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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Judge

Appellate Case No. 2014-002766

Circuit Court Case No. 2012-CP-10-3857

Shipwatch Condominium Association, Inc.,..... .. ..Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G Sisnroy, individually; Terrence J McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonnebom, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC, Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, EFCO Corp.; W.C. Johnston Architectural Inc., Gary Freeman, individually, ...Defendants,

Of which Carolina Concrete Systems, Inc , Sisnroy Engineering, LLC; Robert G Sisnroy, individually; Terrence J. McKelvey, Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonnebom, Inc , Chimney Sweeps, Inc ; Low Country Chimneys, Inc.; Charleston Glass Company, Inc ; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp., Gary Freeman Architect, EFCO Corp , W C. Johnston Architectural Inc ; Gary Freeman, individually are. .. .. .Respondents.

RESPONDENTS ACROCRETE, INC.'S and GLASSTEC, INC.'S JOINT REPLY TO APPELLANT'S RETURN TO MOTION TO DISMISS APPEAL AS TO ACROCRETE, INC. and GLASSTEC, INC.

Pursuant to Rule 240, SCACR, Acrocrete, Inc. and GlassTec, Inc. (hereinafter referred to collectively as "Movants") hereby reply to the Appellant's Return to the Motion to Dismiss Appeal as to Acrocrete, Inc. and GlassTec, Inc.

A. Movants' Status as Defendants Below Does Not Make Them Parties to the Appeal.

Appellant contends that because it is a plaintiff, Movants are defendants, and Movants have denied some of the allegations in Appellant's complaint, Movants are "adverse parties" and thus are respondents. As an initial matter, Appellant's assertion that Movants were subcontractors who performed work on the construction project is incorrect. Acrocrete was a material supplier that performed no work on the project. GlassTec provided labor and materials directly to Appellant for window repairs in 2002. But more importantly, the mere fact that Movants and Appellants are opponents in the case below does not make Movants proper parties to this appeal. Rather, the proper parties are those who were subject to the order being appealed. As Movants explained in their motion, they are not subject to the circuit court's decision, the court never made any decision on Appellant's claims against them or even mentioned Movants in the proceedings below.

Appellant cites no authorities for its view of the appellate system. However, a fairly recent Supreme Court case indicates its view is incorrect. In *McGill v Moore*, the plaintiff contracted with eight people to buy their interests in a piece of land. 381 S.C. 179, 183, 672 S.E.2d 571, 573 (2009). When three of those people failed to close on their contracts, the plaintiff sued them for specific performance. 381 S C. at 184, 672 S.E.2d at 574. The defendants filed a partition counterclaim. *Id* The master in equity allowed several other owners to intervene in the partition claim, and he also appointed a guardian ad litem to represent any unknown minors and incompetent persons who might be affected in the partition claim. *Id* Ultimately, without reaching the partition issue, the master ruled against McGill on his specific performance claims *See id*

McGill appealed that ruling but did not serve the notice of appeal on the guardian. 381 S.C. at 184 n.2, 672 S.E.2d at 574 n.2. Both the guardian and the defendants argued that the appeal should be dismissed because the guardian was a respondent, and McGill had failed to serve all respondents, as Rule 203 requires.[1] *Id* The Supreme Court rejected that argument. It explained that because the appeal did not involve the partition claim, the guardian was "not an 'adverse party' in th[e] appeal and not a 'respondent,'" and thus McGill did not have to serve her with a copy of the notice. *Id*

McGill is analogous to this appeal. Like the guardian in that case, Movants were not parties to the decision on appeal here. Rather, like that guardian, Movants are involved in a related, but nonetheless distinct, dispute with the plaintiff, and no ruling has been issued in that particular dispute. *McGill* also demonstrates that being a party to the appealed order is the keystone of "adversity" under the Appellate Court Rules. In *McGill*, the master's ruling on the three contracts, and the Supreme Court's decision on review of that ruling, could have a practical impact on the partition proceedings in that case, and yet the Supreme Court did not find that the guardian was a respondent. Likewise, although it is possible that this Court's decision on granting Carolina Concrete summary judgment might be influential in other defendants' summary judgment motions, that does not make anyone other than Carolina Concrete a respondent.

