THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-02906
Appellate Case No. 2013-000209

V.E. Amick & Associates, LLC .....Respondent,

v.

James L. Cooper, Jr., Pamela C. Cooper, Palmetto Environmental Group, Inc., and Ecological Resources, Inc.....Appellants.

INITIAL BRIEF OF RESPONDENT

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2. Can defendants a judgment creditor is seeking to hold accountable for a judgment entered against another, either through a veil piercing or successor liability theory, relitigate issues decided against the judgment debtor in the action that gave rise to the judgment?

STATEMENT OF THE CASE

This is a collection action on a judgment obtained by V.E. Amick & Associates, LLC ("Respondent") against Appellant Palmetto Environmental Group, Inc. ("PEG") in Civil Action No. 05-CP-40-5995 (the "Underlying Case") in the amount of $391,209.21. PEG appealed the judgment to the South Carolina Court of Appeals, which affirmed in Opinion No. 4860 on August 10, 2011, and the judgment is a final judgment. Unsuccessful in attempts to collect the judgment in supplemental proceedings, Respondent filed this action against PEG, James L. Cooper ("James"), Jr., Pamela C. Cooper ("Pamela"), and Ecological Resources, Inc. ("Ecological") under a piercing/successor liability theory on April 23, 2012. James is the president and owner of PEG. Pamela is James's wife and the alleged President and owner of Ecological. During the pendency of the Underlying Case, PEG sold substantially all of its assets to Ecological.

On June 4, 2012, the Appellants filed their joint Answer and Counterclaims, generally denying the allegations of the Complaint and asserting claims against Respondent for intentional interference with contractual relationships and prospective business relationship and abuse of process. On June 14, 2012, Appellants served their

Amended Answer and Counterclaims. Appellants' second, third, and fourth alleged defenses were 1.) failure to obtain condition precedent, 2.) unclean hands, and 3.) intentional interference with contractual relationships and prospective business relationship. On June 15, 2012, Respondent filed its Reply to Counterclaims and a Motion to Strike Appellant's Second, Third, and Fourth Defenses on the grounds that all of those defenses were improper, collateral attacks on the Judgment in the Underlying Case. On August 14, 2012, the circuit court heard arguments on Respondent's Motion to Strike. On November 20, 2012, the circuit court entered an Order striking Appellants' second, third, and fourth defenses from their Amended Answer and Counterclaims. On December 4, 2012, Appellants filed a Motion for Reconsideration relating to the Court's November 20th Order. On January 8, 2013, the Court entered an Order clarifying and modifying its November 20, 2012 Order, but still striking Appellants' second, third, and fourth defenses from their Amended Answer and Counterclaims. On January 30, 2013, Appellants filed their Notice of Appeal regarding the Court's January 8, 2013 Order.

FACTS

Respondent entered into a contract with the South Carolina Department of Health and Environmental Control ("DHEC") to repair damage to soil and groundwater caused by the leaking of petroleum products from certain Underground Storage Tanks ("USTs") throughout South Carolina. (Compl. ¶ 10; Am. Answer and Countercl. ¶ 8.) Pursuant to the contract, Respondent was to perform work on five sites: 1.) Lakeside Market, Summerton, SC; 2.) SA Guerry & Sons; 3.) Charleston County General Services; 4.) Huse Property; and 5.) Cromer's Store. (Compl. ¶ 13.) The dispute between Respondent and PEG in the Underlying Case only concerned the Lakeside Market, Huse Property,

and Cromer's Store sites. (Compl. ¶ 13; Am. Answer and Countercl. ¶ 11.) Appellants deny that Respondent subcontracted the work for these three sites to PEG (Compl. ¶ 11; Am. Answer and Countercl. ¶ 9,) yet they admit that PEG agreed to supply all labor, material, and equipment necessary to reduce the levels of certain chemicals found in the groundwater of these sites to Site-Specific Target Levels as determined by DHEC and set forth in the contracts between Respondent and DHEC. (Compl. ¶ 12; Am. Answer and Countercl. ¶ 10.) Regardless, the trial court in the Underlying Case found the PEG was Respondent's subcontractor. *See V.E. Amick & Associates, LLC v. Palmetto Envt'l Group, Inc.*, 394 S.C. 538, 542, 716 S.E.2d 295, 297 (Ct. App. 2011). PEG began performance on these three sites pursuant to the subcontracts between Respondent and PEG, and Respondent paid PEG in accordance with the terms and conditions of the subcontracts. (Compl. ¶ 14; Am. Answer and Countercl. ¶ 12.)

