STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

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

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

Respondent,

v.

Michael Lee Clemons,

Petitioner.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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

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

Attorneys for the Petitioner, Michael Lee Clemons

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INTRODUCTION

The relief sought by the Petitioner, Michael Lee Clemons ("Mr. Clemons"), is narrow, would not lead to a flood of unfounded appeals, and promotes settlement. The Respondent, Junell Johnson, as Personal Representative of the Estate of Woodrow C. Nelson ("Mrs. Johnson"), does not offer any South Carolina case law or procedural rule which prohibits recognition of the narrow appellate exception Mr. Clemons has proposed. Moreover, *S. C. Code Ann.* § 14-3-330 provides only one juncture when an appeal would be appropriate – after the entry of a final judgment. Mr. Clemons complied with this statutory directive and, in turn, respectfully requests this Supreme Court to affirm the viability of his appeal and remand this matter for full consideration by the Court of Appeals on the merits.

ARGUMENT AND CITATION OF AUTHORITY

Summary of the Argument

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

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

A. THIS SUPREME COURT PROPERLY GRANTED CERTIORARI REVIEW

Mrs. Johnson begins her response, not by addressing the merits of this appeal, but by asking this Supreme Court to short-circuit the appellate process, reverse course, and dismiss, as having been improvidently granted, this certiorari review of the Court of Appeals' decision. Her counsel cites several cases, though they offer no real guidance. The South Carolina cases cited only serve to show that such a procedure is available. (*Respondent's Brief*, pp.9-10).**1** In the third referenced case, *Belcher v. Stengel*,**2** the United States Supreme Court concluded that its "plenary consideration ha[d] shed more light on th[e] case than . . . was afforded at the time the petition for certiorari was considered[and, therefore], the writ should be dismissed as improvidently granted."**3** In other words, the appellate record in *Belcher* actually manifested multiple key facts which essentially answered the question presented for review. Conversely, in this case, Mrs. Johnson argued the very same facts in her response to Mr. Clemons' Petition for Writ of Certiorari as she now includes in her present response. In fact, there is no "aha" moment lurking "just around the bend" which would justify this Supreme Court's immediate dismissal of the question of law which Mr. Clemons has offered.

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1 Mrs. Johnson was, at the time, citing to State v. Gibson, 401 S.C. 569, 737 S.E.2d 853 (2103), and Brannon v. Palmetto Bank, 380 S.C. 493, 671 S.E.2d 603 (2009).

2 Belcher v. Stengel, 429 U.S. 118 (1976) (*per curiam*).

3 Belcher v. Stengel, 429 U.S. 118, 119-120.

Instead, Mr. Clemons has presented this Supreme Court with a well-founded, narrow issue for review and he believes this Supreme Court should proceed to decide the question on the merits. The case has not been mooted by any intervening statutory and/or case law, and Mrs. Johnson only "suggests" that Mr. Clemons' appeal was not timely. In fact, the appeal was timely and this Supreme Court has jurisdiction to consider the question presented for review.

Moreover, everything to which Mrs. Johnson now points as justification for the asserted "improvident grant" of certiorari, Mrs. Johnson previously urged in her response to the Petition for Writ of Certiorari. This fact alone tilts heavily in favor of preserving this Supreme Court's current review, given the presumption that this Supreme Court would undoubtedly have duly considered all of Mrs. Johnson's previously-lodged objections to review, and nonetheless, appropriately deemed the issues herein worthy of discretionary review.**4**

Nor can Mrs. Johnson deny that this Supreme Court is the one court uniquely suited to address the issue and approve the narrow exception which Mr. Clemons has requested.**5** Mr. Clemons has appealed to this Supreme Court – effectively the court of last-resort in its law developing role - and this Supreme Court should proceed to render a decision on the merits for the benefit of both the parties hereto as well as for future South Carolina litigants, their counsel, and the guidance of trial and appellate courts.

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4 *See* Rule 242(b)(1), SCACR, describing criteria for certiorari review.

5 *See* South Carolina Farm Bureau Mut. Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610 (2009) (when a case raises a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court) (*citing* S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-330 (West Group 1976 & Thomson Reuters West Supp. 2005).

B. MR. CLEMONS' APPEAL WAS TIMELY

Mrs. Johnson cavalierly suggests that Mr. Clemons' appeal "may not have been timely filed" and, in turn, urges this Supreme Court to dismiss the case on that basis. (*Respondent's Brief*, pp.9, 10-12).**6** This argument is meritless and not worthy of this Supreme Court's consideration.

