STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0573
South Carolina Court of Appeals
Order, filed 1 July 2011

Junell W. Johnson, as Personal Representative
Of the Estate of Woodrow C. Nelson,

Respondent,

v.

Michael Lee Clemons,

Petitioner.

PETITIONER'S BRIEF ON CERTIORARI

Stephen P. Groves, Sr., Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com

James P. Walsh, Esquire
Amy M. Snyder, Esquire
CLARKSON, WALSH, TERRELL & COULTER, P.A.
Post Office Box 6728
Greenville, South Carolina 29606
Telephone: 864.232.4400

Attorneys for the Petitioner, Michael Lee Clemons

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Case Decisions

Statutes, Court Rules, Regulations, Etc.

Treatises, Legal Encyclopedias, Books, Etc.

I. STATEMENT OF THE ISSUE ON CERTIORARI APPEAL

Does The South Carolina Court of Appeals Have Jurisdiction To Hear An Appeal Of An Intermediate Order After A Final Judgment Has Been Entered, When The Final Judgment Is A Consent Final Judgment?

Introduction

Protection of two fundamental principles of South Carolina jurisprudence – one, a litigant's constitutional right to an appeal, and two, the policy encouraging parties to create and enforce their own agreed-upon settlements – can be achieved here by reversing the Court of Appeals and allowing Mr. Clemons' appeal of the Circuit Court's intermediate order to proceed.

Thus far, Mr. Clemons has been deprived of his right to appeal an order in which the Circuit Court declined to dismiss a lawsuit filed against him, even though the Respondent's attorney, Mr. Clemons, and his insurance carrier had earlier reached a complete settlement of that very same claim. By erroneously allowing Mrs. Johnson's suit to proceed, the Circuit Court forced Mr. Clemons to delay his appeal until after a final judgment was entered. The final judgment which was entered was, however, not a post-verdict judgment, but a consent judgment obtained when Mr. Clemons (while incarcerated) agreed to the Respondent's $3,000,000.00 Offer of Judgment. (Appx.148-149). When Mr. Clemons tried to appeal the erroneous intermediate order, the Court of Appeals compounded the error by dismissing his appeal for lack of jurisdiction.**1**

---

1 *See* S.C. Code Ann. § 14-3-330 (Thomson Reuters West 2011).

On review, this Supreme Court can reasonably conclude that in these very narrow circumstances, an intermediate order which denies a party-defendant a complete defense is appealable even following the entry of a consent judgment. To rule otherwise would unduly constrict a defendant's constitutional right to appeal, and would signal that settlement agreements can be disregarded at will.

II. STATEMENT OF THE CASE

The Petitioner, Michael Clemons ("Mr. Clemons") and his insurer, Peak Property and Casualty Insurance Corp., a subsidiary of Viking Insurance Co. ("Peak"), reached an agreement to settle two claims arising from a three-car automobile accident which had occurred on 25 March 2006. Mr. Clemons' lawyer – Michael P. Horger, Esquire ("Attorney Horger")**2** - and the lawyer for the Respondent, Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson ("Mrs. Johnson"), – Paul W. Owen, Jr., Esquire ("Attorney Owen")**3** - advised the Orangeburg County Probate Court on 13 September 2006, that the parties had reached an agreement for payment of Peak's full $30,000.00 automobile insurance policy limits to settle the two claims.**4**

---

2 Attorney Horger of Michael P. Horger, P.A. originally represented Mr. Clemons. (Appx.93, para. 3). Later, James P. Walsh, Esquire ("Attorney Walsh") of Clarkson, Walsh, Terrell & Coulter, P.A. was substituted as Mr. Clemons' legal counsel. (Appx.126-130).

3 Attorney Owen represented Mrs. Johnson in her capacity as Personal Representative of the Estate of Woodrow C. Nelson. (Appx.92, para. 2).

4 The settlement payment was also intended to resolve a related claim against Mr. Clemons by Catina W. Nelson. *See* Eddie Williams, as Conservator for Catina W. Nelson, Civil Action No. 2007-CP-38-0574. That matter is also on certiorari appeal. Lastly, the driver of a third vehicle involved in the accident, Wendell Hamilton, was also injured. (Appx.92, para. 2). Mr. Hamilton's claim was resolved for $5,000.00 outside of this present litigation. (Appx.92, para. 8). After Mr. Hamilton was paid, there

(Appx.92, para. 2; Appx.93-94, paras. 2, 5; Appx.97, paras. 8-10).**5** The Probate Court approved the Estate's settlement as reasonable, and appointed Eddie Williams as the conservator for Mrs. Nelson. (Appx.173, lines 10-13).

Several months later, by telecopier letter dated 27 February 2007, Attorney Owen contacted Attorney Horger and demanded that he receive payment – the very next day – of Peak's total $25,000.00 settlement amount.**6** (Appx.97, para. 7; Appx.99, para. 25; Appx.104).**7** In response, Attorney Horger advised Attorney Owen that he would request the settlement payment checks from the insurance company and deliver them to Attorney Owen as soon as possible – certainly within a day or two. (Appx.94, para. 7). In fact, Peak issued the two $12,500.00 settlement checks**8** on 28 February 2007 (Appx.94, para. 8), Attorney Horger received them on 1 March 2007 (Appx.94, para. 8), then

---

was $25,000.00 in insurance coverage left for the Estate's and Mrs. Nelson's claims. (Appx.157, lines 1-22).

5 In addition, Attorneys Horger and Owen also advised the Probate Court that they were waiting for the invoice for the funeral expenses of the decedent, Woodrow C. Nelson ("Mr. Nelson"), to arrive, before finally transferring the settlement funds. Mr. Williams' counsel had also reached agreement with Mr. Nelson's underinsured motorist's coverage ("UIM") insurer, State Farm Mutual Automobile Insurance Company, for equal payments both to the Nelson Estate and to his wife, Catina Nelson ("Mrs. Nelson") totaling $150,000.00.

6 On 27 February 2007, Attorney Owen wrote that Attorney Horger "ha[d] until 10:00 a.m. tomorrow to deliver [the two settlement] check[s] . . .[and[[i]f the checks are not received by my office by the specified time we will file suit against [Mr.] Clemons and have him served at the jail." (Appx.104).

7 This was the very same amount previously reviewed and approved by the Probate Court. (Appx.95, lines 10-13).

8 One settlement check was to be made payable to Attorney Owen and Mr. Williams as Conservator for Catina Nelson (Appx.104), while the other $12,500.00 check was to be made payable to Attorney Owen and the Estate of Woodrow C. Nelson. (Appx.104).

immediately called Attorney Owen, and offered to have the settlement checks hand-delivered to Attorney Owen's office. (Appx.94, para. 8). In response, Attorney Owen stated that such "hand delivery" was unnecessary. (Appx.94, para. 8). One month later, however, Attorney Owen rejected the previously agreed-upon settlement and refused to accept Peak's $25,000.00 in proffered insurance policy proceeds. (Appx.99, para. 28; Appx.105; Appx.110).

