THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2007-CP-38-0573
Order (S.C. Ct. App. filed July 1, 2011)

Appellate Case No. 2011-202866

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

v.

Michael Lee Clemons, ... Petitioner.

BRIEF OF RESPONDENT JUNELL W. JOHNSON AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WOODROW C. NELSON

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COUNTER-STATEMENT OF THE CASE AND RELEVANT FACTS

These cases arise out of a horrific automobile wreck in Orangeburg County in March 2006. The defendant, Michael Lee Clemons, was driving drunk and crashed head-on into the car in which Woodrow and Catina Nelson were riding. (App. pp. 55-56; description in Peak's memorandum). Mr. Nelson was killed, and Catina Nelson, his wife, sustained a catastrophic brain injury. (App. pp. 56). Mr. Clemons is incarcerated for felony DUI because of this wreck. (App. p. 56, n. 10; p. 99, ¶ 26).

Mr. Clemons was insured by Viking Insurance, the parent company of Peak P&C. (App. p. 56) ("Peak"). On September 13, 2006, the probate court held a hearing on a proposed settlement of Mr. Nelson's death claim as well as appointment of a conservator for Mrs. Nelson. (App. p. 97, ¶ 9; p. 115; pp. 154-182). After that hearing the Nelsons sent several demands for the policy limits that Viking ultimately said it would pay, but Viking never tendered any payment. The Nelsons withdrew their offers after repeated demands for payment went unanswered. (App. pp. 98-99, ¶¶ 20-28; pp. 101-107).

The Nelsons had UIM coverage with State Farm. State Farm tendered its UIM coverage in its entirety even though Viking did not pay its liability coverage, as State Farm understood the gravity of the damages the Nelsons suffered. (App. P. 102, ¶ 19; p. 102). On February 16, 2007, State Farm wrote to the Nelsons' lawyer advising him "[i]t's unfortunate that [Mr. Clemons' lawyer] is taking so long on this case but as we discussed, we will try to move forward without him." (App. p. 98, ¶ 22; p. 102).

On May 10, 2007, Junell W. Johnson, as Personal Representative of the Estate of Mr. Nelson ("Personal Representative"), brought a tort action against Mr. Clemons. (App.

pp. 78-81). Eddie Williams, as Conservator for Catina W. Nelson (Conservator), also brought a tort action against Mr. Clemons. (App. pp. 82-85). These matters were filed in Orangeburg County, eight (8) months after the purported settlement. The Williams action is the subject of a separate matter before this Court and is separately briefed.

On June 6, 2007, Michael P. Horger, Esquire, counsel for Mr. Clemons, moved the Court to dismiss the actions partly on the ground that the parties had reached settlements. (App. pp. 86-89). The motions also sought enforcement of those purported settlements of each action.

The circuit court held a hearing on June 11, 2008, On October 13, 2008, the court entered one order covering both matters, and denied the motions to dismiss and the motions to enforce the purported settlement. The trial court ruled that there was no compliance with Rule 43(k), SCRCP, as construed by *Farnesworth v. Davis Heating & Air*, 367 S.C. 634, 627 S.E.2d 724 (2006). These cases predated the 2009 amendment to Rule 43(k), so that the version of the Rule at issue in *Farnesworth* applies to these cases. (App. pp. 114-119).

On October 28, 2008, Mr. Horger filed a motion to reconsider pursuant to Rule 59(e), SCRCP. (App. pp. 120-123). Mr. Horger asserted that Viking had "tendered its limits of liability insurance coverage and reached and agreement" to settle each case for $12,500, which required court approval pursuant to Section 43-7-410 of the South Carolina Code. Mr. Horger also asserted that the SC Department of Health and Human Services had subrogation and assignment rights. (App. pp. 121, 123).

On December 31, 2008, the circuit court issued its order denying the motion to

reconsider. (App. pp. 124-125). That order was entered on January 13, 2009. (App. p. 124).

Over two (2) years later on January 14, 2011, counsel for Catina Nelson and for Mr. Nelson's estate served offers of judgment on James Walsh, Esquire (who became Mr. Clemons's lawyer after Mr. Horger) in the amount of $6,000,000.00 for Mrs. Nelson and $3,000,000.00 for Mr. Nelson's estate. (App. pp. 148-151). On February 4, 2011, Mr. Walsh accepted the offers of judgment in each case on behalf of the defendant, Mr. Clemons. (App. pp. 152-153).

Thereafter, on March 7, 2011, attorneys Stephen P. Groves, Sr., Bradish J. Waring, and Paul A. Dominick, all of the Nexsen Pruet law firm, filed a motion to intervene in the case on behalf of the insurance company (Peak) pursuant to Rule 24, SCRCP. Peak asserted (a) it had issued the liability policy to Mr. Clemons, (b) that it was so situated that the confessions of judgment impaired Peak's ability to protect its interests in the matter, and (c) that Peak's interests "are not and have not been adequately represented by any of the existing parties to these two actions." (App. pp. 45-47). There was no mention of Mr. Horger's involvement on behalf of Mr. Clemons. In fact, Peak's lawyers signed the Notice as "Attorneys for Intervenor, Peak Property and Casualty Insurance Corp.," (App. p. 47). Peak subsequently filed an "Amended Motion to Intervene) on March 14, 2011, which removed the language about the failure to adequately represent Peak's interest, but otherwise asserted its interests would be impaired if not allowed to intervene. (App. pp. 67-69). Peak served the document upon Mr. Walsh as Mr. Clemons' attorney. (App. p. 71).

That same day, March 7, 2011, Mssrs. Groves, Waring and Dominick also filed and served the notices of appeal to the Court of Appeals. The notices purported to appeal the following orders or judgments:

A) Judge Goodstein's order of September 30, 2008, denying Mr. Clemons's motion to dismiss pursuant to Rule 12(b), SCRCP;

B) Judge Goodstein's order of December 31, 2008, denying Mr. Clemons's motion to reconsider pursuant to Rule 59, SCRCP; and

C) The confessions of judgment dated February 4, 2011, and entered on the Judgment Rolls on February 7, 2011.

