLC, neither of which has any desire or intention to build its own house in the neighborhood. *See Weschester Fire Ins. Co.*, 731 F. Supp. 2d at 1307. But the actions of persons and entities not parties to this case have left Bond Safeguard unable, for the time being, to prove that key fact. According to the public records, Consolidated Ventures owns Lot 228. The law presumes Consolidated Ventures' deed for Lot 228 is valid. *See Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) ("Where a deed is valid and regular on its face, it is presumed to be valid in all respects."). Bond Safeguard cannot rebut that presumption at this time. To do so, Bond Safeguard needs to obtain a favorable resolution in the Lot 228 Lawsuit. By denying Bond Safeguard a stay, the circuit court denied it an opportunity to win the Lot 228 Lawsuit in time to make a difference in Jasper County's lawsuit.

Bond Safeguard brought these unusual circumstances to the circuit court's attention, and then the court denied the stay. In light of those circumstances, the upshot of the court's order is that Bond Safeguard has lost certain of its defenses. In other words, the order had the effect of finally determining a "substantial matter forming the" key part of those defenses. That means the circuit court's order "involves the merits," and therefore is appealable, under subsection 14-3-330(1).

This Court's basis for holding otherwise is not apparent from its order. After reciting Bond Safeguard's position on appealability, the Court stated without explanation that the circuit court's order does not involve the merits. While Bond Safeguard does not believe the Court acted arbitrarily, the Court's order fails to reveal what reasoning guided its decision or how it analyzed Bond Safeguard's arguments, the significance of Lot 228, and the effect of denying the stay. If anything, the order's brevity suggests that the controlling factor in the Court's analysis may have

been the label of the circuit court's order, rather than its effect.³ If so, that analysis was flawed. *See Wetzel v. Woodside Dev. Ltd. P'ship*, 365 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (finding order relieving defendant from default on basis of improper service was appealable because it had "the effect" of dismissal under Rule 12(b)(5), SCRCF, and thus ended the action as to that defendant); *cf. Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (stating that to determine whether an order is appealable under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title). However, whatever analysis the Court employed, it led the Court to the wrong answer. Bond Safeguard asks that the panel reviewing this petition focus on the effect of the circuit court's order, which demonstrates it is appealable under subsection 14-3-330(1).

II. This Court Has Jurisdiction Under Subsection 14-3-330(2)(c).

An order "affecting a substantial right" is immediately appealable when it has the effect of "strik[ing] out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c) (1976 & Supp. 2014); *see also Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (stating that to determine whether an order is appealable under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title). "An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479; *see also Edwards*, 369 S.C. at 94, 631 S.E.2d 530 ("Orders affecting a substantial right 'discontinue an action, prevent an

³ Among other things, Bond Safeguard is concerned the Court may believe an order denying a stay categorically is unappealable. To be sure, the Supreme Court has held orders granting a stay and lifting a stay are not appealable. *See Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 97, 644 S.E.2d 681, 682 (2007) (per curiam) (order lifting stay); *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) (order granting stay). Those cases, however, are readily distinguishable. In addition to the fact that neither involved the outright denial of a stay, the orders at issue in those cases did not have an effect that would make them immediately appealable under section 14-3-330. *See, e.g., Edwards*, 369 S.C. at 94-95, 631 S.E.2d at 530-31 (analyzing the effect of the order granting stay on that particular case).

appeal, grant or refuse a new trial, or strike out an action or defense.” (quoting *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993)).

Certainly, the circuit court’s order removes a material issue—ownership of Lot 228— from the case, thereby preventing Bond Safeguard from establishing any of its defenses that are based on ownership of Phase II West lots. Moreover, Bond Safeguard will not be able to correct the circuit court’s error during the trial. On the contrary, by pushing Bond Safeguard into trial without several defenses, the court’s order creates the problem Bond Safeguard now faces. Nor could Bond Safeguard correct the error after trial. It would lose a JNOV motion involving ownership of Lot 228, it would lack the evidence needed to move for a new trial or to vacate, and it could not introduce on appeal evidence of whatever resolution it obtains in the Lot 228 Lawsuit. *See* Rules 50(b), 59 (a)-(b), & 60(b), SCRCP; Rule 210(c), SCACR. Accordingly, the circuit court’s order fits squarely within the explanation of subsection 14-3-330(2)(c) this Court articulated in *Thornton*. Thus, the order is immediately appealable under subsection 14-3-330(2)(c).

As mentioned above, this Court’s basis for concluding otherwise is not apparent from its order. Whatever that basis may have been, respectfully, it led the Court to the incorrect outcome. Bond Safeguard asks that the panel reviewing this petition focus on the effect of the circuit court’s order and hold that it is appealable under subsection 14-3-330(c)(2).

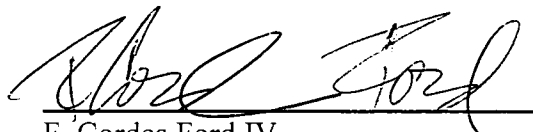
REQUEST FOR ORAL ARGUMENT

Bond Safeguard requests that the panel hold oral argument. Given the highly unusual history of the case and the importance of this appealability question to this Court’s jurisdiction and to the appellate process, oral argument may aid the panel. *Cf.* Rule 215, SCACR.

CONCLUSION

While the circuit court's order here is interlocutory, that characteristic does not prevent Bond Safeguard from immediately appealing it. What matters is its effect. Under the peculiar circumstances in this case, the order had the effect of striking defenses and involved the merits. Bond Safeguard therefore respectfully asks that the panel set aside Judge McDonald's order, hold the circuit court's order is immediately appealable, and deny Jasper County's motion to dismiss. Alternatively, if the panel agrees with Judge McDonald's decision, Bond Safeguard asks that the panel set forth the authorities and reasoning leading the panel to that conclusion.

Respectfully submitted this 19th day of February, 2015.



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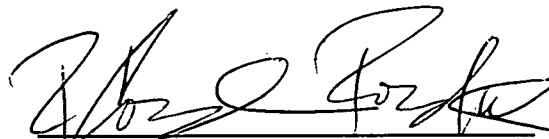
Of which Bond Safeguard
Insurance Company is

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 19, 2015, he served a copy of Bond Safeguard Insurance Company's Petition for Rehearing upon counsel for Respondent by placing a copy in the United States Mail, postage prepaid and addressed to counsel as follows:

David S. Cobb, Esquire
Turner, Padget, Graham & Laney, P.A.
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February 19, 2015

VIA FEDEX, OVERNIGHT DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Calhoun Building
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Jasper County v. The Settings of Mackay Point, LLC and Bond
Safeguard Insurance Company*
Appellate Case No. 2014-002609
WCSR File No. 85369.0000.0

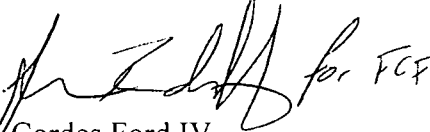
Dear Ms. Kitchings:

I am enclosing with this letter Bond Safeguard's Petition for Rehearing of the Court's order dismissing the appeal, which was filed February 5, 2015. I am also enclosing a \$25.00 filing fee for the petition.

Please let me know if you have any questions or require anything further. Thank you for your assistance.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP


F. Cordes Ford IV

FCF
Enclosure
cc: David S. Cobb, Esq. (w/ enclosures)

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