On 10 May 2007, Mrs. Johnson (on the Estate's behalf) sued Mr. Clemons. (Appx.78-81).[9] Mr. Clemons moved to dismiss the Complaint and to enforce the parties' pre-suit $12,500.00 settlement agreement. (Appx.86-87; Appx.92-95). On 30 September, 2008, the Circuit Court denied Mr. Clemons' Motion to Dismiss (Appx.30-35) and Mr. Clemons sought reconsideration or to alter/amend. (Appx.120-123). On 31 December 2008, the Circuit Court denied that request as well. (Appx.36-37). Mr. Clemons filed his Answer on 8 April 2009. (Appx.126-130).[10]

One year later, on 14 January 2011, while Mr. Clemons was in the midst of serving his felony DUI sentence in prison,[11] Attorney Tinsley[12] presented Mr.

---

9 Mr. Clemons was served with a copy of the Summons and Complaint on 23 May 2007, while incarcerated at the Orangeburg-Calhoun Detention Center ("OCDC"). (Appx.90).

10 Mrs. Johnson successfully moved to strike Mr. Clemons' Answer and to have a default judgment entered against him. (Appx.136-139). The Circuit Court set aside the default judgment on 4 December 2009. (Appx.146). Mr. Williams unsuccessfully moved for reconsideration on 15 December 2009. (Appx.146-147).

11 On 17 April 2007, Mr. Clemons "plead guilty to felony DUI and was sentenced to 11 years in prison . . . ." (Appx.99, para. 26).

12 By this time Attorney Owen had also associated Mark B. Tinsley, Esquire ("Attorney Tinsley") of Gooding & Gooding, P.A. as additional counsel for Mr. Williams. (Appx.150-151).

Clemons' attorney – now Attorney Walsh - with a $3 million Offer of Judgment. (Appx.148-149). Under the terms of the proposed consent judgment, Mr. Clemons would agree that a judgment in favor of the Estate would be entered against him for $3,000,000.00 (Appx.152) - an amount 120 times Mr. Clemons' remaining $25,000.00 in liability insurance coverage. (App.158). On 4 February 2011, with no personal incentive to defend Mrs. Johnson's lawsuit, Mr. Clemons agreed to the $3 million settlement offer. (Appx.152). Attorney Walsh filed Mr. Clemons' acceptance of the $3,000,000.00 judgment with the Circuit Court on 7 February 2011. (Appx.152).

On 7 March 2011, Mr. Clemons appealed the $3 million consent judgment, together with the underlying intermediate orders refusing to enforce the earlier settlement to the South Carolina Court of Appeals. (Appx.9-25). Mrs. Johnson moved to dismiss the appeal. (Appx.1-49). Mr. Clemons filed a return (Appx.50-214) and Mr. Williams replied. (Appx.215-222). On 1 July 2011, the Court of Appeals dismissed Mr. Clemons' appeal based on a perceived lack of jurisdiction. (Appx.223-225). Mr. Clemons unsuccessfully sought a rehearing *en banc* (Appx.229-250; Appx.256-257). Mr. Clemons then filed his Petition for Writ of Certiorari which this Supreme Court accepted.

III. STATEMENT OF THE FACTS

A. The Accident

These actions arise out of a tragic three-vehicle accident which occurred on 25 March 2006, in Orangeburg, South Carolina. (Appx.31, para. 1; Appx.55, para. 3; Appx.79-80, para. 3; Appx.156, lines 14-18). Mr. Clemons was driving east on Chestnut Street in Orangeburg while, at the same time, Mr. Nelson and

his wife, Catina W. Nelson (Appx.79-80, para. 3; Appx.156, lines 14-18), were heading west on Chestnut Street. (Appx.79-80, para. 3). Unfortunately, Mr. Clemons was driving under the influence of alcohol, crossed the center line, and hit Mr. Nelson's vehicle head on. (Appx.79-80, para. 3; Appx.96, paras. 1-2; Appx.156, lines 14-18). Sadly, Mr. Nelson was killed in the collision and Mrs. Nelson suffered serious debilitating injuries.**13** (Appx.79-80, paras.3-4; Appx.96-97, para. 3; Appx.156, lines 18-20).

At the time of the accident, Peak insured Mr. Clemons through a "minimum limits"**14** automobile liability insurance policy capped at $30,000.00. (Appx.97, para. 6). In addition, Mr. Nelson had UIM coverage with State Farm in the amount of $150,000.00. (Appx.97, paras. 5, 7).

B. The Settlement Terms

Not long after the unfortunate collision, Peak Insurance and Attorney Owen reached a settlement "whereby the insurance coverage [for Mr. Clemons] would be exhausted by the payment of the applicable [$30,000.00] limits with $5,000.00 allocated to the claim of [Mr.] Hamilton and $12,500.00 [each] being allocated to the claim[s] of [Mrs.] Nelson and . . . the [Mr. Nelson's] Estate . . . ."

---

13 Mrs. Nelson has been adjudged to be *non compos mentis*. (Appx.156, lines 14-25; Appx.181, lines 19-22).

14 *See* S.C. Code Ann. § 38-77-140 (Thomson West 2005). At the time of the accident, a "minimum limits" automobile policy had "bodily injury" liability coverage in the amount of $15,000.00 per person per accident and $30,000.00 for two or more persons per accident. Beginning 1 January 2007, the limits were increased to $25,000.00 per person per accident and $50,000.00 for two or more persons per accident. *See* S.C. Code Ann. § 38-77-140 (Thomson Reuters West 2007). *See generally* Howell v. U.S. Fidelity & Guar. Ins. Co., 370 S.C. 505, 510, 636 S.E.2d 626, 628 (2006).

(Appx.92, para. 2; Appx.92-93, para. 5; Appx.97, paras. 8-10).**15** Due to the circumstances of the case, the parties agreed that the settlement should be approved by the Orangeburg County Probate Court. (Appx.92, para. 2; Appx.97, para. 9). Peak retained Attorney Horger to represent Mr. Clemons and "to see that the appropriate Petition, Order[,] and Release were obtained from the Estate . . and on behalf of [Mrs.] Nelson upon a conservator being appointed for her." (Appx.93, para. 3).

C. The Approval Hearing

Attorney Owen scheduled a Probate Court hearing before the Honorable Pandora Jones-Glover, Probate Judge, for 13 September 2006. (Appx.93, para. 4; Appx.97, para. 9). The purpose of the hearing was to allow the Probate Court to approve the death settlement between the Estate and Peak Insurance (on behalf of Mr. Clemons) and to have a conservator appointed for Mrs. Nelson. (Appx.93, para. 4; Appx.97, paras. 9-10; Appx.156, line 14 – Appx.157, line 22).**16**

At the hearing, Mr. Clemons' counsel – Attorney Horger - advised the Probate Court that Mr. Clemons' remaining $25,000.00 liability insurance coverage through Peak was being fully exhausted by the settlement - with $12,500.00 allocated to the Estate's claim and $12,500.00 allocated to Catina

---

15 State Farm agreed to pay its $150,000.00 UIM coverage to the Estate and to Mrs. Nelson on a 50/50 basis - $75,000.00 to each. (Appx.97, paras. 7, 10; Appx.157, lines 1-9). Peak settled with Mr. Hamilton for $5,000.00. (Appx.97, para. 8). Life insurance proceeds for Mr. Nelson were separately distributed. (Appx.179, lines 19-23).