PEG abandoned its contracts with Respondent, forcing Respondent to complete the work at a cost over and above its agreements with DHEC. (Compl. ¶¶ 15-20.) Disputes between Respondent and PEG ultimately led to Respondent filing the Underlying Case. (*Id.*) In the Underlying Case, Respondent obtained a verdict in the amount of $391,209.21 against PEG for breaches of the various subcontracts, such amount representing Respondent's costs of completion. (Compl. ¶ 21; Am. Answer and Countercl. ¶ 14.) Respondent was unable to collect any of this amount, because during the pendency of the Underlying Case, PEG sold all of its assets to Ecological, a company that did not exist until six months after the purported sale. (Compl. ¶¶ 22-26; Am. Answer and Countercl. ¶ 16.) James is the president and owner of PEG, and Pamela owns Ecological. (Compl. ¶¶ 27, 32; Am. Answer and Countercl. ¶ 18.) The effect of

this "sale" was to put PEG's assets out of the reach of its creditors, primarily Respondent. (Compl. ¶ 29.)

STANDARD OF REVIEW

"Upon motion pointing out the defects complained of . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. A motion to strike under Rule 12(f), SCRCP is evaluated in a manner similar to a motion to dismiss under Rule 12(b)(6), SCRCP. *Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009) (citing *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)). Under this standard, "the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." *Id.* (quoting *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct. App. 1985)). "The matter of striking from a pleading . . . is largely within the discretion of the trial judge." *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 492, 730 S.E.2d 328, 331 (Ct. App. 2012) (quoting *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975)). A trial court's grant of a motion to strike "will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Id.* (quoting *Brown*, 264 S.C. at 194-95, 213 S.E.2d at 728) (internal citations omitted in original).

ARGUMENTS

1. THE TRIAL COURT CORRECTLY RULED THAT THE DEFENSE OF FAILURE TO OBTAIN CONDITION PRECEDENT IS BARRED BY *RES JUDICATA* AS TO THE ONLY APPELLANT WITH STANDING TO ASSERT SUCH DEFENSE.

The Orders appealed by Appellants struck three of their affirmative defenses, one of which is also designated as a counterclaim. (*See* Order, Nov. 20, 2012; Order, Jan. 8, 2013; Am. Answer and Countercl. ¶¶ 24-54.) The first struck defense, failure to obtain condition precedent, alleges that each of the DHEC contracts with Respondent required the entity performing the work to have either a professional engineer ("PE") or professional geologist ("PG") on staff. (Am. Answer and Countercl. ¶ 26.) Appellants allege that Respondent had a PE on staff, but PEG did not, which prevented PEG from being able to perform its work. (*Id.* at ¶¶ 27-28.) Appellants further allege that to allow PEG to perform its subcontracted work on the DHEC contracts, Respondent and PEG entered into a joint venture or partnership whereby the two entities agreed to share in the profits and losses of the DHEC contracts. (*Id.* at ¶¶ 29-30.) According to Appellants, before bringing any action against PEG, Respondent "must first seek a partnership accounting and until such partnership accounting can be completed, no action lies against PEG or any other party based upon the alleged liability between the partners of the joint venture." (*Id.* at ¶ 31.)

a. ONLY PALMETTO ENVIRONMENTAL GROUP, INC. HAS STANDING TO ASSERT THE DEFENSE OF FAILURE TO OBTAIN CONDITION PRECEDENT.