[1] Specifically, respondents and the guardian argued that under the Appellate Court Rules, "respondents" includes all the parties who oppose the appellant in the case *See* Br of Guardian Ad Litem-Attorney in *McGill v Moore*, 2007 WL 4592813, at *10 (Nov 5, 2007), Br of Respt's in *McGill v Moore*, 2007 WL 4592812, at *8 (Nov 6 2007)

The only material difference between *McGill* and this case is that in the former, someone who was not a party to the decision below was trying to get an appeal dismissed on jurisdictional grounds. Here, Movants are not trying to deny Appellant his right of appeal. They merely ask to not be dragged into an appeal of an order that does not apply to them and that results from proceedings in which they did not participate.

B. The Nature of the Issue on Appeal Does Not Transform Movants into Respondents.

Appellant next argues that the nature of the issue on appeal justifies including Movants as respondents that would be bound by this Court's decision. Noting it has alleged Movants performed work on the project before 2010, Appellant argues Movants should be respondents because the circuit court's order "denies Appellant's right to assert any claims for work performed at the Shipwatch project prior to 2010." (Return p. 2). Appellant has misstated the circuit court's decision in a way that goes right to why Movants should be dismissed from this appeal. The circuit court did *not* hold that Appellant has lost its claims against all the defendants for pre-2010 work. Rather, in a hearing involving only Carolina Concrete's summary judgment motion, and in which only Appellant's and Carolina Concrete's lawyers argued, the court told Appellant's counsel, "You are entitled to sue him [Carolina Concrete] for anything you can relate to things that he [Carolina Concrete] did in 2010." (Tr. of Oct. 27, 2014 Hr'g p. 6:20-22[2]). Consistent with that limitation to Carolina Concrete, the court's Form 4 Order states only that Carolina Concrete's motion, which was filed on September 15, 2014, was granted in part. In other words, the court never granted Movants any relief or even considered their summary judgment motions, which they filed independently of Carolina Concrete and of one another. The Court focused only on Carolina Concrete and ruled only for it.

[2] Appellant attached a copy of the transcript to its April 14, 2015 letter to this Court

To be sure, Movants are seeking summary judgment based on the statute of limitations, based on sets of facts that are similar—but not identical—to those that Carolina Concrete cited in its motion. Moreover, based on their understanding of the facts relating to Carolina Concrete, Movants do believe the circuit court correctly granted Carolina Concrete partial summary judgment. However, neither the similarity of the issues nor Movants' agreement with the relief afforded to another party means that Movants have to defend the judgment below and be bound by what this Court decides on appeal. Under Appellant's view of the appellate process, issues that Movants have raised should be decided in the first instance by an appellate court, and Movants should have to litigate those issues in this Court by defending a judgment that gave them no relief, using only the closed record to which they were unable to contribute in the proceedings below. Appellant's position is at odds with the nature of the appellate system and with due process. This Court should reject it and instead—as it has traditionally done—let the circuit court be the first to rule on Movant's motions

C. Rule 208(b)(6) Does Not Apply in This Appeal.

Appellant also suggests that Movants join in the brief of Carolina Concrete or adopt it by reference. *See* Rule 208(b)(6), SCACR. That rule is not applicable. It applies "[i]n cases involving more than one appellant or respondent." Here, there is only one respondent—Carolina Concrete [3] Moreover, nothing in Rule 208 suggests that parties improperly designated as respondents should be participating in the appeal without the Court's permission It would be inappropriate for Movants and Carolina Concrete to file a joint "respondents'" motion, and if Movants agree with what Carolina Concrete writes in its brief, the appropriate way to convey that agreement is through an *amicus* brief.