16 Contemporaneously with approving the insurance allocation settlement, the Probate Court also appointed Mr. Williams as Mrs. Nelson's conservator. (Appx.97, para. 11; Appx.175, line 15 – Appx.181, line 24).

Nelson's claim. (Appx.158, line 5 - Appx.159, line 5).**17** In addition, Attorney Owen placed the parties' settlement agreement on the Probate Court record and Attorney Horger confirmed the terms. (Appx.92-94, paras. 2, 5; Appx.97, paras. 9-10; Appx.156, line 18 – Appx.159, line 7; Appx.159, line 22 - Appx.162, line 13).**18**

During the Probate Court hearing, Attorney Owen questioned Mrs. Johnson, the Estate's appointed Personal Representative and Catina Nelson's mother (Appx.159, line 22 – Appx.160, line 6), as to her understanding of the settlement between Peak (for Mr. Clemons) and the Estate and Mrs. Nelson:

> Q. And do you understand that we have done a diligent search for all insurance carriers involved in this case and that basically Woodrow has three vehicles insured with State Farm and they're tendering all the monies available under those policies in settlement of this case? You understand that?
>
> A. Yes, I do.
>
> Q. Okay. And that there was another policy that Mr. Clemons had that had a total combined value of [$]30,000[.00], [$]25,000[.00] coming to your family, essentially your family, twelve-five being to Woodrow's estate and twelve-five going to Catina. The remaining [$]5,000[.00] went to a third driver who was also involved in this accident and received permanent nerve damage to his leg, okay –
>
> A. Yes.

---

17 As already noted, Peak Insurance paid Mr. Hamilton $5,000.00 (of the total $30,000.00 in coverage) to settle his claims against Mr. Clemons. (Appx.97, para. 8).

18 Attorney Horger had contacted Attorney Owen on 17 August 2006, almost a month before the hearing and requested certain "information [in order to be able] to prepare the appropriate Petition, Order[,] and Release for the [Probate] [C]ourt['s] approval of the death settlement." (Appx.93-94, para. 5). Attorney Horger did not receive any information and/or documentation from Attorney Owen until the day of the scheduled Probate Court hearing. (Appx.93-94, para. 5).

Q. – and is represented by another party not present today, represented by another attorney.

A. Yes.

Q. And that exhausted their coverage as well.

A. Okay.

Q. Okay, and there's no more coverage out there from any other insurance carriers, and life insurance has been paid, but that's separate from what's before the court today.

A. Okay.

(Appx.160, line 13 – Appx.161, line 10).

Mrs. Johnson then testified she believed the settlement as described was in the ***best interests*** of the Estate (Appx.159, line 17- Appx.161, line 14) and she also testified that she believed settling this matter, as was described, was in Catina Nelson's ***best interests***. (Appx.162, lines 18-23). Mrs. Johnson agreed the settlement constituted a final resolution of the obligations of Peak Insurance on behalf of Mr. Clemons and of State Farm regarding the available UIM coverage. (Appx.171, line 22 – App.172, line 7). Based upon the parties' settlement agreement, the limited amount of liability insurance coverage, and Mrs. Johnson's on-the-record agreement, the ***Probate Court "approve[d] the settlement*** [as] reasonable, and in light of all [of the] circumstances [as being] in the best interest of the [E]state." (Appx.173, lines 10-13).**19**

---

19 The Probate Court appointed Mr. Williams as Mrs. Nelson's conservator. (Appx.175, line 1-Appx.181, line 24). After brief testimony from Mr. Williams (Appx.177, line 18 – Appx.178, line 13), Attorney Horger requested the Probate Court approve the settlement of Mrs. Nelson's claim against Mr. Clemons for the sum of $12,500.00. (Appx.179, lines 2-8). Specifically, Attorney Horger told the Probate Court it could issue a ruling *nunc pro tunc* if an "amended global settlement petition" was filed. (Appx.179, lines 2-8) The Probate Court found Mrs. Nelson to be incapacitated and asked Attorney Owen to prepare such an order. (Appx.181, lines 19-24).

Also during the hearing, the Probate Court determined that since third-party claims could still be made against the Estate up through 10 February 2007, all settlement funds allocated to the Estate would have to be held in trust until the claims period ended. (Appx.163, line 23 - Appx.164, line 25; Appx.166, line 21 - Appx.170, line 14).**20** Given the possible substantial claim for Mr. Nelson's funeral expenses, Attorney Owen advised the Probate Court that he would hold any funds from the insurance settlement in trust until the final claim period expired. (Appx.168, line 14 – Appx.169, line 24). The Probate Court approved this arrangement. (Appx.173, lines 10-13).

While the Probate Court did not explicitly approve the settlement of Mrs. Nelson's claim against Mr. Clemons, the Probate Court set a bond amount of $90,000.00 for her conservatorship in recognition of the allocated auto insurance settlement funds and life insurance funds she would ultimately be receiving. In this vein, in 2009, when faced with a Motion to Enforce Settlements, the Circuit Court stated in a footnote that "there is nothing in the transcript of the [P]robate [Court] hearing specifically about the settlement of Catina Nelson's claims . . . ." (Appx.17 n.3). While express court approval may not have occurred – and indeed is not required under Rule 43(k), SCRCivP - the record is replete with evidence that Attorney Owen reached a settlement agreement with Attorney Horger. Attorney Owen, who represented both Mrs. Nelson and the Estate, consistently referenced the agreed-upon settlement amount-- $25,000.00 – as payment for both claims. (Appx.97-99, Paras. 8, 12, 28). Moreover, the Probate Court was advised (a) the $25,000.00 paid by Peak on Mr. Clemons' behalf would be divided equally between the Estate and Mrs. Nelson, (b) State Farm's UIM proceeds would be divided equally between the Estate and Mrs. Nelson ($75,000.00 each), and (c) Attorney Horger would be drawing up an amended global settlement petition reflecting that agreed-upon proceeds' division. (Appx.157, lines 8-9; Appx.158, lines 17-22; Appx.179, lines 2-8) *See, e.g.*, Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 604, 567 S.E.2d 514, 517-518 (Ct.App. 2002) ("Even though the settlement agreement was not in writing, it complied with Rule 43(k)[, SCRCivP,] because it was made in open court and noted upon the record.").