Nowhere in Mrs. Johnson's submissions to the Court of Appeals did she ever insinuate, much less affirmatively assert, that Mr. Clemons' appeal may have been untimely. (App.1-7; App.215-222). Nowhere in the Court of Appeals' order dismissing Mr. Clemons' appeal – a dismissal based on an allegedly non-appealable order - did the Court of Appeals find (or even address) that proposition that Mr. Clemons' appeal was untimely. (App.223-225). It was not until 28 December 2011, as part of her response to Mr. Clemons' Petition for Writ of Certiorari that Mrs. Johnson first decided to raise this "untimeliness" issue. Notwithstanding Mrs. Johnson's late-coming "arguments", this Supreme Court determined it was appropriate to grant Mr. Clemons' his sought-after certiorari review.

The *South Carolina Appellate Court Rules* require that a Notice of Appeal shall include a statement as to when the notice of entry of the judgment or order appealed from was received, when and if timeliness is an issue.**7** As noted, Mrs.

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6 An appellant's failure to timely file and serve the Notice of Appeal is a jurisdictional defect and the time to appeal may not be extended. *See generally* Hill v. S. C. Dept. of Health & Envt'l Control, 389 S.C. 1, 21-22, 698 S.E.2d 612, 623 (2010).

7 *See* Rule 203(e)(1)(C), SCACR. This appellate rule provides that the form of the Notice of Appeal shall contain:

> (C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the

Johnson never made the timeliness of this appeal an issue until, over nine months after Mr. Clemons filed his Notice of Appeal, Mrs. Johnson used that argument when she sought to oppose certiorari review to this Supreme Court. Moreover, if Mrs. Johnson wanted to make "untimeliness" an issue, her counsel should have included some evidence in the record to support her argument as to the alleged late filing.**8** This was not done. Mrs. Johnson' suggestion of "untimeliness" is not a fact which appears in the record before this Supreme Court and, therefore, this Supreme Court should not consider the issue.**9**

More importantly, on the merits, Mrs. Johnson' untimeliness argument is wholly and completely unfounded. Mrs. Johnson challenges the timeliness of Mr. Clemons' Notice of Appeal following the Circuit Court's entry of the order denying Mr. Clemons' Motion to Dismiss (App.30-35), as well as of the Circuit Court's order denying reconsideration of the earlier order. (App.36-37).**10** Mrs. Johnson appears to ignore the fact that ***neither*** the intermediate order denying dismissal (App.30-35), ***nor*** the order denying reconsideration (App.36-37), were

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> determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken . . . .

8 *See* Rule 209(b), SCACR, regarding an appellate party's opportunity to designate items to include in the record on appeal; and Rule 212(b), SCACR, regarding party's opportunity to supplement the record in advance of oral argument. While this case is slightly unusual in that there was not a true "Record on Appeal" in the Court of Appeals, Mrs. Johnson certainly could have supplied the Court of Appeals (and ultimately this Supreme Court) with any and all relevant documentation and/or information "supporting" his untimeliness assertions. Such documentation and/or information is glaring in its absence.

9 *See* Jenkins v. Jenkins, 401 S.C. 191, 205, 736 S.E.2d 292, 300 (Ct. App. 2012).

10 As the record reflects, Mr. Clemons' Motion to Dismiss was based on the proposition that the parties had previously agreed upon a settlement of the claim through payment of Mr. Clemons' liability insurance limits which, importantly, had been placed on the record in the Probate Court and agreed to by all of the affected parties. (App.30-35).

immediately appealable. Instead, any appeal of those orders had to await the entry of a final judgment in the case.**11** That is exactly the course Mr. Clemons took, and Mrs. Johnson does not assert that any appeal from the final judgment (which necessarily included the two prior orders) was "untimely."

If Mrs. Johnson' is actually arguing that Mr. Clemons should have immediately appealed the two intermediate orders (App.30-35; App.36-37), then it is Mrs. Johnson who is arguing for a truly substantial change to this State's appellate procedure, particularly to *S.C. Code Ann.* § 14-3-330. But such an argument is undeveloped and, moreover, it is doubtful this Supreme Court would be inclined to agree given other clear Supreme Court precedent.**12**

Axiomatically, *S.C. Code Ann.* § 14-3-330(2) controls which limited instances warrant the immediate appeal of an interlocutory order. Under that statute, South Carolina law permits affected parties to appeal interlocutory orders "affecting a substantial right" in three situations.**13** Appeals are permitted when the order at issue:

> (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,
>
> (b) grants or refuses a new trial[,] or
>
> (c) strikes out an answer or any part thereof or any pleading in any action.**14**

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11 *See* S.C. Code Ann. § 14-3-330(1) (Thomson Reuters West 2010).