[3] Carolina Concrete agrees it is the only true respondent *See* Initial Br of Respondent p 1 (filed Apr 2, 2015)

D. There Are Other Ways for Movants to Participate in This Case, If They Wish.

Finally, Appellant contends that "all parties affected by the appeal" should be made respondents so that they can receive copies of all filings and communications and thus can have an opportunity to participate as they deem appropriate. (Return p. 3) However, as discussed above, this Court's disposition of the appeal could affect Movants only incidentally, if at all. Neither that incidental connection nor the opportunity to participate in the appeal permit Appellant to unilaterally—and improperly—name Movants as parties to the appeal. The parties can use the online South Carolina Appellate Court Public Index to stay abreast of developments in the appeal. If they wish to enter the appeal as parties and be bound by the appellate court's judgment, they may move to intervene *See Al-Shabazz v State*, 338 S.C. 354, 361, 527 S.E.2d 742, 745 (2000); Hon. Jean Hoefer Toal, *et al* , *Appellate Practice in South Carolina* 265 (2d ed. 2002) ("A party may move to intervene in an appeal."). Alternatively, they can participate as *amici* *See* Rule 213, SCACR.

Because Movants are not parties to the order being appealed, were not granted relief by that order, and were not even heard in the proceedings below, they are not "adverse parties" under Rule 202(a). Movants reiterate their request that the appeal as to them be dismissed, that

their designations as respondents be stricken from the caption, and that any stay existing as a result of this appeal be lifted as to Movants so that their respective motions for summary judgment be heard in the Court below.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Respondents Acrocrete, Inc 's and GlassTec, Inc.'s *Joint Reply to Appellant's Return to Motion to Dismiss Appeal as to Acrocrete, Inc and GlassTtec, Inc* by depositing a copy in the U.S. mail, postage paid, on April 17, 2015 addressed to counsel of record as set forth below:

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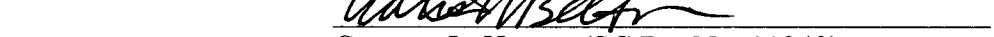

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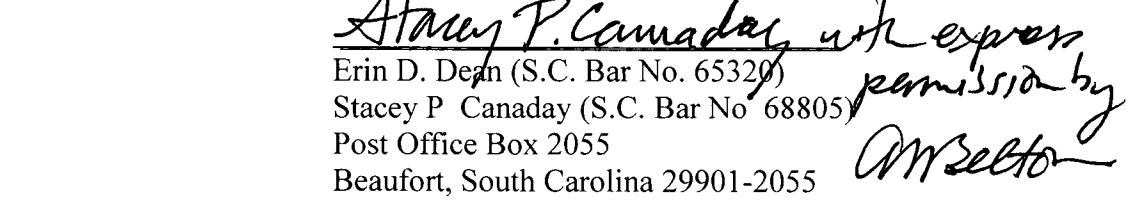

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April 17, 2015

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Re **Oscar Mendiondo v. Carolina Concrete Systems, Inc., et al.**
Appellate Case No. 2014-002765
Circuit Court Case No 2012-CP-10-3858

Shipwatch Condominium Association, Inc. v.
Carolina Concrete Systems, Inc., et al.
Appellate Case No. 2014-002766
Circuit Court Case No 2012-CP-10-3857

Dear Ms. Kitchings:

With regard to the above referenced matters, please find enclosed the original and one copy of Respondents Acrocrete, Inc 's and Glasstec, Inc.'s Joint Reply to Appellant's Return to Motion to Dismiss Appeal as to Acrocrete, Inc and Glasstec, Inc. and proofs of service for each. Please date stamp the copies and return them to us in the self-addressed, stamped envelope which is also enclosed

Thank you for your assistance.

Sincerely,

Adriane Malanos Belton

AMB/mmm
Enclosures
cc. All counsel of record