20 At the time of the hearing, the only known potential outstanding claim was Mr. Nelson's $16,000.00 funeral bill. (Appx.163, line 23 - Appx.165, line 25; Appx.167, line 18 - Appx.171, line 14).

Attorney Horger agreed to prepare a comprehensive final order "encompassing the terms of the settlement as to all parties and [all of the liability] insurance carriers." (Appx.97, Para. 12; Appx.172, line 20 - Appx.173, line 15). Based upon the then available information, Attorney Horger proceeded to draft the appropriate settlement documents. (Appx.93-94, para. 5).

D. Attorney Owen Rescinds His Agreement to Settle

On or about 28 December 2006, well before the 10 February 2007 final deadline for claims to be made against the Estate, Attorney Owen sent Attorney Horger a letter requesting payment of Peak's $25,000.00 settlement amount (*i.e.*, $12,500 each for the claims of the Estate and of Mrs. Nelson) and submission of the final global order to the Probate Court. (Appx.94, para. 6; Appx.98, para. 21). When he received the letter, Attorney Horger contacted Attorney Owen about both claims, advising (a) he still had not received a certified copy of the appointment of a conservator for Mrs. Nelson and (b) the applicable claim period had not run for a decision to be made on the payment of Mr. Nelson's still-outstanding funeral bill.**21** (Appx.94, para. 6). Attorney Owen told Attorney Horger there was " 'no problem of time demand.' " (Appx.94, para. 6).**22**

---

21 Attorney Owen asserts he did not receive any response, telephonically or otherwise, from Attorney Horger to the 29 December 2006, letter. (Appx.99, para. 23). Attorney Owen also disputes the assertion that Attorney Horger had not received a copy of the conservator appointment form. (Appx.98-99, paras. 16-17, 23-25). Debate about these facts can be handled in the substantive appeal, once this Supreme Court has reversed the Court of Appeals' erroneous decision and permits Mr. Clemons' appeal to proceed on in the normal course to a decision on the merits.

22 At this point, Attorney Owen associated Shane M. Burroughs, Esquire ("Attorney Burroughs") of Lanier & Burroughs, LLC (Appx.106, para. 1) to assist him in obtaining the settlement funds from Attorney Horger. (Appx.99, para. 23).

On 27 February 2007, two weeks or so after the claims deadline expired, Attorney Owen sent Attorney Horger a telecopier letter demanding ***payment and receipt*** of the $25,000.00 for the two claims ***by 10:00 a.m. the following day***. (Appx.94, Para. 7; Appx.99, Para. 25; Appx.101). Attorney Horger called Attorney Owen and advised him that delivery of the settlement funds on that time frame was physically impossible, but he would have the checks issued and sent as quickly as could be done. (Appx.94, Para. 7). Peak issued the settlement checks on 28 February 2007, and Attorney Horger received them the next day – 1 March 2007. (Appx.94, Para. 8). That same day Attorney Horger contacted Attorney Owen and "offered to hand deliver the checks, but [Attorney Owen] stated that was not necessary." (Appx.94, Para. 8). Unfortunately, Attorney Horger was, thereafter, unable to reach a resolution with Attorney Owen of the post-settlement dispute after the 1 March 2007 date. (Appx.94, Para. 10). Attorney Owen thereafter declined to accept Attorney Horger's tender of the two $12,500.00 settlement checks from Peak. (Appx.94, para. 10; Appx.99, para. 28).

By letter dated 30 April 2007, as a result of not having ***accepted*** the $25,000.00 in settlement proceeds or any settlement documents (Appx.105), Attorney Owen rescinded the Estate's and Mrs. Nelson's settlement agreement with Peak Insurance (Appx.99, para. 28; Appx.105) and set out on an apparent attempt to pursue a "bad faith" action against Peak Insurance.

E. Mrs. Johnson Sues Mr. Clemons

On 10 May 2007, Mrs. Johnson sued Mr. Clemons (Appx.78-81) asserting claims for wrongful death. (Appx.79-81). Mr. Clemons moved to dismiss Mr. Williams' Complaint or, alternatively, to enforce the previous agreed-upon settlement. (Appx.86-87).**23** Attorney Horger submitted a supporting affidavit. (Appx.92-95). Attorney Owen submitted counter affidavits opposing Mr. Clemons' Motion to Dismiss. (Appx.96-105; Appx.106-112; Appx.113).

F. The Circuit Court Refuses to Enforce the Parties' Settlement Agreement

The Circuit Court considered Mr. Clemons' Motion to Dismiss or to enforce the settlement on 11 June 2008 (Appx.114), and, on 30 September 2008, issued its written order denying the motion. (Appx.114-119). Mr. Clemons moved for reconsideration or to alter and/or amend the judgment. (Appx.120-121)**24** The Circuit Court denied the motions on 31 December 2008. (Appx.124-125).

---

23 Mr. Clemons' Motion to Dismiss (Appx.88-89) described the settlement reached between Peak (Attorney Horger) and Attorney Owen as was presented to the Probate Court Judge at the 13 September 2006 hearing and was "tentatively approved subject to the filing of a Petition to encompass the settlement of all claims by payment of the liability coverage and UIM Coverage with the Appointment of a Conservator on behalf of Catina Nelson and the waiver of lien/subrogation rights to SCDHHS with the establishment of a special needs trust for Catina Nelson." (Appx.89). Attorney Horger specially appeared in filing the motion. (Appx.88).

24 Mr. Clemons moved for reconsideration, *etc.* on the grounds that Peak had tendered its full $30,000.00 limits of liability coverage and had reached a settlement agreement for all claims arising out of the accident, including specifically those of both the Estate and Mrs. Nelson with the understanding that the settlements (or at least the Estate's settlement) would be court approved. (Appx.120-121). Mr. Clemons later filed an amended reconsideration motion. (Appx.122-123). The only difference between the two reconsideration motions was that the first cited Rule 59(b), SCRCivP, and the second cited Rule 59(e), SCRCivP.

G. While Incarcerated, Mr. Clemons Agrees To A Multi-Million Dollar Offer of Judgment

On 14 January 2011, while Mr. Clemons remained imprisoned, Mrs. Johnson's attorney served a $3,000,000.00 Offer of Judgment on Mr. Clemons' counsel – now, by that time, James P. Walsh, Esquire ("Attorney Walsh"). (Appx.148-149). On 4 February 2011, Attorney Walsh, on Mr. Clemons' behalf, accepted the $3 million Offer of Judgment. (Appx.152) Attorney Walsh subsequently filed Mr. Clemons' acceptance of the $3,000,000.00 judgment with the Circuit Court on 7 February 2011. (Appx.152).

H. The Court Of Appeals Dismisses Mr. Clemons' Appeal

Mr. Clemons appealed the executed Offer of Judgment, as well as the two Circuit Court's orders denying enforcement of the settlement. (Appx.26-42). By granting Mrs. Johnson's Motion to Dismiss (Appx.1-49), the Court of Appeals summarily dismissed the appeal for lack of jurisdiction. (Appx.226-228).