Taking as true Appellants' assertion that a partnership existed between Respondent and PEG, PEG as the only alleged partner with Respondent may raise the

defense that as a condition precedent to a lawsuit, there must first be a partnership accounting. James, Pamela, nor Ecological are alleged to be partners. (*See id.* ¶¶ 29-30.) Appellants' argument that these non-partners[1] may raise the issue of a partnership accounting as a condition precedent to the present action is without any support in existing case law and in contravention of the provisions of the Uniform Partnership Act, S.C. Code Ann. §§ 33-41-10, *et seq*. Every case discussing the equitable requirement of a partnership accounting prior to legal action between partners does so in the vein of a *partner's* right to an accounting. *See, e.g., Norris v. Heyward*, 312 S.C. 67, 70, 439 S.E.2d 264, 265 (1993) ("Furthermore, '[a]n accounting and settlement between copartners is a condition precedent to an action by one partner against another on partnership claims and transactions.'") (citations omitted); *Lawson v. Rogers*, 312 S.C. 492, 499, 435 S.E.2d 853, 857 (1993) (citing S.C. Code Ann. § 33-41-540) ("A ***partner's right*** in the partnership property carries with it a right to an accounting.") (emphasis added); *Goiser v. Harper*, 307 S.C. 64, 66, 413 S.E.2d 845, 847 (Ct. App. 1991) ("Generally ***co-partners may not sue each other*** at law unless an accounting in equity has been had.") (citations omitted; emphasis added); *Burch v. Ashburn*, 295 S.C. 274, 280, 368 S.E.2d 82, 85 (Ct. App. 1988) ("This case calls for application of the rule that ***copartners cannot sue each other*** at law for matters arising out of the partnership until there is first an accounting in equity between the partners.") (citations omitted; emphasis added). Further, the Uniform Partnership Act only holds partners accountable to other

[1] Respondent does not admit the existence of a partnership with PEG, but it must accept this allegation as true for purposes of this brief, despite this allegation flying in the face of a finding in the Underlying Case.

partners and the partnership and only gives partners a right to a partnership accounting. *See, e.g.,* S.C. Code Ann §§ 33-41-540(1); -550; -1090.[2]

As the right to a partnership accounting only accrues to other partners, only PEG may assert the defense of failure or condition precedent. However, as explained below, PEG is barred from now raising this defense.

b. PALMETTO ENVIRONMENTAL GROUP, INC.'S DEFENSE OF FAILURE TO OBTAIN CONDITION PRECEDENT IS BARRED BY *RES JUDICATA*.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *RIM Associates v. Blackwell*, 359 S.C. 170, 183, 597 S.E.2d 152, 159 (Ct. App. 2004) (citing *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). To successfully assert *res judicata*, a party must establish three elements: "1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit." *Stone v. Roadway Express, Employer*, 367 S.C. 575, 580, 627 S.E.2d 695, 698 (2006); *see also Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011) (citing *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992)) (stating the elements to be proven to establish *res judicata* are (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit."). The doctrine of *res judicata* bars not only claims raised in the prior litigation, "but also those 'issues which *might have been* raised in the former suit.'" *RIM Associates*, 359 S.C. at 183, 597 S.E.2d

[2] These rights and duties are also applicable to a partner's legal representative or a deceased partner's representative. James, Pamela, nor Ecological allege they are PEG's legal representative.

at 159 (quoting *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109) (emphasis in original). Appellants admit in their brief that the judgment in the Underlying Case is a final, valid judgment on the merits. (Appellants' Br. 6.) Further, Respondent and PEG are the same parties as in the Underlying Case. The only element to be decided is whether PEG's defense of a partnership accounting as a condition precedent to suit should have properly been included in the Underlying Case. Stated another way, is the issue of a partnership accounting an issue which might have been raised in the Underlying Case?

South Carolina courts have utilized at least four different tests to determine whether a claim should have been brought in a prior action. *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (citing James F. Flanagan, *South Carolina Civil Procedure* 649–50 (2d ed. 1996)). Those four tests are:

> (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action.