12 *See, e.g.*, McLendon v. South Carolina Dept. of Highways & Public Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (interpreting S.C. Code Ann. § 14-3-330) and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later state of the proceedings and, therefore, is not directly appealable).

13 S.C. Code Ann. § 14-3-330(2) (Thomson Reuters West 2010).

14 *See* S.C. Code Ann. § 14-3-330(2).

The South Carolina Court of Appeals, in *Cobb v. Maccaro*,[15] explained that avoidance of trial was not a substantial right. Likewise, this Supreme Court, in *Brown v. County of Berkeley*,[16] held that an order denying dismissal based on immunity did not affect a substantial right, or involve "the merits of the case."[17] Generally speaking, this rule allowing appeal from non-final orders affecting substantial rights has been applied when the order "affected the mode of trial" because such error could not be corrected later.[18]

In this case, the non-final order denying dismissal based on the prior settlement agreement (App.30-35) is more akin to a non-final order denying dismissal based on a statute of limitations argument.[19] Both of those errors are susceptible of later correction. Because the non-final order denying Mr. Clemons' Motion to Dismiss based on the prior settlement agreement does not fit one of the exceptions for immediate appeal, Mr. Clemons could not have earlier appealed either the original order (App.30-35) and/or the reconsideration order. (App.36-37). Mrs. Johnson's "untimeliness" argument falls flat.[20]

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15 Cobb v. Maccaro, 310 S.C. 303, 423 S.E.2d 156 (1992).

16 Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005).

17 Brown v. County of Berkeley, 366 S.C. 354, 361-362, 622 S.E.2d 533, 537-538.

18 *See* Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) (no appeal of denial of change of venue, as it was an error which could be corrected on appeal following trial).

19 *See* Thornton v. South Carolina Elec. & Gas Corp., 391 S.C. 297, 307, 705 S.E.2d 475, 481 (Ct. App. 2011) (denial of summary judgment motion not appealable, whether parties complied with statute of limitations remains one the circuit court must answer at trial); Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 809-810 (1995) (order refusing to approve settlement in wrongful death action did not determining anything about a cause of action or defense and was not immediately appealable).

20 *See also* Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 587-588, 671 S.E.2d 98, 100 (Ct.App. 2008) (order granting relief from judgment not immediately appealable

C. THIS SUPREME COURT MAY REVIEW AND ADJUDICATE THE FACTUAL DISPUTES INVOLVED IN THIS APPEAL

Mrs. Johnson does not dispute that her legal counsel could have had the settlement check from Mr. Clemons' insurer *hand-delivered* to him on 1 March 2007. She also does not dispute that her attorney refused to accept the settlement check at that time and, shortly thereafter, rescinded the settlement agreement which the Probate Court had approved. That on-again, off-again maneuver is a singular fact which Mrs. Johnson has decided not to address or explain – apparently because it is unexplainable. It is a fact which makes this scenario manipulative and which reflects a level of sharp practice that neither this Supreme Court nor our judicial system should condone. It is, however, one of a number of facts which can be addressed by the Circuit Court once this Supreme Court remands to the Court of Appeals to permit an appeal on the question of whether the prior settlement agreement should have been enforced.

D. THIS CASE PRESENTS A NARROW CIRCUMSTANCE WHERE THE CONFESSION OF JUDGMENT SHOULD BE APPEALABLE.

Mrs. Johnson highlights the general rule, which Mr. Clemons has already acknowledged (*Petitioner's Brief*, pp.17-18), that ordinarily a consent judgment cannot be attacked by either direct appeal or a collateral proceeding. (*Respondent's Brief*, p.13). Mrs. Johnson, however, completely sidesteps the "Catch-22" nature of the circumstances here. The order denying Mr. Clemons'

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since the original judgment was consent judgment arising from pretrial settlement, a trial had yet to be held, and order did not affect substantial right).