V. ARGUMENT AND CITATION OF AUTHORITY

Summary of the Argument

This appeal arises from the intersection of two long-standing policies. The first policy is the preservation of a party's right to an appeal.**25** The second policy is that which encourages parties to create, and enforce, their own agreed-upon settlements. This Supreme Court can uphold both policies by adopting a narrow, yet practical, rule:

> ***When An Intermediate Order Deprives A Party Of A Complete Defense To A Claim, Our Appellate Courts Retain Jurisdiction To Hear An Appeal Of The Intermediate Order Regardless Of Whether The Final Judgment Results From Either Summary Judgment, A Verdict, Or A Consent (Unless The Consent Expressly Waives The Right To An Appeal).***

A. The Court of Appeals Should Have Allowed Mr. Clemons' Appeal To Proceed To Conclusion.

In this case, Attorney Horger (Mr. Clemons), his insurer (Peak), Mr. Nelson's UIM insurer (State Farm) and Attorney Owen (Mrs. Johnson) had admittedly reached a settlement agreement to completely resolve the Estate's and Mrs. Nelson's claims against Mr. Clemons. They advised the Probate Court, ***on the record***, of that settlement agreement and the respective amounts to be paid thereunder. The Probate Court ***expressly approved*** the settlement terms as to the Estate (Appx.173, lines.10-13), was advised that the settlement

---

25 *See generally* Stroup v. Duke Power Co., 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1950) (explaining that statutes will be construed liberally in favor of the right to appeal).

similarly would yield $87,500.00 to Mrs. Nelson (Appx.176, line 7 – Appx.177, line 3, Appx.179, line 15 – Appx.181, line 23) and set a $90,000.00 conservator's bond accordingly, but all present recognized that no money would be conveyed until the funeral bills from Mr. Nelson's burial service were received as a claim. (Appx.170, line 21 – Appx.171, line 8). Later, even though Attorney Horger had Peak's $12,500.00 settlement funds in hand (Appx.94, para. 8), Attorney Owen rejected the settlement agreement and filed suit. (Appx.99, para. 28; Appx.105; Appx.110). Mr. Clemons then asked the Circuit Court to dismiss the lawsuit and instead enforce the parties' earlier settlement agreement (Appx.86-87; Appx.92-95), but the Circuit Court refused. (Appx.13-18; Appx.19-20). At that juncture, Mr. Clemons had no opportunity to appeal the Circuit Court's refusal to enforce his settlement agreement until a final judgment was rendered. (Appx.19-25).**26**

Thereafter, Mr. Clemons, while in prison for his felony DUI conviction, agreed to a $3,000,000.00 judgment, an amount far beyond his insurance policy limits (Appx.148-149; Appx.152) and millions beyond any assets he had or likely could have accumulated in his entire lifetime. The Court of Appeals dismissed Mr. Clemons' appeal of that judgment and of the underlying Circuit Court intermediate orders as "improper" and not fitting recognized exceptions to the general rule that a judgment entered by consent cannot be attacked. (Appx.223-225).

---

26 Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 809-810 (1995) (finding that order refusing to approve settlement in wrongful death action did not determine anything about a cause of action or defense and thus was not immediately appealable.).

There is no dispute that the final judgment in this matter was a consent judgment. As this Supreme Court is aware, South Carolina law provides:

> [A]ny party in a civil action. . . may file . . a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor . . . . Within [20] days after service of the offer of judgment . . the offeree or his attorney may file a written acceptance of the offer of judgment. Upon the filing, the court shall immediately issue the judgment and the clerk shall enter the judgment as provided in the offer of judgment.**27**

The Court of Appeals has explained that both Rule 68, SCRCivP, and Rule 68, FRCivP, while not identical, are, nevertheless, clearly "intended to encourage settlements and avoid protracted litigation."**28** Furthermore, this Supreme Court, in Belton v. State,**29** has acknowledged that a case resolved by acceptance of a Rule 68, SCRCivP, Offer of Judgment is considered "settled" without a decision on the merits.**30**

Avoidance of trial by such an agreed-upon judgment does not, however, necessarily mean the judgment -- or any court orders preceding it -- are necessarily rendered unreviewable on appeal. The Court of Appeals has acknowledged that "a consent order is an agreement of the parties, under the

---

27 *See* Rule 68, SCRCivP.

28 Black v. Roche Biomedical Laboratories, a Div. of Hoffman-LaRoche, Inc., 315 S.C. 223, 227, 433 S.E.2d 21, 23 (Ct. App. 1993) (*citing* 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 3001 (West 1973)).

29 Belton v. State, 339 S.C. 71, 529 S.E.2d 4 (2000).

30 Belton v. State, 339 S.C. 71, 74 n.4, 529 S.E.2d 4, 5 n.4 (*citing* Fletcher v. City of Fort Wayne, 162 F.3d 975, 978 (7th Cir. 1998)).

sanction of the court, and is to be interpreted as an agreement"**31** while also acknowledging that such an order or judgment may be set aside or modified under certain circumstances.**32**

In dismissing the appeal in this case, the Court of Appeals referenced decisions which recognized an array of exceptions permitting appeal of consent judgments. In *Johnson v. Johnson*, for example, the parties had consented to vacate one order, but not a related order.**33** There the Court of Appeals invoked its equitable authority under Rule 60(b)(5), *SCRCivP*, to set aside a consent order.**34** Likewise, this Supreme Court in *Raby Construction, LLP v. Orr*,**35** analyzed the *Johnson* holding and recognized that "even consent judgments are

---

31 Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (Ct.App. 1992) (*citing* Jones & Parker v. Webb, 8 S.C. 202 (1876)).

32 Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 46-47 (*citing* Jones & Parker v. Webb, 8 S.C. 202).

33 Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (*citing* Jones & Parker v. Webb, 8 S.C. 202).

34 In Mrs. Johnson's Reply on the Motion to Dismiss Appeal, she suggested Mr. Clemons' insurer Peak should have "collaterally attacked the judgments under Rule 60" (Appx. 221), asserting the parties in Johnson v. Johnson, among others, took that approach. There is, however, nothing in Johnson v. Johnson which states that Emodene Johnson herself sought relief under Rule 60(b)(5), SCRCivP. *See* Johnson v. Johnson 301 S.C. 44, 48, 425 S.E.2d 46, 47. Instead, it appears therein that the Circuit Court or the Court of Appeals, *sua sponte*, relied on the equitable authority under Rule 60(b)(5), SCRCivP, to relieve Ms. Johnson of her obligations under the consent order. Johnson v. Johnson 301 S.C. 44, 46-47, 425 S.E.2d 46, 46-47. *See also, e.g.,* Mr. T. v. Ms. T., 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2009) (court has equitable power under Rule 60(b)(5), SCRCivP, and noting that "where the interests of minors or incompetents are involved, procedural rules are subservient to the court's duty to zealously guard the rights of minors (or incompetents). Where the rights and best interests of a minor child (or incompetent) are concerned, the court may appropriately raise, *ex mero motu*, issues not raised by the parties.").