Id. at 172 n.7, 712 S.E.2d at 414 n.7 (quoting Flanagan, *supra*, at 649-650). The South Carolina Supreme Court has declined to specifically adopt any of the four tests as the definitive means for determining whether a claim should have been brought in a prior action; rather, the four tests are to be used as factors in determining the application of *res judicata* to a particular claim or defense. *Id.* at 173, 712 S.E.2d at 414. If Appellants' allegations are to be believed, which they must be in this context, the Underlying Case was a suit by one partner, Respondent, against another, PEG. The present action and the Underlying Case have an identity of subject matter and involve the same primary right

held by Respondent and the same primary wrong committed by PEG: Respondent is trying to recoup the cover costs incurred due to PEG's failure to complete its work on the DHEC contracts. The claims in both actions also arise out of the same transaction or occurrence: the DHEC contracts and PEG's inability to complete them. PEG had its opportunity to request or demand an accounting prior to the Underlying Case or to raise that defense during the Underlying Case; it did neither. To now request an accounting flies in the face of the valid, final jury verdict, which is in essence the jury's accounting between Respondent and PEG. To go a step further, the trial court in the Underlying Case found that PEG was a *subcontractor* of Respondent, not a partner. *See V.E. Amick & Associates, LLC*, 394 S.C. at 542, 716 S.E.2d at 297 ("DHEC awarded [Respondent] all three contracts, and [Respondent] ***subcontracted*** 100% of the DHEC contracts to [PEG].") (emphasis added).

2. BECAUSE PALMETTO ENVIRONMENTAL GROUP, INC.'S COUNTERCLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS AND PROSPECTIVE BUSINESS RELATIONSHIP COULD HAVE BEEN ASSERTED IN A PRIOR ACTION, THE TRIAL COURT CORRECTLY DETERMINED THAT THIS COUNTERCLAIM IS BARRED BY *RES JUDICATA*.

The trial court's Orders struck PEG's defense and counterclaim for intentional interference with contractual relationships and prospective business relationship. (*See* Order, Nov. 20, 2012; Order, Jan. 8, 2013.) Respondent's actions, as alleged by Appellants, purportedly put PEG's PE's license at risk, damaged the business reputation of PEG and James, and intentionally interfered with the employer/employee relationship between PEG and its PE. (Am. Answer and Countercl. ¶¶ 47-49.) This caused PEG to lose its PE and make it unable to perform its subcontracted work under the DHEC

contracts at issue in the Underlying Case or any future DHEC contracts. (*Id.* at ¶¶ 50-52.) Respondent's actions were allegedly intentional, designed to harm PEG, and resulted in damage to PEG. (*Id.* at ¶¶ 53-54.)

It is well settled that "[r]es judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109 (citing *Sub–Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992)). As discussed in Section 1., b., *supra*, the only issue to be decided is whether this defense and counterclaim should have properly been included in the Underlying Case. Notably, PEG is now making a different excuse for its failure of performance than it did in the Underlying Case. In the appeal of the Underlying Case, this Court noted that at trial James "conceded the biggest reason he failed to meet the ultimate target levels for the reduction of petroleum was that his company ran out of money and could no longer operate." *V.E. Amick & Associates, LLC*, 394 S.C. at 543, 716 S.E.2d at 297; *see also id.* at 548, 716 S.E.2d at 300 ("Finally, [James] admitted that the reason [PEG] ceased working on these projects and failed to reach the 100% milestone was because his company ran out of money, not because of impossibility of performance."). In essence, PEG argues that because it is now asserting a different excuse for its non-performance than that in the Underlying Case, it should be allowed a second bite at the apple.

PEG's defense and counterclaim for intentional interference with contractual relationships and prospective business relationship clearly would have been a compulsory counterclaim under Rule 13(a), SCRCP in the Underlying Case. Rule 13(a), SCRCP reads in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, ***if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(Emphasis added). Both *res judicata* (assuming certain conditions are met) and Rule 13(a), SCRCP bar subsequent actions on a claim not raised in a prior action that arises out of the same transaction or occurrence. All of PEG's alleged damages arose of its relationship with Respondent on the DHEC contracts. The subject matter (or transactions) at issue in the Underlying Case were PEG's non-performance on the DHEC contracts. By failing to raise this claim in the Underlying Case, PEG lost the ability to raise it as a defense and counterclaim in the present action. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) (citing *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997)) ("If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action.").

