

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Oct 20 2020**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

**SC Court of Appeals**

The Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc.,.....Respondent,

v.

Estate at Westbury Owners Association, Inc.,.....Appellant.

RESPONDENT’S REPLY TO THE RETURN TO THE MOTION TO DISMISS

The issue before the Court is straightforward—are the statements made by the lower court final rulings on the merits that grant summary judgment in favor of Westbury Park or are they simply an explanation in an order that denies summary judgment? Westbury Park asks the Court to find the statements are the latter.

The statements are an explanation of why the Court *denied* summary judgment and not a ruling that granted summary judgment. This is made plain and unmistakable by the final paragraph of the Order that lists nine rulings—six that “Deny” summary judgment and three that “Grant” summary judgment in the Estate’s favor. (Order p. 2). Because Westbury Park did not appeal, the Estate must establish appealability based solely on the rulings denying summary judgment. It fails to do so, and this Court should grant Westbury Park’s motion to dismiss.

Westbury Park addresses each of the Estate’s arguments below. None of them change the fact that an order denying a motion for summary judgment is never appealable.

**I. The statements are not final judgments and do not involve the merits under S.C. Code Ann. § 14-3-330.**

The lower court's explanation of why it denied in part the motion for summary judgment is not a final judgment and does not involve the merits under S.C. Code Ann. § 14-3-330(1).

“A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution. An order reserving an issue, or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory.” *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017). By denying the Estate's motion for summary judgment as to Westbury Park's causes of action for declaratory judgment, termination by breach, unjust enrichment, and changed conditions, and the Estate's causes of action for easement by necessity and an accounting, the lower court plainly left the inevitability (not mere possibility) of further action by the trial court before the rights of the parties are resolved. The Order is not appealable by the Estate.

“An order ‘involves the merits,’ as that term is used in section 14-3-330(1), and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (internal quotation and alteration marks omitted). “The denial of a motion for summary judgment is not appealable because it does not finally determine anything about the merits or strike a defense.” *Id.* at 457, 756 S.E.2d at 162. “The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). The lower court's order denying summary judgment did not finally determine anything except that the Estate has an express appurtenant easement.

Therefore, as to the issues the Estate seeks to appeal, there is no ruling that involves the merits, and this Court should dismiss the appeal.

The hearing on the Estate's motion included the submission of witness, document, and video evidence for the lower court to decide Westbury Park's motion for an injunction. Westbury Park did not appeal the denial of that motion. Therefore, the "mini-trial" procedure, as the Estate calls it, is irrelevant to appealability.

## **II. The law of the case doctrine does not require an immediate appeal.**

As explained in the motion to dismiss and above, the lower court did not make final rulings that granted summary judgment in Westbury Park's favor on the issues the Estate seeks to appeal. "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Westbury Park does not take the position that the explanatory statements the Estate seeks to appeal are final rulings. On the contrary, the basis of the motion to dismiss is that those issues remain to be litigated and the Estate may raise them again later in the proceedings. Notably, the Estate does not respond to this argument.

If the Court dismisses the appeal, there will be no question that the lower court's explanatory statements are not the law of the case and the parties may litigate those issues. The law of the case doctrine does not apply to the denial of summary judgment and is not a basis for appealability in this case.

## **III. The lower court's rulings that "Deny" summary judgment necessitate the dismissal of this appeal.**

The Estate's final argument is that the "procedural posture" of appealing the denial of a motion for summary judgment does not override its interpretation of the Order as granting

summary judgment in Westbury Park's favor. This is based on an incorrect interpretation of the Order that ignores the lower court's express statements that it denied the motion.

"In construing a judge's order, we must do so in light of the judge's intent as discerned from the order as a whole. Adhering to this principle, this court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of the issues presented." *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 123, 609 S.E.2d 811, 814 (Ct. App. 2005). Construing the order as a whole, it is evident that the lower court denied the Estate's motion for summary judgment on the issues it seeks to appeal. (Order p. 2). That the Estate wants to shortcut litigation and have an appellate Court decide the issues is not a basis for appealability.

### CONCLUSION

The Order denies summary judgment and does not establish final findings of fact or law against the Estate. The Court should dismiss the appeal as unappealable.

In the event that the Court denies the motion to dismiss, Westbury Park reserves all of its rights to argue for an opinion from this Court affirming the lower court's rulings.

October 20, 2020

Respectfully submitted,

s/Kathleen C. Barnes

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APPEAL FROM BEAUFORT COUNTY  
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The Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

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v.

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PROOF OF SERVICE

The undersigned certifies that a copy of the Respondent’s Reply to the Return to the Motion to Dismiss has been served upon counsel for Appellant via electronic mail at the email address stated in the Attorney Information System as set forth below on October 20, 2020.

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October 20, 2020

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# BARNES

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Kathleen C. Barnes  
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October 20, 2020

**Via E-Mail**

The Honorable Jenny Abbott Kitchings  
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Re: *Westbury Park Residential Association, Inc. v. Estate at Westbury Owners Association, Inc.*  
Appellate Case No. 2020-001275

Dear Mrs. Kitchings:

Attached for electronic filing and service pursuant to section (c)(6) of Supreme Court Order 2020-05-29-02 *RE: Operation of the Appellate Courts During the Coronavirus Emergency*, please find the Respondent's Reply to the Return to the Motion to Dismiss and proof of electronic service of the motion. Please file the documents and return one file-stamped copy to me via email. By electronic copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

s/Kathleen C. Barnes

Enclosures

cc: Ian S. Ford  
Ainsley F. Tillman  
Evan K. Bromley  
Benjamin T. Shelton

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