(App. pp. 9-42). The lawyers for Peak represented in the notices that "Counsel for Mr. Clemons received filed and stamped copies of the Judgment no earlier than 7 February 2011." (App. pp. 10, 27). There is no mention of when Mr. Horger, who was Mr. Clemons' actual counsel at the time the 2008 orders were entered, or Mr. Walsh, who was Mr. Clemons' actual counsel at the time of the confessions of judgment (and who signed the offers of judgment) received written notice of the rulings that this new group of lawyers appealed. (App. pp. 9-12). Neither Mr. Walsh nor Mr. Horger were listed on the Notice as counsel for Mr. Clemons. (App. pp. 11, 18).[1]

On April 15, 2011, the Conservator moved to dismiss the appeal, asserting none

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[1] *See* Rule 264 (a), SCACR ("The attorneys ... of the respective parties in the court below shall be deemed the attorneys ... of the same parties in the appellate court until withdrawal is approved and notice is given as prescribed in this Rule."); *Ex parte Strom*, 343 S.C. 257, 263, 539 S.E.2d 699, 702 (2000) ("[I]n order to be removed as counsel of record, an attorney must receive a court order pursuant to [Rule] 11(b), SCRCP. In a case where an attorney believes he has been discharged, if the client fails to request a court order changing attorneys, the attorney is required to request such an order on his own motion.").

of the orders were appealable rulings pursuant to Section 14-3-330 of the South Carolina Code of Laws. (App. pp. 1-7). Peak filed a Return, contending the confessions of judgment were appealable and that it could challenge the other, nonappealable orders ancillary to the appeal. Peak also contended the Conservator waived the appealability issue. (App. pp. 50-66). Mr. Walsh, who is the counsel for defendant Clemons, was listed as co-counsel on the filing. (App. p. 51, 66, 71).[2] The Conservator filed a Reply in opposition to the arguments Peak raised in its Return. (App. pp. 215-222).

On July 1, 2011, the Court of Appeals filed its order granting the motion to dismiss, finding all of the rulings Peak attempted to appeal were not appealable orders or judgments as contemplated by Section 14-3-330. (App. pp. 223-228; pp. 248-250).

On July 14, 2011, Peak's lawyers filed a petition for rehearing, ostensibly on behalf of the defendant, Mr. Clemons. Mr. Walsh was once again listed as co-counsel. Peak's lawyers also included a suggestion for rehearing *en banc*. (App. pp. 229-247). Respondent notified that Court that he was not going to file a return. (App. p. 254). The Court of Appeals denied rehearing on October 13, 2011. (App. p. 256).

On November 10, 2011, Peak's lawyers filed a "Joint Petition for Writ of Certiorari," challenging the Court of Appeals' orders dismissing the appeals Peak took in this matter and in the companion case involving the Conservator for Mrs. Nelson, ostensibly on behalf of Mr. Clemons. On November 23, 2011, Peak's lawyers re-filed

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[2] Mr. Walsh was listed for the fist time as *co-counsel* with Peak's lawyers, despite the obvious conflict of interest created by Peak's actions seeking to intervene on the grounds that the actions of Mr. Clemons, through Mr. Walsh, "may, as a practical matter, impair or impede Peak Property and Casualty's ability to protect *its* interests herein..." (App. p. 68, ¶ (b)).

separate Petitions for Writ of Certiorari in this matter and the companion matter.

The Conservator for Mrs. Nelson filed a Return to the Petition involving Mrs. Nelson. Ms. Johnson, who is the Personal Representative for Mr. Nelson's Estate, filed a separate return. On February 22, 2013, the Court granted the Petitions.

This Brief is essentially identical to the Brief filed in the companion case involving Eddie Williams as Conservator for Catina W. Nelson.

ARGUMENTS

INTRODUCTION

The Brief of Petitioner filed by the lawyers for the insurer, Peak, contains a misleading introduction. Peak asserts that if this Court fails to reverse the order of the Court of Appeals dismissing the appeal in this case, *Mr. Clemons* will suffer a deprivation of *his* right to appeal the trial court's refusal to enforce a purported settlement. (Brief of Petitioner, p. 1). The short answer is this – the purported settlement agreement was not enforceable under Rule 43(k), SCRCP as it existed at the time and this Court's jurisprudence construing that Rule. Further, no "fundamental right" is deprived by adhering to the law that a party who is represented by competent counsel and who voluntarily consents to a judgment has agreed through that counsel to end the case and may not thereafter take a direct appeal of the consent judgment. And *no* fundamental right is affected where an appeal is attempted by an at-fault's insurer after the at-fault party has confessed judgment.

The Court should dismiss the writ of certiorari as improvidently granted. Alternatively, the Court should assess whether the attempt at an appeal in this case is even timely. If the Court is satisfied that the appeal is timely the Court should re-affirm its prior precedent and hold that (1) an order denying a motion to compel settlement is not appealable under Section 14-3-330 of the South Carolina Code until after a true final judgment, and (2) an appeal from that order may not be bootstrapped into an appeal from a confession of judgment, itself an unappealable order. The Court should affirm the Court of Appeals' decision dismissing this appeal.

I. THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

This Court should dismiss the Petition for Writ of Certiorari as improvidently granted for a number of reasons. First, the Court of Appeals' decision is completely consistent with precedent from this Court and Petitioner has not demonstrated sufficient reason to proceed with the matter. Second, the purported appeals from the earlier two orders may be untimely pursuant to Rule 203, SCACR, depending upon when Mr. Horger and Mr. Walsh received written notice of the entry of those orders. Third, if the appeals are timely, neither of those rulings involve appealable orders pursuant to Section 14-3-330. Fourth, the September 2008 order denies a motion to dismiss pursuant to Rule 12(b), SCACR, and is not an immediately appealable order pursuant to Section 14-3-330 until after a final judgment. Fifth, the December 31, 2008, order denies a motion to reconsider the order denying the motion to dismiss; therefore, it, too, is not an immediately appealable order pursuant to Section 14-3-330 unless a true final judgment is entered. Lastly, the February 2011 judgment, which Mr. Clemons himself confessed, is not an appealable decision. Instead, Mr. Clemons must move pursuant to Rule 60, SCRCP, to set the judgment aside and then seek review if he does not receive relief.

The Court of Appeals correctly applied this Court's precedent in holding that the attempted appeals filed by Peak's lawyers ostensibly on behalf of Mr. Clemons were not appropriate. Although this Court granted Peak's petition to review that order, the Court should review the Briefs and the Appendix and dismiss the Petition as improvidently granted. *See, e.g., State v. Gibson*, 401 S.C. 569, 737 S.E.2d 853 (2013) (Court dismissed

certiorari as improvidently granted after "careful consideration of the record, appendix, and briefs"); *Brannon v. Palmetto Bank*, 380 S.C. 493, 671 S.E.2d 603 (2009) (certiorari dismissed as improvidently granted "after careful consideration of the record and briefs"). *See also Belcher v. Stengel*, 429 U.S. 118, 119-120 (1976) (dismissing certiorari as improvidently granted after "plenary consideration ... shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered").

II. THE PURPORTED APPEAL OF THE 2008 ORDERS MAY NOT BE TIMELY

The notices of appeal purport to appeal two orders the circuit court entered in 2008 along with the confession of judgment. The notices do not indicate when the purported appellant, Mr. Clemons, received written notice of the entry of these orders. In light of the filings in this case, however, Mr. Clemons, through his then-counsel Mr. Horger, must have received written notice of the entry of these orders in 2008 and 2009, respectively. Hence, the notices are untimely. And Mr. Clemons and his lawyer, Mr. Walsh, certainly knew when they executed the confession of judgment.

Rule 203, SCACR, provides, in pertinent part:

> **(1) Appeals From the Court of Common Pleas.** A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely ... motion to alter or amend the judgment (Rules 52 and 59, SCRCP) ... has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion....