motion to enforce the prior settlement (App.30-35) – a settlement which both Mr. Clemons and Mrs. Johnson had agreed-upon and approved – could not be appealed until some final judgment had been entered. In this case, that final judgment ultimately came in the form of Mr. Clemons' consent judgment (App.195-196) a "consent" judgment which contained the excessive amount of $3,000,000.00. (App.197). True, Mr. Clemons's counsel signed that consent judgment (App.197), but there is no evidence in the record demonstrating that Mr. Clemons (or his counsel) knowingly foreclosed Mr. Clemons' right to appeal upon entry of a final judgment. In fact, no such foreclosure language is included in the consent's text (App.197) and could have easily been included.**21** Mrs. Johnson suggests that Mr. Clemons should have "reserved the right" to challenge the non-final orders as part of the consent judgment. (*Respondent's Brief*, p.15). Mrs. Johnson ignores the fact her lawyer drafted the Offer of Judgment (App.195-196), as well as the proposition that South Carolina's procedural rules normally provide that non-final orders may be appealed once a final judgment is entered.**22**

Mr. Clemons proposes a better rule which (a) accounts for South Carolina appellate policy, (b) "tips the scales" in favor of preserving a right to appeal, and (c) encourages clarity in judgment-drafting. The rule proposed here is not unlike the approach which some federal courts take in considering whether attorneys'

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21 *See generally* Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); Columbia East Assocs. v. Bi–Lo, Inc., 299 S.C. 515, 519–520, 386 S.E.2d 259, 261–262 (Ct.App.1989) ("Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract.").

22 *See* S.C. Code Ann. § 14-3-330.

fees are part of a Rule 68, *FRCivP*, offer of judgment. Those courts require specific mention of attorneys' fees in the offer of judgment, before acceptance of the offer would bar those claims.**23** In *Nusom*, the United States Court of Appeals for the Ninth Circuit found that the offer of judgment included a specific sum plus costs, but was silent as to an award of attorney fees. The Ninth Circuit held the offer did not preclude the plaintiff from seeking attorneys' fees when the underlying statute did not make fees a part of the recoverable costs.**24** Similarly, the United States District Court for the District of Connecticut, in *Chambers*, construed the failure to mention anything about attorneys' fees against the drafter/offeror.**25** Finally, the United States District Court for the Eastern District of Pennsylvania, in *Minnick*, concluded that when attorneys' fees are not part of the costs of an action pursuant to the underlying statute, and the offer of judgment was silent as to attorneys' fees, such fees were not necessarily included and/or excluded without additional clarifying language.**26**

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23 *See* Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997); Chambers v. Manning, 169 F.R.D. 5 (D. Conn. 1996); Minnick v. Dollar Financial Group, Inc., 2002 WL 1023101 (E.D. Pa. 2002).

24 *See* Nusom v. Comh Woodburn, Inc., 122 F.3d 830, 835.

25 Chambers v. Manning, 169 F.R.D. 5, 8.

26 Minnick v. Dollar Financial Group, Inc., 2002 WL 1023101, *4. Mrs. Johnson asserts that recognizing a right to appeal here "would run afoul of Rule 68, SCRCP" because the rule is "intended to encourage settlement and avoid protracted litigation," (*Respondent's Brief*, p.16 *citing* Black v. Roche Biomedical Laboratories, a Division of Hoffmann-LaRoche, Inc., 315 S.C. 223, 433 S.E.2d 21 (Ct.App. 1993)). The Court of Appeals, in Black, made that statement in the context of holding that Rule 68(a), SCRCivP, applies only when the plaintiff obtains a judgment in an amount less than was offered by defendant. The federal cases cited in this section discuss a rule which applies regardless of which party is the offeror. Notwithstanding the differences between the rule described in Black and Rule 68, FRCivP, the policy of encouraging settlement and avoiding extended litigation by requiring specificity in a consent judgment as to whether any part of the case remains appealable neatly comports with that policy.

In this case, Mrs. Johnson's counsel drafted the offer of judgment (App.195-196), which failed to include any language whatsoever barring Mr. Clemons' appellate rights. Because South Carolina's procedural rules precluded an immediate appeal of non-final orders like those which deny a motion to dismiss based on a prior settlement (App.30-35), this Supreme Court should conclude that a consent judgment drafted by a party's counsel which does not expressly bar the acceptor's appellate rights should be deemed to permit an appeal of prior orders which were not immediately previously appealable. Alternatively, as Mr. Clemons proposed in his principal brief (*Petitioner's Brief*, p.15), the rule could be narrowed to permit appeal only of those prior orders which, had they been reversed, would have provided a complete defense.