35 Raby Construction, LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004).

subject to attack under particular circumstances."**36** The Court of Appeals also identified a third case, *Linda Mc Co., Inc. v. Shore*,**37** where this Supreme Court held that a confession of judgment may be vacated or modified if void or insufficient in form.**38** (Appx. 224; 227).

Unfortunately, none of the cases cited by the Court of Appeals addressed defects in intermediate orders – defects which if rectified would have provided Mr. Clemons a complete defense and ended this litigation. This case presents the opportunity for this Supreme Court to recognize that this narrow procedural circumstance constitutes another exception permitting an appeal.

B. *S. C. Code Ann.* § 14-3-330 Should Be Harmonized With The Recognition That A Consent Judgment May Be Appealed In Certain Circumstances.

This Supreme Court strives to "balance the interest of finality against the need to provide a fair and just resolution of the dispute."**39** Here, this Supreme Court should confirm that the consent judgment is appealable in the particular circumstance where an intermediate order which denied an absolute defense is the basis of the appeal. Under current South Carolina procedure, there was no other procedural juncture at which Mr. Clemons could have lodged an appeal of the Circuit Court's order before some form of final judgment was entered.

---

36 Raby Construction, LLP v. Orr, 358 S.C. 10, 18 n.3, 594 S.E. 2d 478, 482 n.3.

37 Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010).

38 Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 551-552, 703 S.E.2d 499, 503-504.

39 Raby Construction v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (*citing* Chewning v. Ford Motor Co., 354 S.C. 72, 80, 579 S.E.2d 605 (2003)) (involving an independent action for fraud on the court).

In general, "South Carolina adheres to the final judgment rule [wherein] an appeal lies only from a final judgment."**40** The South Carolina Legislature has set out parameters for the appellate jurisdiction of South Carolina's appellate courts:

> South Carolina's appellate courts] shall have appellate jurisdiction for correction of errors or law in law cases, and ***shall*** review upon appeal:
>
> (1) Any intermediate judgment, order[,] or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from **41**

Adhering to this legislative directive, the occasions when South Carolina's appellate courts will entertain an appeal of an interlocutory order have been strictly limited. The exception is confined to orders which abridge a party's constitutional right to trial by jury.**42** Because of this restriction, Mr. Clemons was unable to appeal as of right the Circuit Court's earlier two orders denying his

---

40 Brunson v. American Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (*citing* Hagood v. Somerville, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1) (Thomson West 1976 and Supp. 2004); Rule 72, SCRCivP; Rule 201(a), SCACR).

41 *See* S.C. Code Ann. § 14-3-330(1) (Thomson Reuters West 2010). *See also* Ashenfelder v. City of Georgetown, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (Ct.App. 2010) (*citing* S.C. Code Ann. § 14-8-200(a) ("[T]his jurisdiction is appellate only, and the court shall apply the same scope of review that th[is] Supreme Court would apply in a similar case.")) (Emphasis added).

42 Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008). *See also* Pocisk v. Sea Coast Construction of Beaufort, 380 S.C. 584, 671 S.E.2d 98 (Ct.App. 2009).

request to enforce the parties' prior settlement (Appx.13-18; Appx.19-20; Appx.30-35; Appx.36-37) until this case had reached some form of final judgment.**43**

The Court of Appeals' decision to dismiss Mr. Clemons' appeal primarily addressed the appealability of Mr. Clemons' acceptance of Mrs. Johnson's $3,000,000.00 Offer of Judgment. (Appx.223-225). Conversely, the Court of Appeals failed to directly address whether the circumstances of this case permitted any opportunity whatsoever for Mr. Clemons to appeal the Circuit Court's denial of his motion to enforce the settlement agreement. (Appx.223-224, para. 2) Nevertheless, established law provides that the entry of the final judgments here rendered the two earlier circuit court orders appealable.**44** This is particularly true both because the Orangeburg County Probate Court had already approved the settlement in this case, albeit indirectly, and because pursuant to *S.C. Code Ann.* § 14-3-330(1), a party is not required to actually challenge "the final judgment itself in order to contest an intermediate judgment."**45** Moreover, Mr. Clemons is likely to prevail on his appeal of the

---

43 Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 809-810.

44 In Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), this Supreme Court concluded that a party who appealed from an interlocutory order was not required to make any arguments supporting reversal of the final judgment "in order to contest an intermediate judgment or order under S.C. Code Ann. § 14-3-330(1)." Link v. School District of Pickens County, 302 S.C. 1, 7, 393 S.E.2d 176, 179. *See also* Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (the appealability of intermediate orders attaches when the rights of the parties have finally been determined by some action of the court.").

45 Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) (*citing* Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176). *See also* Greenwood County v. Kenwood Enterprises, Inc., 353 S.C. 157, 174 n.13, 577 S.E.2d 428, 436-437 n.13 (2003), *overruled on other grounds*, Byrd v. City of Hartsville, 365

Circuit Court's order denying enforcement of the parties' settlement agreement.[46] As this Supreme Court is aware, the Court of Appeals has recognized that in some circumstances a consent judgment can be vacated when the court finds that the defendant "had a meritorious defense" to the action.[47]

Consequently, in conformance with S.C. Code Ann. § 14-3-330(1), and because there had not been a prior appeal of any interlocutory orders in this case, the Court of Appeals could have properly entertained an "appeal from such final judgment [in order to] review any intermediate order or decree necessarily affecting the judgment not before appealed from . . . ."[48] Instead, the Court of Appeals simply dismissed this appeal.

Interestingly, the Court of Appeals only dealt with S.C. Code Ann. § 14-3-330(1) quite briefly. The Court of Appeals found that it had not been necessary for Mr. Clemons to have consented to the $3,000,000.00 judgment. (Appx.227). This is, however, quite a different inquiry than the one posed by S.C. Code Ann.

S.C. 650, 620 S.E.2d 76 (2005). In addition, this Supreme Court explained that "if there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under [S.C. Code Ann. §] 14-3-330(1) [an appellate] [c]ourt can review any intermediate order or decree necessarily affecting the judgment not before appealed from." Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377.

46 *See, e.g.*, Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 416-417 (Ct.App. 1984) (holding defendant bound by terms of settlement reached by his attorney of record in pending tort action, despite assertion of lack of authority). *See also generally* Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct.App. 2012) (court enforced the parties' settlement notwithstanding assertion condition precedent had not been met); Pruitt v. S.C. Med. Malpractice Liab. JUA, 343 S.C. 335, 540 S.E.2d 843 (2001) (settlement agreement upheld regardless of monetary guaranty by third-party).

47 Lord Jeff Knitting Co., Inc. v. Mills, 281 S.C. 374, 315 S.E.2d 377 (Ct. App. 1984) (recognizing that relief from judgment, including consent judgments, may be granted under S.C. Code Ann. § 15-27-130 where there is mistake, inadvertence, surprise or excusable neglect and evidence of a meritorious defense or claim.).