As the Rule provides, the trigger-point for the deadline to serve and file a notice of appeal

is the date the party receives written notice of the entry of the order.

Mr. Horger received the Order of September 2008 shortly after it was entered, because he filed a motion for reconsideration of this order later in 2008. There is nothing attorneys Peak's lawyers provided to this Court to indicate that Mr. Horger, on behalf of Mr. Clemons, did not also receive written notice of the entry of the December 2008 order denying that motion to reconsider. See Rule 203(e)(2), SCACR (providing the Notice of Appeal "*shall* contain ... a statement of when the appealing party received notice of the order or judgment from which the appeal is taken" if appropriate for the determination of the timeliness of the appeal).

Timely service of the notice of appeal is a jurisdictional requirement. *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985) (timely service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served); *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002) (same). In fact, while this Court may enlarge nearly any deadline under the appellate court rules, timely service of a notice of appeal is one event that cannot be extended. Rule 263(b), SCACR, provides:

> **(b) Extending and Diminishing Time Prescribed by These Rules.** The time prescribed by these Rules for performing any act *except the time for serving the notice of appeal under Rules 203* and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof. The time prescribed by these Rules for performing any act or taking any action may not be extended by agreement of the parties.

(Emphasis added). The requirement of service of the notice of appeal is jurisdictional,

i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Mr. Clemons is bound by the acts and omissions of Mr. Horger, who was acting within the scope of his agency relationship with Mr. Clemons. In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority. *Koutsogiannis v. BB & T*, 365 S.C. 145, 616 S.E.2d 425 (2005). Notice to Mr. Horger was, in fact, notice to Mr. Clemons that the orders had been entered. A purported appeal of those orders over two years later comes too late.

This Court should explore the question of the timing of the appeals Peak is bringing in this case. The Court should dismiss the Petition for a Writ of Certiorari as improvidently granted inasmuch as the underlying appeal was an attempt to appeal two orders that were signed in 2008 and entered in 2008 and 2009.

III. THE FEBRUARY 2011 CONFESSION OF JUDGMENT IS NOT AN APPEALABLE ORDER

The notices of appeal purport to appeal the entry of the judgment under the confessions of judgment Mr. Clemons executed through his attorney, Mr. Walsh, in February 2011. The Court of Appeals correctly held those confessions of judgment are

not appealable. This is the primary issue in this case – appellate review of the 2008 orders is affected by the appealability of the confession of judgment that has not first been challenged by collateral attack. Peak's arguments should not be persuasive.

A. THE CONFESSION OF JUDGMENT IS BINDING ON MR. CLEMONS, MAY NOT BE APPEALED, AND MUST BE COLLATERALLY ATTACKED

The confession of judgment is binding on Mr. Clemons as it was executed by his lawyer, Mr. Walsh. *See, e.g., Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007) (if the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy in such a case being against the attorney). As noted above, in the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority. *Koutsogiannis v. BB & T*, 365 S.C. 145, 616 S.E.2d 425 (2005).

Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding. *Johnson v. Johnson*, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992). The judgments in this case were confessed freely by Mr. Clemons, and executed by his attorney, Mr. Walsh. This is not an appealable decision.

What Petitioner's attorneys have attempted to do on behalf of an insurance company, *not Mr. Clemons himself*, is directly appeal the confession of judgment without first seeking to be relieved of its effect. There is no mechanism under Section 14-3-330

for the appeal Petitioner is attempting to pursue.

Furthermore, while Petitioner's lawyers assert they are "counsel for Mr. Clemons," Mr. Walsh is the attorney who served in that capacity and executed the confessions of judgment for Mr. Clemons. Attorneys Groves, Waring, and Dominick are, in fact, counsel for Peak Property and Casualty Company, Mr. Clemons's insurance carrier. This is evidenced by the motion to intervene they filed on behalf of Peak in which they asserted Mr. Clemons's true counsel, Mr. Horger and later Mr. Walsh, failed to protect Peak's interests in the matter. (Appx. p. 47, ¶ (d)). That is, they represented a party in the trial court (Peak) and took the position that the parties already in the case (including Mr. Clemons) did not adequately represent the interest of their client (Peak). In sum, Mr. Clemons was satisfied with the confession, as evidenced by his authorizing his attorney, Mr. Walsh, to execute it, and the ink was not dry on those documents before Peak's lawyers filed the notices of appeal. In any event, no matter who the appellant or petitioner is in this matter, the voluntary confessions of judgment cannot be appealed under Section 14-3-330, and the Court of Appeals correctly dismissed the appeal as improper.

Peak contends this Court should adopt the following "narrow, yet practical" rule of appealability:

> 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).

(Brief of Petitioner, p. 15). The Court should decline to adopt this suggestion for several

reasons.

First, this suggestion arguably expands the narrow question beyond the question Peak stated in its Petition for Writ of Certiorari. In the Petition, Peak stated the "Question Presented" as follows:

> Does the Court of Appeals have jurisdiction to hear an appeal of two intermediate orders after a final judgment has been entered, when the judgment is a consent judgment?

(Petition, p. 3). It is that question, and that question alone, that this Court agreed to decide when it granted the petition, not the broader question posed in this brief.

Second, the rule that Peak advocates is troubling when applied to this case. The intermediate order in this case did not deprive Peak of a "complete defense to a claim." The order instead correctly refused to enforce a purported settlement, which was never consummated, under the version of Rule 43(k), SCRCP, that existed at the time as well as this Court's construction of that rule in *Farnsworth*. If Mr. Clemons had desired to seek further review of *that* ruling, then nothing compelled him to enter into the confessions of judgment. Instead, he could have litigated liability and damages and then sought appellate review of the orders denying the motion to compel the failed settlement. Instead, he chose to end the cases against him.

Third, had Mr. Clemons desired to preserve the challenge to the previous rulings yet confess judgment, nothing prevented him from negotiating that right and reserving that right as a term of the agreement to confess judgment. He did not do so. Instead, under the advice of able counsel, Mr. Clemons freely and voluntarily entered into the confession of judgment without expressly reserving the right to appeal those earlier rulings.

Fourth, the rule Peak suggests is unnecessary and, in its purest form, unworkable. Currently, an appellate court is permitted to review *any* intermediate order upon appeal from a final judgment, whether that judgment be entered by summary judgment or a verdict on the record. S.C. Code Ann. § 14-3-330(1) (1979 & Supp. 2012) ("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."). Hence, the rule Peak proposes is unnecessary for those types of rulings.

As for reviewing a previously unappealable intermediate order where the party later enters into a consent judgment, like an admission of guilt in a criminal case, a confession of judgment does not preserve anything about the merits of the case for appellate review. *Compare State v. Rice*, 401 S.C. 330, 737 S.E.2d 485 (2013) (South Carolina does not recognize conditional guilty pleas; rather, in South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects, defenses, and claims of violations of constitutional rights). And if a criminal defendant, whose liberty is at stake, *cannot* enter into a conditional confession of judgment so as to preserve any claims of prior error, then certainly a civil defendant should not be permitted to do so. The confession of judgment should at least stand on the same footing as a plea of guilt in a criminal matter.