Mrs. Johnson attempts to divert attention from the "Catch-22" nature of this situation by asserting that Mr. Clemons ought to sue his legal counsel. (*Respondent's Brief*, pp.13, 27 n.4). She ignores the fact that such an option does not address the legal problem here, where a settlement agreement was extended and accepted in open court for the $30,000.00 Peak policy limits[27] has

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[27] At the time of the accident Mr. Clemons was covered by a liability insurance policy issued to him by Peak Property and Casualty Insurance Company ("Peak"), a subsidiary of Viking Insurance Company. (App.3; App.56; App.97, para. 6). The policy provided the minimum liability limits required by South Carolina law. (App.3; App.56; App.97, para. 6). *See generally* S.C. Code Ann. § 38-77-140 (Thomson West 2005 rev.). In addition to Mrs. Johnson's claim against Mr. Clemons on behalf of the Estate of Woodrow Nelson, the settlement payment was also intended to resolve a related claim against Mr. Clemons by Catina Nelson. *See* Eddie Williams, as Conservator for Catina W. Nelson v. Michael Lee Clemons, (Orangeburg County Court of Common Pleas, Civil Action No. 2007-CP-38-0574). That matter is also on certiorari appeal. The driver of a third vehicle involved in the accident, Wendell Hamilton, was also injured. (Appx.92, para. 2). Mr. Hamilton's claim was resolved for $5,000.00 outside of this present litigation. (Appx.97, para. 8). After Mr. Hamilton was paid, there was **$25,000.00** in insurance coverage left for the Estate's and Mrs. Nelson's claims. (App.97, para. 8; Appx.157, lines 1-22).

now mushroomed to an amount 120 times those limits, chiefly by virtue of Mrs. Johnson's attorney's unilateral decisions to (a) impose an arbitrary and unreasonable deadline for receipt of the settlement check, (b) refuse acceptance of the settlement check once it was offered, and (c) then rescind the agreed-upon settlement because he had not received payment. Mr. Clemons not only carried the state-required insurance limits[28] and authorized his counsel to offer the full limits to the Nelsons' representatives, he also has been paying his debt to society by serving his time in prison.

Given the fact South Carolina's statutes and court rules are and, indeed, must be construed liberally in favor of a party's right to appeal,[29] this Supreme Court should conclude that Mr. Clemons retained the right to appeal the two intermediate non-final orders (App.30-35; App.36-37) once a final judgment (App.195-196; App.197) was entered, even if the "final judgment" which was entered was a consent judgment.[30]

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

29 *See* Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 167, 662 S.E.2d 430, 434 (Ct.App. 2008) (*citing* Stroup v. Duke Power Co., 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); Haughton v. Order of United Commercial Travelers of Am., 108 S.C. 73, 74–75, 93 S.E. 393, 394 (1917); O'Rourke v. Atl. Paint Co., 91 S.C. 399, 403, 74 S.E. 930, 931 (1912)), *opinion vacated on other grounds*, 381 S.C. 332, 673 S.E.2d 417 (2009).

30 *See also* Porter v. J.J. Hydrick Realty Co., 134 S.C. 34, 131 S.E. 768, 771 (1926) ("that fact that a judgment has been rendered by consent does not give it any greater validity than if it had been rendered after sharp and protracted litigation").

Mrs. Johnson also asserts that Mr. Clemons' proposed rule to permit an appeal in this situation "arguably expands the narrow question" stated in Mr. Clemons' Petition for Writ of Certiorari. (*Respondent's Brief*, p.15). To the contrary, the narrow rule Mr. Clemons has proposed – limiting it to appeal of orders denying a motion that would provide an absolute defense - is more circumscribed than a holding which simply agrees with the proposition that the Court of Appeals had jurisdiction to hear Mr. Clemons' appeal of the two intermediate non-final orders (App.30-35; App. 36-37) after a final judgment, in the form of a consent judgment, was entered.**31** Mr. Clemons is amenable to either the latter broader ruling, or the more narrow option discussed.

Mrs. Johnson' argument that the intermediate orders (App.30-35; App.36-37) did not deprive Mr. Clemons (or Peak) of a complete defense to the Nelsons' direct or representative claims is somewhat puzzling. (*Respondent's Brief*, p.15). If the Circuit Court had granted Mr. Clemons' motion to enforce the prior agreed-upon settlement with Mrs. Johnson, there would be nothing left for Mr. Clemons (or Peak) to defend as the case would have been over. Such an objection is a non-starter.

