

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Circuit Court Judge

RECEIVED
APR 20 2017
SC Court of Appeals

Case No. 2015-000593

Ronald J. Ferguson

Appellant,

v.

John D. Hatcher, Rachel Shaluly, James F. Gilbert,
Molly A. Miller, and Michael Stehney, individually
and as members of the Architectural Committee of
Mill Creek Estates,

Respondent.

RESPONSE TO RESPONDENTS
MOTION FOR COSTS AND ATTORNEY FEES

Respondents submitted a motion citing Rule 222 of the Appellate Court Rules alleging entitlement to costs and fees. Respondents state, "Pursuant to Rule 222, the Appellate Court will tax the costs against the Appellant when a judgment is affirmed."

Judicial Recognition should be placed on the Order dated March 22, 2017, which states the appeal was "[d]ismissed pursuant to rule 220(b), SCACR. and the following authority: Duncan v. Gov't Employees Ins. Co., 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) ("[A]n order granting a motion to intervene is not immediately appealable.")"

As this Court has ruled on multiple occasions, dismissal of an appeal relating to an interlocutory

order is not a judgment on the merits. Therefore, the Court has declined imposition of any fees requested.

The record should further reflect that SCACR, Rule 222(e) provides, in part, "If a petition for a writ of certiorari is sought under Rule 242, the Court of Appeals shall tax costs only in those cases in which the petition for a writ of certiorari is denied."

In the instant case the underlying court's order granting the motion to intervene was clearly in contravention of South Carolina Supreme Court precedent:

South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304 S.C. 502, 504 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the four requirements precludes intervention. *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993).

This is consistent with both the Fourth Circuit and United States Supreme Court precedents denoting the timeliness of intervention requests and "collateral order" exception to § 1291. This doctrine recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify as a collateral order, a decision must: (i) "conclusively determine the disputed question"; (ii) "resolve an important issue completely separate from the merits of the action"; and (iii) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). See also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981).

The appellate record clearly shows that summary judgment had been issued against Defendant Mill Creek, LP – prior to the Respondents even filing to seek intervention. The Respondents indicated they have no affiliation or liabilities with Defendant Mill Creek, LP, nor played part in creating the

contracts in question, and their only desire to intervene is an attempt to preclude a judgment in this matter which might adversely affect the other litigation they are pursuing. An argument specifically found lacking basis by the United States Supreme Court precedent.

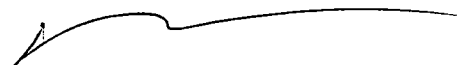
When, as in this case, a request for intervention is not timely, a court is authorized, if not required, to deny it. See *Houston General*, 193 F.3d at 839 (“[T]imeliness is a cardinal consideration of whether to permit intervention.”) (internal quotation marks omitted). The purpose of the timeliness requirement “is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.” *Scardelletti v. Debarr*, 265 F.3d 195, 202-03 (4th Cir. 2001) (quoting *United States v. South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983)), rev’d on other grounds, 536 U.S. 1 (2002).

Therefore, under both South Carolina and United States Supreme Court precedents, (i) Mill Creek, LP, created contracts - and the claimed intervenor had nothing to do with those being created; (ii) has had summary judgment issued against them and pursuant to S.C. Code the lower court was vested with authority to examine the legality of such contracts and enter damages based on the conduct of Mill Creek, LP; and (iii) that decision is not subject to any appeal.

It is the Appellants holding that the Appellate Court abdicated its responsibilities by adjudicating the matter be remanded despite clear state and federal precedents contrary to their citations. The entire lower court proceeding now changes to an attempt of an outside party or parties who has nothing to do with the Defendant or that entities actions, to argue – we really do not know. They never filed any counter complaint, response, or documents outside of asking to intervene. And that was only after an Order entering Summary Judgment against the Defendant. Thus, even if the Court did impose costs and fees in this type of dismissal, any discussion of such is premature.

Respectfully submitted,

April 18, 2017



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CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Initial Brief of Appellant, dated 04/18/2017 on
Respodents' Attorney of record by

 delivering it to him/her personally; or,

 mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an
envelope with sufficient postage affixed, addressed as follows; or,

 X mailing it to the address indicated by their counsel of record in the Summons as follows:

Rodney M. Brown
210 S Main St
Fountain Inn, SC 29644

This the 18 day of April, 2017.



Ronald J. Ferguson