48 *See* S.C. Code Ann. § 14-3-330(1).

§ 14-3-330(1). This statute specifically grants appellate review of "any intermediate order or decree necessarily affecting the [final] judgment not before appealed from."[49] It should be beyond dispute that the Circuit Court's failure to enforce the settlement "necessarily affected" Mr. Clemons' eventual consent $3,000,000.00 judgment. Had the Circuit Court enforced the settlement in 2008 and/or 2009, the $3 million February 2011 consent judgment never would have come into existence. As such, the Circuit Court's orders refusing Mr. Clemons' complete defense unequivocally affected the basis for the $3,000,000.00 Offer of Judgment and Mr. Clemons' subsequent acquiescence/consent.[50] If Mr. Clemons' argument that the original settlements between his insurer (Peak) and Attorney Owen (the Estate) should have been enforced by the Circuit Court in 2008 is endorsed on appeal, then this case would have ended in 2008, and Mr. Clemons never would have faced the prospect of a $3,000,000.00 judgment, whether post-verdict or by consent.

Although not expressly stated in Mr. Clemons' acceptance of the $3 million Offer of Judgment, this Supreme Court can acknowledge from the facts of record that Mr. Clemons was faced with the proverbial "*Hobson's Choice*"[51] of

---

49 S.C. Code Ann. § 14-3-330.

50 This Supreme Court has "long ago held that the phrase 'necessarily affecting the judgment' has the equivalent meaning as the phrase 'involving the merits, and that the legislature meant to use these phrases interchangeably." Link v. School District of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (*citing* Blakely & Copeland v. Frazier, 11 S.C. 122 (1878)).

51 The term "Hobson's Choice" may be defined as either " an apparently free choice when there is no real alternative" or "the necessity of accepting one of two or more equally objectionable alternatives". *See* Merriam-Webster On-Line Dictionary (http://www.merriam-webster.com/dictionary/hobson's%20choice) (Last viewed on 14 May 2013).

finding the most expedient way in which to appeal the Circuit Court's refusal to enforce the agreed-upon settlements. Already facing a lengthy prison term for felony DUI, Mr. Clemons either could proceed to and go through a lengthy civil trial or, alternatively, agree to the Offer of Judgment. Patently, the latter was the most expeditious way to have the enforceability of the prior settlement reviewed, and avoid the unnecessary use of court resources in "protracted litigation."**52**

Consequently, consistent with the approach taken in *Link v. School District of Pickens County*, this Supreme Court should hold that South Carolina's appellate rules allow a party, once a final judgment in any form is entered, to appeal an intermediate order necessarily affecting the final judgment and which denies the party a complete defense.**53**

C. If Mr. Clemons' Appeal Is Dismissed, He Has Lost Any Meaningful Opportunity For Appellate Review Of An Order Denying Him A Complete Defense To Mrs. Johnson's Claims.

Consent judgments are appealable in limited circumstances. The facts here compel the proposition that Mr. Clemons should have been given a meaningful opportunity for appellate review of an order which denied him a complete defense. Not only had Peak and Attorney Owen reached a settlement agreement concerning the Estate's claim, but the Probate Court had:

(a) ***effectively approved the Estate's agreed-upon settlement,***

---

52 *See* Black v. Roche Biomedical Laboratories, a Div. of Hoffman-LaRoche, Inc., 315 S.C. 223, 227, 433 S.E.2d 21, 23.

53 *See generally* Link v. School District of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 179; S.C. Code Ann. § 14-3-330(1).

(b) ***the Personal Representative of the Estate had assured the Probate Court the agreed-upon settlement was in the best interest of the Estate,*** and

(c) ***Mrs. Nelson's mother testified the agreed-upon settlement was in Mrs. Nelson's best interests***.

These narrow, discrete circumstances should reasonably constitute one of the several exceptions to the general rule that consent judgments are not appealable.**54**

South Carolina has unquestionably modeled its civil procedure rules on the *Federal Rules of Civil Procedure*.**55** Consequently, appropriately looking to authority from the federal judiciary, a number of federal courts, for example, have recognized some opportunity for litigants to perfect an appeal from a consent judgment.**56** Additionally, on the state court side, the California Supreme Court,

---

54 Allowing Mr. Clemons to appeal the orders at issue does not resurrect a "moot" issue, in contrast to the circumstances of other cases which have rejected such an appeal. *See, e.g.*, Reedy River Power Co. v. City of Laurens, 109 S.C. 210, 96 S.E. 116 (1918) (where judgment has been paid and litigation is at an end, there is nothing to consider on appeal); Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) (ruling that, in appeal of ejectment proceeding that since tenants had vacated premises and gave the landlord possession, the issue of right to possession was moot and appeal would not be considered). In those cases, and in a number of the cases cited by the Berry v. Zahler court, an appeal ***would not have*** yielded a " 'practical benefit . . . .even if the court should conclude that there was error.' " Berry v. Zahler, 220 S.C. 86, 88, 66 S.E.2d 459, 460 (*quoting* Wright v. City of Columbia, 77 S.C. 146, 57 S.E. 1096 (1907)). Here, in contrast, the $3 million judgment has not yet been satisfied. There is immense "practical benefit" to Mr. Clemons' defense if the Circuit Court's orders refusing to uphold the earlier settlement agreement (Appx. 13-18; Appx. 19-20) were reversed.

55 Woodard v. Westvaco Corp., 315 S.C. 329, 333, 433 S.E.2d 890, 892 (Ct.App. 1994), *opinion vacated, appeal dismissed on other grounds*, 319 S.C. 240, 460 S.E.2d 390 (1995).

56 *See, e.g.*, Dorse v. Armstrong World Industries, 798 F.2d 1372, 1375 (11th Cir. 1986) (*citing* United States v. Procter & Gamble Co., 356 U.S. 677 (1958)) (discussing appeals from dismissal that were voluntarily sought for the purpose of

in *Norhart v. Upjohn Co.*,**57** acknowledged that even though a consent judgment was not normally appealable "there existed at least one 'exception', namely, '[i]f consent was merely given to facilitate an appeal following adverse determination of a critical issue, the party [appealing would] not lose his right to be heard on appeal.' "**58** Furthermore, the California Court recognized that " 'it is 'wasteful of trial court time' to require [a party] to undergo a probably unsuccessful . . trial merely to obtain an appealable judgment.' "**59**

Importantly, neither our Legislature nor our appellate courts have instituted an absolute blanket prohibition to pursuing an appeal from a consent judgment. Notably absent is an express prohibition of appeal when the review sought is from an intermediate order which could have entirely disposed of the case (and put insurance proceeds in the claimants' hands much, much sooner).**60**

---

obtaining appellate review of otherwise interlocutory orders); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) (allowing appeal of adjudicated claims where peripheral claims were voluntarily dismissed without prejudice); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266 & n.1 (7th Cir.), *certiorari denied*, 429 U.S. 1029 (1976) (appeal following voluntary dismissal without prejudice of peripheral claims); Norhart v. Upjohn Co., 21 Cal. 4th 383, 400, 981 P.2d 79, 90 (1999) (allowing appeal from consent judgment where trial court's ruling was tentative and where the parties consented for purpose of expediting appeal); Schurr v. Austin Galleries of Illinois, Inc., 719 F.2d 571, 576 (2nd Cir. 1983) (finding consent judgment appealable and ultimately unenforceable, where there was no meeting of the minds regarding essential term and condition).