Fifth, the rule Peak proposes runs afoul of the public policy that underlies Rule 68, SCRCP. The rule was intended to encourage settlement and avoid protracted litigation. *Black v. Roche Biomedical Laboratories, a Div. of Hoffman-LaRoche, Inc.*, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993).

Sixth, even if the Court is intrigued by Peak's suggestion, the Court should resist the temptation. Such a rule would permit parties to manipulate appealability and dictate this Court's jurisdiction. *Cf. Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013) (parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy). The rule would also violate the policy of finality in litigation that is fulfilled by a confession of judgment.

The Court should decline Peak's request that it adopt a rule permitting a party to appeal an interlocutory order after that party has voluntarily entered a confession of judgment. The Court should affirm the Court of Appeals decision dismissing this appeal.

B. THE SOUTH CAROLINA CASES PEAK CITES DO NOT SUPPORT APPEALABILITY

Peak contends prior case law of this Court permits it to directly appeal from a confession of judgment without first taking a collateral attack. Petitioner cites primarily to *Raby Construction, L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004), *Jones & Parker v. Webb*, 8 S.C. (8 Rich.) 202 (1876), *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010), and *Johnson v. Johnson*, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992) in support of this claim. (Brief, pp. 18-19). The Court of Appeals' order, however, is completely consistent with the decisions from this Court and its own precedent.

An examination of *Raby Construction* demonstrates how that case is meaningfully distinct from the attempted appeal in this case. In *Raby*, a contractor (Raby) sought to

foreclose a mechanic's lien against a property owner (Orr). While the litigation was pending the parties entered into a settlement agreement wherein Orr would pay Raby $150,000 by January 24, 2002. The settlement provided that if Orr did not make the payment by that date, a confession of judgment would be filed for $200,000, plus interest and attorneys' fees incurred in connection with foreclosure of the lien. Both the settlement and the confession of judgment stated that Orr would not oppose or contest any foreclosure on the property. Orr did not pay the $150,000 settlement amount, and an order of judgment for $200,000 was entered on February 2002. Shortly thereafter the circuit court issued an order of foreclosure which required Orr to pay $200,000 plus interest and $15,000 in attorneys' fees.

On April 4, 2002, Orr moved pursuant to Rule 60(b)(2) and (3), SCRCP, to vacate the judgment and foreclosure. Orr sought relief because the orders were allegedly the product of Raby's fraud and misconduct, and also because of after-discovered evidence. After a hearing the trial court denied relief, and Orr appealed the denial of the Rule 60(b) motion. This Court affirmed.

Petitioner relies upon language in a footnote in *Raby* to contend that it is entitled to directly appeal the voluntary confession of judgment. This language, however, does not aid Petitioner's cause. In Footnote 3 of *Raby*, this Court stated:

> We note that the trial court initially made a finding that where there is a consent judgment, it is generally conclusive and not subject to collateral attack, citing *Johnson v. Johnson*, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992). Respondent argues that because Orr has not appealed this finding, it is the law of the case. We disagree. In its order, the trial court correctly stated the **general** rule. *See id.* at 46, 425 S.E.2d at 48 ("**Ordinarily**, where a judgment or order is entered by consent, it is

> binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding.") (emphasis added). Furthermore, we note the *Johnson* court ultimately granted relief pursuant to Rule 60(b)(5); therefore, even consent judgments are subject to attack under particular circumstances.

Raby, 358 S.C. at 18, n. 3, 594 S.E.2d at 482, n. 3 (bold by the Court; underline added). Unlike the case currently before this Court, the Court in *Raby* was dealing with an appeal following a collateral attack under Rule 60 on both the confession of judgment and the foreclosure. It was not a direct appeal from the entry of the confession of judgment.

A closer examination of *Jones & Parker v. Webb*, is also instructive. In *Webb*, the parties (Jones, Parker and Webb) were all partners in a business. In February 1874, Jones and Parker sued Webb, claiming Webb had engaged in self-dealing with partnership assets. They sought dissolution, appointment of a receiver, and injunctive relief against creditors. On February 16, 1874, a special referee ordered the partnership dissolved with Webb's consent and issued a separate order enjoining creditors from suing at law and requiring them to present claims to the Clerk of Court (acting as a referee).

On May 12, 1874, the Clerk made a report of the claims presented. The circuit court entered an order that same date "with the consent, in writing, of the attorneys of the plaintiffs and the defendant, confirming the report of the Clerk and making it the judgment of the Court." 8 S.C. at 203. The order disposed of various claims and set forth the procedure for enforcing them.

In July 1874, Webb (the defendant) moved the circuit court to set aside the May 12, 1874 order. The court dismissed the motion as it related to claims that had matured when the May 12, 1874 judgment had been entered, but granted the motion as it related to

claims that had not yet matured. Several creditors (J. B. Jones, L. W. White, W. C. Bee & Co.) who held claims that had not matured appealed so much of the July 1874 order which vacated the May 12, 1874 consent judgment as to their claims.

The Supreme Court held the only issue on appeal was the authority of the circuit court to set aside that portion of the May 12, 1874 order in regards to the creditor claims that had not matured. The Court stated:

> Was the Court authorized to set aside a portion of the order made on the presentment of the report of the Referee, with the consent of all of the parties, leaving the rest of it with the full force which it acquired when originally passed? If he was, then the order no longer remained one of consent, but one entirely of his own notion, for no such modification was asked for by Webb or either of the other partners, or any creditor, and was without notice, too, to the parties affected by it.
>
> When the report of the Referee was submitted, no creditor whose claim was embraced in it had acquired any lien on the property held by the firm or any member of it. The order gave a decree against each one of the firm on every claim reported, with leave to its holder to issue execution. It was made by consent, for its benefit was to be enjoyed by all the creditors. When it is sought so to amend it as to exclude a portion of those without whose consent it could not have been had, may they not with right and propriety say: "Our consent was in consideration of the benefit we secured by the order, and to vacate so much of it as is in our favor and continue it in favor of others who are thereby to gain an advantage at our expense is a violation of the obligation through which they secured our assent"?
>
> In the case before us the change in the order was not asked for by any party in interest. A consent order is the mere agreement of the parties under the sanction of the Court, and is to be interpreted as an agreement. *Allen vs. Richardson*, 9 Rich. Eq., 56 [(1856)]. If so, how can it be set aside in part, so that while the one retains the benefit he expected to receive under it, he may absolve himself from the duty which devolved upon him in regard to the other?
>
> It may be that where a mere administrative order is derived from consent, it may be modified or reformed by the Court on the ground of mistake. Where, however, a decree or judgment is founded on the consent