3. THE TRIAL COURT CORRECTLY RULED THAT THE APPELLANTS ARE BARRED FROM RAISING THE DEFENSE OF UNCLEAN HANDS.

The trial court's Orders also struck Appellants' defense of unclean hands. (*See* Order, Nov. 20, 2012; Order, Jan. 8, 2013; Am. Answer and Countercl. ¶ 32.) Appellants allege that Respondent's PE retired in 2001 and that Respondent would not hire a replacement in violation of the DHEC contracts and state law. (Am. Answer and Countercl. ¶ 33.) These actions allegedly resulted in PEG's inability to complete its obligations under the subcontracts. (*Id.*) In furtherance of this defense, Appellants also allege that Respondent's owner, David Jordan, through his general contracting firm L-J,

Inc. entered into a contract with the City of Goose Creek (that is in no way related to the DHEC contracts) and further subcontracted a portion of that work to PEG. (*Id.* at ¶ 34.) To complete its subcontracted work on the Goose Creek contract, PEG allegedly needed to further subcontract certain portions of its agreed upon scope of work. (*Id.* at ¶ 35.) PEG could not find any sub-subcontracts allegedly because other contractors would not work on a job with Respondent, Respondent's owner, or L-J, Inc. (*Id.* at ¶ 36.) Although essentially admitting that PEG could not complete its scope of work on the unrelated Goose Creek job (*see id.* at ¶ 35-36,) Appellants allege this was merely an "excuse" for L-J, Inc.'s decision to take over PEG's scope of work (*id.* at ¶ 37). Appellants allege that L-J, Inc.'s refusal to pay PEG $90,000 owed for the Goose Creek job left PEG essentially bankrupt and unable to meet its obligations under the DHEC subcontracts. (*Id.*) PEG's poor financial condition was somehow masterminded by Respondent and its owner. (*Id.*)

According to Appellants, when Respondent's actions threatened PEG's reputation and financial condition and PEG's PE's license, PEG's PE refused to work on the DHEC contracts despite the fact that they were supposedly 95% complete. (*Id.* at ¶¶ 38-39.) The above-described chain of events allegedly ruined PEG's reputation, caused it to become insolvent, resulted in the loss of its PE, and forced it to cease working on the DHEC contracts. (*Id.* at ¶¶ 40-41.) Appellants allege that in the Underlying Case, Respondent represented that it would perform and be liable for all future services under the DHEC contracts and, thus, be liable for over $391,000 in future damages, which the jury awarded. (*Id.* at ¶ 42.) Respondents argue, however, that Respondent did not have a licensed PE and PG on staff, then or now, to maintain a Class I contractors certification and to legally perform the DHEC contracts. (*Id.* at ¶ 43.) Appellants assert, in the vein

of a conspiracy theory, that through some illegal agreement with DHEC Respondent maintains its certification by hiring an outside firm and using their PG in the face of DHEC regulations prohibiting such a practice. (*Id.*) Respondent has allegedly performed no work under the DHEC contracts, with the exception of monitoring at minimal cost, and suffered no damage as a result. (*Id.* at ¶ 44.) Appellants also believe that DHEC would release Respondent at no cost from all liable under the DHEC contracts if requested. (*Id.* at ¶ 45.) All of the above-described actions and chain of events allegedly show Respondent has suffered no damages and is barred from any recovery against Appellants due to unclean hands. (*Id.* at ¶ 46.)

a. BECAUSE APPELLANTS' UNCLEAN HANDS DEFENSE IS AN IMPROPER COLLATERAL ATTACK ON THE JUDGMENT IN THE UNDERLYING CASE, THE TRIAL COURT CORRECTLY RULED THAT IT CANNOT BE RAISED IN THE CURRENT ACTION.

A "collateral attack" on a judgment is an attack on the judgment "in an action other than that in which it was rendered." *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 346, 108 S.E.2d 414, 422 (1959). South Carolina has recognized three grounds on which a judgment may be collaterally attacked: "(1) by reason of jurisdictional defect apparent on the face of the record of the cause in which it was rendered; (2) by proof of fraud or collusion in its procurement; or (3) by proof that it had been paid." *L.B. Price Mercantile Co. v. Redd*, 231 S.C. 446, 452, 99 S.E.2d 57, 60 (1957) (citations omitted); *see also* 14 S.C. Jur. *Action of Debt* § 23. Appellants essentially allege the second ground, fraud or collusion by Respondent in procuring the judgment in the Underlying Case, as cause for the allowance of a collateral attack. Assuming Appellants' allegations

to be true, which they must be, these allegations of fraud are not grounds to allow a collateral attack on the judgment in the Underlying Case.