57 Norhart v. Upjohn Co., 21 Cal. 4th 383, 981 P.2d 79.

58 Norhart v. Upjohn Co., 21 Cal. 4th 383, 400, 981 P.2d 79, 90 (*quoting* Building Industry Ass'n v. City of Camarillo, 41 Cal.3d 810, 817, 226 Cal.Rptr. 81, 84, 718 P.2d 68, 71 (1986)) (First alteration in original). *See also generally* Mecham v. McKay, 37 Cal. 154, 1869 WL 874 (1869).

59 Norhart v. Upjohn Co., 21 Cal. 4th 383, 400, 981 P.2d 79, 90 (*quoting* Building Industry Ass'n v. City of Camarillo, 41 Cal.3d 810, 817, 226 Cal.Rptr. 81, 84, 718 P.2d 68, 71).

60 *See, e.g.*, Rule 201, SCACR.

Admittedly, some jurisdictions permit an appeal from a consent judgment only if the parties have specifically reserved the right to appeal.**61** South Carolina has not, however, articulated such a restriction.**62** If this Supreme Court prefers to set forth a more limited rule to qualify when our appellate courts have jurisdiction to hear appeals from a consent judgment (or, from intermediate orders preceding it), this Supreme Court can hold that an intermediate order which denies a party a complete defense is appealable after a consent judgment has been entered, ***unless the consent judgment expressly precludes such appeal***. This type of rule places the onus on the settling parties to knowingly and intelligently preclude appealability, but only if both parties affirmatively agree.**63** This type of rule would enable the parties to a consent judgment to knowingly agree to foreclose appellate rights for certain issues but, on the other hand, would also preserve a party's right to appeal "any intermediate order or decree necessarily affecting the judgment not before appealed from" as an important

---

61 *See, e.g.*, Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 249 (4th Cir. 1986) (had appellant desired to preserve his right to appeal . . . he might have embodied that reservation in the judgment. Because he has not done so, we may not entertain his appeal from the consent judgment); Verzilli v. Flexon, Inc., 295 F.3d 421, 424 (3d Cir. 2002) (explaining that a party can appeal from a consent judgment only if he or she did not actually consent; the court approving the consent order lacked subject matter jurisdiction to enter the judgment; or the consent judgment explicitly reserved the right to appeal.).

62 South Carolina does permit, for example a motion to vacate a consent judgment pursuant to Rule 60(b), SCRCivP. *See* Pocisk v. Sea Coast Constr., 380 S.C. 584, 671 S.E.2d 98 (holding that order vacating consent judgment not immediately appealable); Maybank Fertilizer Co. v. Jeffcoat, 131 S.C. 420, 127 S.E. 835 (1925) (permitting vacatur of consent judgment due to excusable neglect; and noting that the answer made a prima facie showing of a valid defense).

63 *See* Local No. 93, Int'l Assoc. of Firefighters, AFL-CIO, C.L.C v. City of Cleveland, 478 U.S. 501, 522 (1986) ("[I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.").

default rule. At the same time, this proposed rule would not impair, and indeed should further, the state's policy of encouraging parties to fully and completely settle their disputes.

When litigants, such as Mr. Clemons, Peak, Attorney Owen, and Attorney Horger herein, reach an agreed-upon settlement that also substantially affects third parties, such as Peak, the court overseeing the settlement must be satisfied that the effect on the third-parties is neither unreasonable nor proscribed by law.**64** Here, there is absolutely no evidence that Peak, Mr. Clemons' insurer, had any role whatsoever in agreeing to Mr. Clemons entering into the $3 million consent judgment. In fact, it must be reasonably presumed that Peak was completely excluded from and had no knowledge of the process. As such, Mr. Clemons' $3 million "consent" judgment, which is 120 times his remaining $25,000.00 of liability insurance coverage, substantially, negatively, and unreasonably affected Peak as that is the entity from which Mrs. Johnson will seek satisfaction of the judgment. Therefore, this substantial, negative, and unreasonable effect is simply another basis and justification for this Supreme Court to implement the limited rule authorizing an appeal as Mr. Clemons has proposed.

---

64 Bayou Fleet, Inc. v. Alexander, 234 F.2d 852, 858 (5th Cir. 2000).

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Michael Lee Clemons, respectfully requests this Supreme Court to reverse the Court of Appeals, permit his appeal to proceed, and hold that in narrow circumstances such as these, the presence of a consent judgment does not deprive our appellate courts of jurisdiction to review an interlocutory order which deprived a party of a complete defense.

Respectfully submitted,

NEXSEN PRUET, LLC

By:_____

Stephen P. Groves, Sr., Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

CLARKSON, WALSH, TERRELL & COULTER, P.A.
James P. Walsh, Esquire
Amy Snyder, Esquire
Post Office Box 6728
Greenville, South Carolina 29606
Telephone: 864.232.4400

Attorneys for the Appellant, Michael Lee Clemons

Charleston, South Carolina

21 May 2013

NPCHAR1:1157970.1-BR-(SPG) 022447-00005

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574
South Carolina Court of Appeals
Order filed 1 July 2011

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Petitioner.

PROOF OF SERVICE FOR THE PETITIONER'S BRIEF ON CERTIORARI

Stephen P. Groves, Sr., Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com

James P. Walsh, Esquire
Amy M. Snyder, Esquire
CLARKSON, WALSH, TERRELL & COULTER, P.A.
Post Office Box 6728
Greenville, South Carolina 29606
Telephone: 864.232.4400

Attorneys for the Petitioner, Michael Lee Clemons

I, Stephen P. Groves, Esquire, hereby certify that on 21 May 2013, I served two copies of the ***Brief of the Petitioner on Certiorari*** and one copy of the ***Appendix*** submitted by the Petitioner, Michael Lee Clemons, on counsel for the Respondent, Eddie Williams, as Conservator for Catina W. Nelson, via United States Mail, postage pre-paid, and addressed as follows:

John S. Nichols, Esquire
BLUESTEIN NICHOLS THOMPSON DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A.
Post Office Box 1000
Allendale, South Carolina 29810

Attorneys for the Respondent,
Eddie Williams, as Conservator for Catina W. Nelson

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

21 May 2013

NPCHAR1:1158036.1-BR-(SPG) 022447-00005