> of parties, it is binding and conclusive; and, while it may be assailed for fraud, cannot be attacked by the parties to it either directly or collaterally. In 2 Daniel Ch. Prac., 617, it is said "that a decree or order made by consent of the counsel for the parties cannot be set aside either by rehearing or appeal, or by a bill of review, unless by clerical misprision anything has been inserted in the order." In *Harrison vs. Rumsey*, [28 Eng. Rep. 312, 2 Ves. Sen. 488 (1752)] Lord Chancellor Hardwicke said he "would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous." In *French vs. Shotwell*, [5 Johns. Ch. 564 (N.Y. 1821)], Chancellor Kent said: "The same rule was admitted by Lord Hardwicke, in *Bradish vs. Gee*, [27 Engl Rep. 152, 1 Amb. 229 (1754);] and there can be no doubt of the settled doctrine that a decree by consent is binding, unless procured by fraud." In *Atkinson vs. Monks*, [1 Cowen 709 (N.Y. 1823)] it is said by Judge Sutherland: "No appeal or rehearing lies from a decree made by consent." In *Leitch vs. Compton*, [4 Paige 476 (N.Y. 1834),] Chancellor Walworth says: "It had been decided in the case of *The Washington Insurance Company vs. [Slee*, 2 Paige 365 (N.Y. 1832)] which was before the Court in March, 1832, that an answer by consent could not be modified or varied in an essential part without the assent of both parties to such order." If, therefore, a Court of Equity will not set aside a decree or judgment taken by consent, so that the parties would be remitted to the positions they occupied before it was taken, what answer could it make to an application to avoid only so much of it as requires a duty to be performed by the one now seeking to avoid it, while the obligation on the others is to remain in full force and vigor?
>
> In our view of what was said in the argument, and is referred to in the petition of J. B. Jones, L. W. White, W. C. Bee & Co., the Court feels it a duty to Mr. Suber, the attorney and counsel for the appellants, Inmann, Swann & Co., to say that it perceives nothing in regard to his course in the case inconsistent with a high and honorable discharge of the duty which he owed to his clients.
>
> The motion [to set aside the July 1874 order which partially vacated the May 12, 1874 consent decree] is granted, and the order referred to in the record, dated May 12, 1874, will stand as originally passed by the Circuit Judge. The costs of the appellant on his appeal must be paid out of the fund in the hands of the Receiver.

Webb, 8 S.C. at 205-207 (underline added). Hence, this Court was citing to cases from the Chancery Courts of England as far back as the 1750s for the rule that a judgment taken by

consent (such as a confession of judgment) is binding unless procured by fraud, and no appeal or rehearing lies from a decree made by consent. *Webb* actually supports the dismissal by the Court of Appeals. In the situation where there may be an allegation of fraud, the proper thing to do is to challenge the consent judgment through Rule 60(b)(3), SCRCP, and seek appellate review from the order which emanates from that procedure. That is what was done in *Raby*, and what was *not* done here.

The next case, *Linda Mc Co., Inc. v. Shore*, also involved an analysis of Rule 60(b)(4), SCRCP, and did not involve an attempt at a direct appeal from a confession of judgment. The proceedings in *Linda Mc* were supplemental proceedings to execute on the confessed judgment, and the issue was whether that judgment still had energy with the applicable 10-year period. The Court of Appeals relied upon this case merely to explain that this Court has permitted a confession of judgment to be vacated or modified "if void or insufficient in form," and that "void" as defined by Rule 60(b)(4) requires either a failure of due process or a lack of subject matter jurisdiction or personal jurisdiction. (App. p. 249). This parenthetical explanation is right out of the case. *Linda Mc Corp.*, at 552, 703 S.E.2d at 503 ("The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.").

Lastly, *Johnson v. Johnson* involved the setting aside of a consent order under Rule 60(b)(5), SCRCP, where a related consent order had been withdrawn by agreement. Judge Randall Bell, writing for the Court of Appeals, stated:

> Ordinarily, where a judgment or order is entered by consent, it is

> binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding. *Jones & Parker v. Webb*, 8 S.C. 202 (1876). However, a consent order is an agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement. *Id.* It can be rescinded by mutual consent in a subsequent court action. *See In re Pendergrass' Will*, 251 N.C. 737, 112 S.E.2d 562 (1960); *State ex rel. North Carolina State Board of Registration for Professional Engineers & Land Surveyors v. Testing Laboratories, Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981). It cannot, however, be set aside in part so that one party is absolved from the duty imposed by it, while the same party retains the benefit it confers. *Jones & Parker v. Webb*, *supra*. Thus, in a case like this one, where the final order in one case is the basis for the final order in a related case, the court may, if justice requires it, relieve a party of the consent order in the related case if the other consent order has been vacated. Rule 60(b)(5), SCRCP.

Johnson, at 46-47, 425 S.E.2d at 48.The key here is that the court had before it a challenge pursuant to Rule 60, and used that Rule to set the judgment aside. It was the appeal from *that* ruling that was before the Court of Appeals, not a direct appeal from the entry of the consent order.

The orders entered in 2008 (denying a motion to dismiss and denying a motion to enforce a judgment pursuant to Rule 43(k), SCRCP) were not immediately appealable. Insofar as they were subject to review, the deadline for that review has long since passed. The consent offer of judgment, which Mr. Clemons voluntarily accepted, is not appealable at all – that has been the law for over 250 years and is still the law today. *E.g.*, *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005) (the general rule is that consent orders are binding and conclusive and cannot be attacked by the parties either on direct appeal or in a collateral proceeding ; although this is the general rule, consent judgments are subject to attack in particular circumstances, including for the reasons specified in Rule 60(b)). The proper thing for Peak to have done (assuming it could

properly assert standing) would be to collaterally attack the consent judgment on grounds available to it under Rule 60, SCRCP, as was done in *Raby Construction*, and as was suggested in *Johnson v. Johnson* , 310 S.C. at 47, 425 S.E.2d at 47 ("in a case like this one, where the final order in one case is the basis for the final order in a related case, the court may, if justice requires it, relieve a party of the consent order in the related case if the other consent order has been vacated. Rule 60(b)(5), SCRCP.").

Accordingly, this Court should reject the arguments made by Peak and find that the Court of Appeals' decision is fully consistent with this Court's precedents, including *Raby* and *Webb* and its own decision in *Johnson*. The Court should therefore affirm that ruling.

C. SECTION 14-3-330 IS NOT OFFENDED BY THE SETTLED RULE THAT THE CONFESSION OF JUDGMENT IN THIS CASE IS NOT APPEALABLE BUT MUST BE COLLATERALLY ATTACKED

Peak contends that the Court should create an exception to the "final judgment" rule to permit appeals in cases involving confessions of judgment so as to allow review of previously unappealable interlocutory rulings. Peak contends "[u]nder 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." (Brief of Petitioner, p. 19; pp. 20-21). This argument is misleading and should not be persuasive.