Not every instance of fraud opens the door for a party to collaterally attack a judgment. To serve as grounds for a collateral attack, the fraud complained of must be extrinsic fraud rather than intrinsic fraud. *Bryan v. Bryan*, 220 S.C. 164, 167-68, 66 S.E.2d 609, 610 (1951) ("However, not every fraud is sufficient to move a court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered; intrinsic fraud is not sufficient for equitable relief."); *Mr. G v. Mrs. G*, 320 S.C. 305, 307, 465 S.E.2d 101, 102-03 (Ct. App. 1995) ("A party may not use intrinsic fraud to mount an attack upon a judgment if the judgment is more than one year old.").

> Extrinsic fraud induces a person not to present a case or deprives a person of the opportunity to be heard. On the other hand, intrinsic fraud is fraud which was presented and considered in the trial and which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.

Ray v. Ray, 374 S.C. 79, 83, 647 S.E.2d 237, 239 (2007) (internal citations and quotations omitted). The primary distinction between intrinsic and extrinsic fraud is the ability of the complaining party to discover it. *Id.* at 84, 647 S.E.2d at 239. Courts refuse to allow judgments to be collaterally attacked on the grounds of intrinsic fraud "on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable . . . ." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003) (quoting *Bryan*, 220 S.C. at 168, 66 S.E.2d at 610). Extrinsic fraud, however,

prevents a party from ever receiving a determination of the issues which it is deprived of presenting and, thus, is a proper ground to collaterally attach a judgment. *See id.*

The "fraud" of which Appellants complain is, at best, **intrinsic** fraud. The gravamen of Appellants' unclean hands assertions have already been presented to the trial court (and this Court) in the Underlying Case and decided against PEG. Rather than reiterating all of the facts of the Underlying Case, this Court need not look any further than the following excerpts from it own opinion in *V.E. Amick & Associates* to reach the conclusion that the fraud of which Appellants now complain has previously been presented to and decided by a court of competent jurisdiction:

> [James] conceded the biggest reason he failed to meet the ultimate target levels for the reduction of petroleum was that his company ran out of money and could no longer operate. [James] also admitted [PEG] was paid for all the invoices it submitted to [Respondent]. *V.E. Amick & Associates*, 394 S.C. at 543, 716 S.E.2d at 297.
>
> At the close of [Respondent]'s case, [PEG] moved for a directed verdict on multiple grounds, including the contention that it "would have been illegal until [Respondent] ... hired another [professional licensed engineer] as an employee to continue to certify completion to DHEC." *Id.* at 544, 716 S.E.2d at 298.
>
> During the post-trial hearing, [PEG]'s attorney argued frustration of purpose because [Respondent]'s only engineer left the company in 2001, leaving no one to certify [PEG]'s work to DHEC. [PEG] also argued the amount of damages presented during trial was speculative because it included future payments to CTSI. *Id.* at 545, 716 S.E.2d at 298-99.
>
> [PEG] contends its performance was excused because [Respondent] failed to employ another registered engineer as required by DHEC regulations after Eugene Amick retired due to illness. *Id.* at 546, 716 S.E.2d at 299.
>
> [PEG] argues performance was impossible because after Eugene Amick retired from [Respondent], [Respondent] did not employ a full-time engineer or geologist to sign and certify [PEG]'s submissions. In support of its argument, [PEG] cites a DHEC regulation relating to the qualifications for certified site rehabilitation contractors and contends

> [Respondent] did not comply with this regulation. *Id.* at 546-47, 716 S.E.2d at 299.