First, to say that Mr. Clemons had no means of preserving his right to challenge the 2008 rulings is not factually or legally correct. If Mr. Clemons desired to pursue a

challenge of the trial court's faithful application of this Court's decision in *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006), he could have refused the confession of judgment and pursued his right to have the judgment entered by trial before a judge or jury. He did not. Instead, he decided, with advice of counsel, to accept the confession and end the case. That was his right to do.

Peak contends that Mr. Clemons faced a proverbial "Hobson's Choice,"[3] that is, "an apparently free choice when there is no real alternative." (Brief of Petitioner, pp. 23-24). Peak asserts that the most expedient manner for Mr. Clemons to seek review of the 2008 orders was to agree to the Confessions of Judgment. (Brief of Petitioner, pp. 23-24). This Court should not be persuaded by this argument.

As noted by the Court of Appeals, the trial court's denial of the motion to enforce the settlement did not render it necessary for Mr. Clemons to then consent to judgment. (App. p. 249). He was in jail under a lengthy sentence, so there was nothing pressing him to have a quick judgment entered so that he could appeal. Furthermore, he could have attempted to condition the judgment upon preserving the right to appeal the 2008 rulings – he did not. Peak's scenario presenting the "Hobson's Choice" is speculation and lacks any foundation in this record.

Second, nothing about Section 14-3-330(1) permits a party to agree to confess

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[3] *E.g. Bostan v. Obama*, 674 F. Supp.2d 9, 22 n. 7 (D. D. C. 2009) (the phrase "Hobson's Choice" refers to the option of taking the one thing offered or nothing at all)(citing Bryan A. Garner, *The Elements of Legal Style* 117 (Oxford Univ. Press 2d ed. 2002)); *Chudacoff v. University Medical Center of Southern Nevada*, 609 F. Supp.2d 1163, 1170 n. 2 (D. Nev. 2009) ("Hobson's Choice" is "an apparently free choice where there is no real alternative," citing Webster's Ninth New Collegiate Dictionary 574 (1984)).

judgment and then turn around and appeal that confession along with any interlocutory order. Instead, the statute anticipates that "upon appeal from such final judgment" the court may "review any intermediate order or decree necessarily affecting the judgment not before appealed from...." S.C. Code Ann. § 14-3-330 (1976 & Supp. 2012). Since the policy of this state is not to permit a direct appeal from a confession of judgment, then Section 14-3-330 does not permit review of prior unappealed interlocutory orders.

Peak points to cases it claims hold that Section 14-3-330(1) does not require a party "to actually challenge 'the final judgment itself in order to contest an intermediate judgment." (Brief of Petitioner, p. 21). These cases, however, do not stand for such a broad proposition.

For instance, in *Lancaster v. Fielder* (Petitioner's Brief, n. 45), the Court held that under § 14-3-330(1), a party need not challenge the final judgment itself in order to contest an intermediate judgment. 305 S.C. 418, 409 S.E.2d 375 (1991). Thus, if there is a final judgment, and the party timely files his notice of intent to appeal *from that judgment*, under Section 14-3-330(1) the Court can review any intermediate order or decree necessarily affecting the judgment not before appealed from. The significant difference in *Lancaster*, however, is that the final judgment was entered on a jury verdict and Fielder's motion for new trial on the venue issue was denied. He appeal from that denial, but raised only the issue of the trial court's denial of his motion to transfer venue made on the first day of trial. The Court noted "[w]hile preserving their right to appeal the trial judge's decision to transfer venue, petitioners agreed to try the case in Laurens County." Here, Mr. Clemons confessed judgment, voluntarily agreeing to end the case,

and not preserving *any* rights to appeal or otherwise challenge any prior orders.

In *Greenville County v. Kenwood Enterprises, Inc.*, this Court noted that because appellant was "appealing from a final judgment" the supreme court was permitted to review any intermediate order or decree necessarily affecting the judgment not before appealed from." 353 S.C. 157, 174 n. 13, 577 S.E.2d 428, 437 n. 13 (2003), *overruled on other grounds*, *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).

In *Lord Jeff Knitting Co., Inc. v. Mills*, the Court of Appeals stated the general rule under S.C. Code Ann. § 15-27-130, the predecessor to Rule 60, that orders involving consent judgments may not be challenged except in particular circumstances involving evidence of a mistake, inadvertence, surprise, or excusable neglect and also evidence of a meritorious defense or claim. 281 S.C. 374, 376, 315 S.E.2d 377, 378 (Ct. App.1984).[4] Thus, once again the Court was dealing with an appeal following a collateral attack on a judgment by consent, not a direct appeal from those consent judgments.

In sum, none of these cases support appealability of the confession of judgment in this case, which Mr. Clemons entered into freely and with the advice of competent counsel, and which did not reserve the ability to challenge the 2008 orders.

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[4] The Court also noted that under South Carolina law, where there is an action pending and the attorney is of record, the attorney has, merely by reason of his employment, the implied or apparent authority to confess judgment in the other party's favor if he acts in good faith and without fraud or collusion." *Lord Jeff Knitting*, 281 S.C. at 377, 315 S.E.2d at 379. In such instance, if the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy in such a case being against the attorney. *Id.*

D. THE CASES FROM FOREIGN JURISDICTIONS CITED BY PEAK DO NOT SUPPORT APPEALABILITY

Peak contends that because South Carolina models its rules of procedure after the federal rules, federal cases are instructive on the appealability of consent judgments. (Brief of Petitioner, pp. 25-28). For various reasons these arguments should not be persuasive.

First, appeals in South Carolina are governed by statute, not rule. *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (the right to appeal is controlled by statute and not by Rule 72, SCRCP). Whether a federal rule "recognizes some opportunity for litigants to perfect an appeal from a consent judgment," as Peak argues (Brief of Petitioner, p. 25) does not inform appellate procedure in South Carolina.

Second, the differences between state and federal appellate practice are important. For instance, the federal rules permit the parties to seek certification under Rule 54, Fed.R.Civ.P., for immediate appeal of a ruling that does not finally dispose of the entire case. This Court has not decided yet whether that procedure exists under South Carolina's version of Rule 54. *Link v. School Dist. of Pickens County*, 302 S.C. 1, 5 n. 3, 393 S.E.2d 176, 178 n. 3 (1990) ("Rule 54(b) certification purports to alter the definition of 'final judgment' by allowing a final judgment to be entered on certain claims before disposition of the entire case. Until this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b)."). *See also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856

(Ct. App. 2010) (Rule 54(b), SCRCP, does not require certification, but if the court chooses to certify a judgment, it must do so in a definite and unmistakable manner). So under South Carolina's general appellate statute, appeals must be from a "final judgment," unless the case falls within the limited category of cases permitting or requiring immediate appeal of an interlocutory judgment.