In sum, the issues and fraud which Appellants contend they may raise as defenses to Respondent's efforts to collect on its judgment have previously been considered and decided in Respondent's favor. Respondent should not be, and is not, required to face these allegations twice, regardless of the form they take. Hence, the reason that intrinsic fraud will not support a collateral attack on a judgment, "otherwise litigation would be interminable . . . ." *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610 (citation omitted).

b. ALTERNATIVELY, APPELLANTS' UNCLEAN HANDS DEFENSE IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Alternatively, should this Court decide that some or all of the Appellants raising the allegations of the unclean hands defense is not a collateral attack on the judgment in the Underlying Case, those Appellants are barred from raising the defense on the grounds of collateral estoppel. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*. 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy*, 383 S.C. at 7, 677 S.E.2d at 217). The fact that Appellants' allegations are now in the guise of a different defense, unclean hands, is not important as "[t]he doctrine of collateral estoppel prevents the relitigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." *Id.* at 556, 684 S.E.2d 783 (emphasis in original). "A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was '(1) actually litigated in the prior action; (2) directly

determined in the prior action; and (3) necessary to support the prior judgment.'" *Crosby v. Prysmian Communications Sys. & Cables USA, LLC*, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012) (quoting *Carolina Renewal, Inc.*, 385 S.C. at 554, 684 S.E.2d at 782).

As outlined above, the issues which Appellants assert in their defense of unclean hands were litigated in the Underlying Case and directly determined in Respondent's favor. Prevailing on those issues was necessary for Respondent to obtain its judgment, as the issues were raised by PEG in the form of the affirmative defenses of frustration of purpose and impossibility. *See V.E. Amick & Associates, LLC*, 394 S.C. at 299, 716 S.E.2d 546. Had PEG been successful in asserting either defense, Respondent would not have received its judgment in the Underlying Case. In arguments before the trial court and throughout their brief, Appellants continually assert that James, Pamela, and Ecological were not parties to the Underlying Case and thus could not raise this defense. However, collateral estoppel not only extends to the parties in the first action but to others who are in privity with those parties. *Carrigg v. Cannon*, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) ("Only a party to a prior action or one in privity with a party to a prior action can be precluded from relitigating an issue on the basis of offensive collateral estoppel.") (citations omitted). When referencing a judgment, the term "privity" "means one so identified in interest with another that he represents the same legal right." *Id.* (internal quotations and citation omitted). "Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the

prior proceeding." *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998).

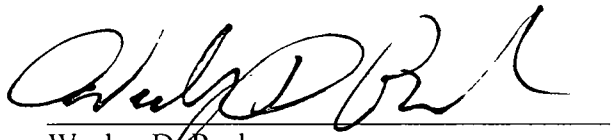
The entire purpose of the present action is for Respondent to show that, in fact, James, Pamela, and Ecological *are so identified in interest* that they should be held responsible for Respondent's judgment against PEG. In essence, the goal of this action, and any veil piercing or successor liability action, is to show that the defendants not involved in the prior suit are in privity with the entity against whom there is a judgment. In a veil-piercing action, the plaintiff seeks to disregard the corporate entity because it is merely a façade for another's interests and that person so dominates the corporate entity that justice requires he be accountable for its obligations. *See Hunting v. Elders*, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004). If Respondent successfully proves its veil piercing case, it will have proved that James is in privity with PEG; therefore, collateral estoppel would apply to James' alleged unclean hands defense. Further, a successor company is liable for its predecessor's debts if "the successor company was a mere continuation of the predecessor company[] or []the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims," both of which are applicable to this action. *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008) (citing *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005)). If Respondent is successful in its successor liability theory as to Pamela and Ecological and a trial court finds that they are "mere continuations" of PEG due to their commonality of ownership, among other things, then it is essentially saying the Pamela and Ecological are one in the same with PEG, i.e., they have identical interests. *See Simmons* at 312 n. 1, 622 S.E.2d at 215 n. 1 (2005) (emphasizing the

importance of commonality of ownership when the "mere continuation" theory of successor liability is pursued). In its simplest form, to prevail against James, Pamela, and Ecological, Respondent must prove that they are in privity with PEG. If Respondent is successful, then collateral estoppel prevents these Appellants from being able to assert the defense of unclean hands. If Respondent is unsuccessful, then the defense is irrelevant because Respondent will lose.

CONCLUSION

For the reasons stated above, the Circuit Court correctly struck Appellants' defenses of failure to obtain condition precedent, unclean hands, and intentional interference with contractual relationships and prospective business relationship. This Court should affirm the Circuit Court's Orders in all respects.

Respectfully submitted,



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