Furthermore, the cases cited support the decision of the Court of Appeals to dismiss the appeal. For instance, in *Dorse v. Armstrong World Industries, Inc.*, (Brief of Petitioner, pp. 25-26, n. 56), the Eleventh Circuit actually stated: "*Where the parties have agreed* to entry of an order or judgment *without any reservation* relevant to the issue sought to be appealed, one party may not later seek to upset the judgment, unless lack of 'actual consent' or a failure of subject matter jurisdiction is alleged." 798 F.2d 1372, 1375 (11 th Cir. 1986) (emphasis added). This is a rule that is common among the federal courts. *See, e.g., Verzilli v. Flexon, Inc.*, 295 F.3d 421 (3rd Cir. 2002) (party cannot appeal a consent judgment unless there is an explicit reservation of right to appeal). In *Verzilli*, the Third Circuit Court of Appeals discussed the rule:

> There is some disagreement among the Courts of Appeals on the so called "standing" issue. *See, e.g., Clark v. Housing Auth. of City of Alma*, 971 F.2d 723 (11th Cir. 1992) (consent decree is appealable in some circumstances); *Hudson v. Chicago Teachers Union, Local No. 1.*, 922 F.2d 1306 (7th Cir. 1991) (appeal allowed because "stipulation memorialized their continued disagreement" with issues previously decided by the district court); *Dorse v. Armstrong World Indus., Inc.*, 798 F.2d 1372 (11th Cir.1986) (appeal allowed when parties expressly stated an intent to appeal); *Greenhouse v. Greco*, 544 F.2d 1302, 1305 (5th Cir.1977) (party who consented to dismissing case as moot so as to appeal district court's order was not barred from appealing the case because the party did not consent to a judgment that would preclude appellate review). *But see Amstar Corp. v. Southern Pac. Transp. Co. of Texas & Louisiana*,

607 F.2d 1100 (5th Cir. 1979) (appeal precluded even when parties expressly stipulated intent to appeal).

> We have recognized that, as a general rule, a party cannot appeal a consent judgment. There are two limited exceptions: failure to assent and lack of subject matter jurisdiction. *In re Sharon Steel Corp.*, 918 F.2d 434, 437 n. 3 (3d Cir.1990). But we have also held that a party to a consent judgment may obtain appellate review *if there is an explicit reservation of the right to appeal. Keefe v. Prudential Prop. & Cas. Co.*, 203 F.3d 218, 223 (3d Cir.2000). The stipulation in this case does preserve appellate rights and thus eliminates the defense of waiver. That said, however, finality remains an issue.

295 F.3d at 423-424 (emphasis added). There was no such explicit reservation here.

The primary case Peak relies upon is in accord with this general rule. In *Norgart v. Upjohn Co.*, parents brought a pharmaceutical products liability suit against The Upjohn Company on behalf of their deceased daughter. 981 P.2d 79 (Cal. 1999). The child had committed suicide by means of an overdose of "controversial" hypnotic or sleeping drug, Halcion, exactly six years prior to the date the Norgarts commenced the suit. Upjohn raised a statute of limitations defense to the action based upon California's one-year wrongful death limitations period and its three-year period for actions based in fraud. Following discovery Upjohn moved for summary judgment, and the Norgarts countered with the discovery rule, contending there were triable issues as to when they came to entertain a suspicion or have reason to suspect a factual basis for their wrongful death claim based upon Upjohn's behavior in marketing Halcion despite its allegedly "unreasonable dangerousness." *Norgart*, 981 P.2d at 84-85. When the court denied the motion, Upjohn made an entirely new summary judgment motion as to the Norgart's "survival" cause of action for fraud, and renewed its motion as to the wrongful death

claim. *Id.*, at 85.

Importantly, "the Norgarts and Upjohn entered into an agreement, on the Norgart's proposal, to resolve the proceedings. The Court described the stipulation as follows:

> [T]he Norgarts and Upjohn entered into an agreement, on the Norgarts' proposal, to resolve the proceedings in the superior court in Upjohn's favor following the superior court's tentative ruling on its summary judgment motion against the operative complaint, in order apparently to hasten review in the Court of Appeal. If the tentative ruling was to grant, the Norgarts would accept that determination as final. But if it was to deny, they authorized Upjohn to submit the following stipulation: the superior court should grant Upjohn's summary judgment motion because there was no triable issue of material fact and it was entitled to judgment as a matter of law based on the statute of limitations, specifically the statute of limitations applicable to causes of action for wrongful death with its one-year limitations period, and should enter judgment in its favor accordingly. As for any subsequent appeal by the Norgarts, the stipulation, in effect, bound both the Norgarts and Upjohn to the facts that Upjohn had stated, and the Norgarts had admitted, were undisputed; *it did not, however, bind either to the law, each being free to "assert the same legal arguments and objections before the Court of Appeal as were made" in the superior court; but it bound each not to "argue" that the other "is not an aggrieved party for purposes of appeal.*"

Norgart, 981 P.2d at 85-86 (emphasis added).

The California Court noted it first had to discuss "whether the superior court's judgment was nonappealable under what ... we called the 'rule' that 'a party may not appeal a consent decree.'" *Norgart*, 981 P.2d at 90. The Court first defined "consent judgment" as "a judgment entered by a court under the authority of, and in accordance with, the contractual agreement of the parties, intended to settle their dispute fully and finally." *Id.* (Citations omitted). The Court then noted "there existed at least one 'exception,' namely, that '[i]f consent was merely given to facilitate an appeal following

adverse determination of a critical issue, the party will not lose his right to be heard on appeal.'" *Id.* That is, "[a]lthough a consent ... judgment is not normally appealable, an exception is recognized when 'consent was merely given to facilitate an appeal following adverse determination of a critical issue.'" *Id.* (Citations omitted). The basis for the exception is the principle that "it is 'wasteful of trial court time' to require the plaintiff to undergo a probably unsuccessful ... trial merely to obtain an appealable judgment." *Id.* (Citations omitted).

Turning to *Mecham v. McKay*, 37 Cal. 154 (1869), described as California's "seminal decision in this area," the Court explained the rule, its exception, and their underlying rationale:

> "We have several times decided that we will not review, on appeal, judgments and orders entered by consent. [Citations.]
>
> "These decisions proceed on the theory that by consenting to the judgment or order the party expressly waives all objection to it, and cannot be al-lowed afterwards, on appeal, to question its propriety, because by consenting to it he has abandoned all opposition or exception to it.
>
> "We are not inclined to retract or modify this proposition, but it is to be limited to cases wherein it does not appear from the record that the consent was given only *pro forma* to facilitate an appeal, and with the understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition to the judgment or order. In other words, we will construe the stipulation according to the intention and understanding of the parties at the time, and give effect to it accordingly. If it appears from the record that it was intended by the parties to be only a *pro forma* judgment or order entered by consent for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid ruling to give to the stipulation a conclusive effect not contemplated by the parties. We adopt the more liberal practice of construing the stipulation as the parties understood it at the time."

Norgart, 981 P.2d at 90 (emphasis added). The Court added:

> The rationale turns on the intent of the parties either to settle their dispute fully and finally or merely to hasten its transfer from the trial court to the appellate court. The rule covers cases in which the parties intended a full and final settlement of their dispute, and the exception covers those in which they intended merely a hastening of its trial-court to appellate-court transfer.

Id. at 91 (emphasis added). Thus, there must be "an understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition to the judgment or order." *Id.* The Court added:

> If "it is 'wasteful of trial court time' to require the plaintiff to undergo a probably unsuccessful ... trial merely to obtain an appealable judgment" [] — and indeed it is — it is wasteful no matter what the cause of the probable lack of success. That is true if the "adverse determination" in question is one by the trial court, even though such a decision may be revisited by the trial court itself before it exerts any effect. It is true, *a fortiori*, if the "adverse determination" in question is one by an appellate court, in the same action or another, inasmuch as such a decision is beyond the trial court's power to change. Be that as it may, any "adverse determination" of this sort is not a legal condition that defines the exception, but only a factual circumstance that may happen to accompany, and explain, the plaintiff's consent to an unfavorable judgment or order. For it is "accidental" why the plaintiff might desire "to facilitate an appeal." [] It is "essential," however, that the plaintiff actually so desire. There is no question that the Norgarts harbored such a desire.

Id. (Emphasis added).

So the determinative fact in all of this is whether that was an expression by *both* parties that the confession of judgment was entered "merely to hasten its transfer from the trial court to the appellate court." The understanding must be "on both sides" and the understanding must "appear from the record that the consent was given only *pro forma* to facilitate an appeal...." *Norgart*, at 90.

Examining this record, there is *nothing* to base an assertion that Mr. Clemons entered the confession intending to preserve his right to appeal the 2008 orders. (App. pp. 21-23, 212-214). There is also *nothing* in the record that Mrs. Nelson conservator, Mr. Williams, understood or agreed that the confession was being entered solely to facilitate Mr. Clemons' appeal of the 2008 orders. Peaks lawyers do not point to anything, nor can they, because it is just not there.

Apparently recognizing the absence of any expression that both parties intended to preserve Mr. Clemons right to challenge the 2008 orders, Peak advocates that the Court adopt a rule 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.***" (Brief of Petitioner, p. 27) (Bold, underline and italics in the original). Peak contends this "type of rule places the onus on the settling parties to knowingly and intelligently *preclude* appealability, but only if both parties affirmatively agree." *Id.* The Court should reject this invitation.

First, such a rule flies in the face of settled precedent in this jurisdiction that a confession of judgment is not appealable but must be challenged by collateral attack. Furthermore, as discussed above, the general rule elsewhere is that a consent order is *not* appealable, and in order to preserve the right to appeal under an exception to that rule, both parties must express on the record that the consent order is entered to facilitate appeal of a specific ruling. That rule puts the onus on the party wishing to seek appellate review of a ruling to include that term as a condition of the consent order and to obtain the other party's agreement.

Although the Court need not adopt such a rule here, since the record is clear that this Confession of Judgment was entered without any reservations, the rule espoused by *Norgart* is a better rule than the rule Peak advocates here. Peak's rule would leave the parties wondering when they left the settlement table whether the other side might have "buyer's remorse" and decide to appeal a prior ruling even after entering a consent order ending the case. The rule discussed in *Norgart* permits all parties to leave the discussion knowing the parameters of the consent judgment they just entered, without having to guess if the other side will take a subsequent appeal.[5]

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[5] Peak finally admits the true nature of this appeal in the final paragraph of its brief. It is *not* appeal on behalf of Mr. Clemons, even though that is the pretense of this entire exercise. Instead, Peak unabashedly confesses that Mr. Clemons entered into the "agreed-upon settlement" but complains that it "substantially affects *third parties, such as Peak....*" (Brief of Petitioner, p. 28). Peak poses the adverse affect on *Peak*, as a third-party, as a justification to permit it to don Mr. Clemons' clothes and pursue this appeal from the confession of judgment Mr. Clemons freely entered under advice of counsel and without reservation. (Brief of Petitioner, p. 28). Peak then persuaded Mr. Clemons' lawyer, Mr. Walsh, to permit Peak's lawyers to represent to the Court of Appeals and to this Court that these lawyers *also* represent Mr. Clemons, even though everything they are attempting here is adverse to Mr. Clemons' wishes and the agreement he freely entered under Mr. Walsh's advice. It is an obvious conflict of interest that has not, and truly cannot, be waived. *Compare* Rule 1.7(a), RPC, Rule 407, SCACR ("A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); Rule 1.7(b), RPC, Rule 407, SCACR (permitting concurrent representation so long as all four elements are met, including informed written consent by both clients). The comments to Rule 1.7 explain that this rule protects loyalty to the client and independent judgment regarding the proceedings. This Court should explore this aspect of this case and require these lawyers to withdraw from their purported representation of Mr. Clemons.

CONCLUSION

These appeals were initiated by an insurance company that is not and has never been a party to these cases, and the appeals are taken over two years after the purported Petitioner/Appellant, Mr. Clemons, received the orders at issue. The appeals are untimely.

But even if the appeals were timely served and filed, the appeals are from: (a) an order denying a motion to dismiss; (b) an order denying the motion to reconsider the denial of the motion to dismiss; and (c) a voluntary confession of judgment entered under the advice of counsel. An order denying a motion to dismiss is not immediately appealable, and the same is true for voluntary confessions of judgment that the purported Petitioner/Appellant Mr. Clemons freely entered. And that last order has the effect of waiving all prior complaints and ending the case.

The appellate courts of this State must address the issue of subject matter jurisdiction, even if not raised by the parties. See, e.g., *Central Realty Corp. v. Allison*, 218 S.C. 435, 448, 63 S.E.2d 153, 159 (1951) ("[I]f the Court is without jurisdiction of the subject matter, such an objection may be first raised in this Court, and is not waived by a failure to make the question in the Court below; and indeed, without any such objection the Court should *sua sponte* determine such a question if it arises on the record."). Pursuant to Rule 203, SCACR, and Section 14-3-330, the Court of Appeals correctly ruled it lacked jurisdiction over the purported appeal in this matter, and appropriately dismissed the appeal.

As for the rule of limited appeal of a consent order Peak advocates in this case, the Court should reject that rule. If the Court intends to adopt a rule that would permit a

party to appeal from a consent order, the Court should *not* adopt the rule Peak advocates, but should adopt the rule espoused in the vast majority of jurisdictions who follow a rule of limited appealability, and declare the record must demonstrate that *both* parties expressly entered the agreement as a means to facilitate an appeal without the time and expense of a lengthy trial.

The Court should affirm the Court of Appeals' dismissal of the appeal by Petitioner ostensibly on behalf of the defendant below, Mr. Clemons. The Court should further instruct the Court of Appeals to remit the matter to the circuit court for further proceedings consistent with this ruling.

Respectfully submitted,

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July 19, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2007-CP-38-0573
Order (S.C. Ct. App. filed July 1, 2011)

Appellate Case No. 2011-202866

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

v.

Michael Lee Clemons, ... Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with the *Brief of Respondent* by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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