Mrs. Johnson then analogizes the rule Mr. Clemons has requested herein to a request for a "conditional guilty plea". (*Respondent's Brief*, p.16). This analogy is, however, inapt. Looking to the various federal and other state cases

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31 Mrs. Johnson appears to alternatively argue that should this Supreme Court decide the issue identified in the Petition for Writ of Certiorari in Mr. Clemons' favor such a decision would be create and "unworkable" appellate situation. (*Respondent's Brief*, p.16). Mrs. Johnson does not, however, explain how that situation would be "unworkable" as to someone in Mr. Clemons' position.

Mrs. Johnson cites (*Respondent's Brief*, pp.29-33),**32** those decision demonstrate that "conditional consent judgments" which allow for appeal in certain circumstances are indeed permissible and reflect different policy interests than South Carolina's "steadfast adherence" to the rule against conditional guilty pleas in criminal cases.**33**

In her this Supreme Court "should resist the temptation" argument, Mrs. Johnson urges that allowing an appeal in these narrow circumstances would "permit parties to manipulate appealability and dictate this [Supreme] Court's jurisdiction." (*Respondent's Brief*, p.17).**34** Mrs. Johnson' manipulation charge, however, rings somewhat hollow given the circumstances of this case. Moreover, allowing an appeal (after entry of a consent judgment) of intermediate non-final orders which deprived the defendant of a complete defense (such as a court's failure to enforce a settlement), is no different than allowing an appeal where there has been a partial settlement. It is simply another method of limiting the issues for appeal. It is not, however, an attempt to improperly manufacture a justiciable controversy.**35**

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32 Mrs. Johnson was responding to Mr. Clemons' initial discussion of the same cases.

33 This Supreme Court, in State v. Rice, 401 S.C. 330, 737 S.E.2d 485 (2013), acknowledged that most states, all federal courts, and all military courts allow some form of conditional guilty plea. State v. Rice, 401 S.C. 330, 332, 737 S.E.2d 485, 486 (*citing* People v. Neuhaus, 240 P.3d 391, 394-396 (Colo.App. 2009) (providing a general review of the varying approaches as to conditional guilty pleas)). "South Carolina[, however,] does not recognize conditional guilty pleas." State v. Rice, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (*citing* State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982)).

34 At this point, Mrs. Johnson was citing to Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 742 S.E.2d 371 (2013). (*Respondent's Brief*, p.17).

35 Mr. William's reference to Tourism Expenditure Review Comm. v. City of Myrtle Beach is inapposite. (*Respondent's Brief*, p.17), That case dealt with South Carolina's

E. MR. CLEMONS' CIRCUMSTANCES SHOULD APPROPRIATELY JOIN OTHER CASE LAW WHICH RECOGNIZES SOME LIMITED OPPORTUNITY TO APPEAL FROM CONSENT JUDGMENTS

Mrs. Johnson spends a substantial section of her brief (*Respondent's Brief*, pp.17-24) quoting, at length, from the cases Mr. Clemons' cited in his opening brief. (*Petitioner's Brief*, pp.18-19). Mrs. Johnson asserts that none of these cases support Mr. Clemons' proposition that he was permitted to appeal the two intermediate non-final orders in this case following the entry of the final consent judgment.

Drilling down, both Mr. Clemons and Mrs. Johnson agree that both *Johnson v. Johnson*[36] and *Raby Construction, LLP v. Orr*[37] discuss the "general rule" and both parties accept that these courts also recognized that "even consent judgments are subject to attack under particular circumstances,"[38] circumstances which can include either by direct appeal or collateral attack. Mrs. Johnson then discusses, at length, the factual differences in *Raby Construction* and traces the historical analyses in *Jones & Parker v. Webb*[39] to urge that the Court of Appeals correctly dismissed Mr. Clemons' appeal without considering its merits. Mr. Clemons has never asserted that he has located a prior case with

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Uniform Declaratory Judgments Act and the exclusive statutory procedure for challenging the expenditure of tax funds. Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 81-82, 742 S.E.2d 371, 373-374.

36 Johnson v. Johnson, 310 S.C. 44, 415 S.E.2d 46 (Ct.App. 1992).

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

38 Raby Construction, LLP v. Orr, 358 S.C. 10, 18 n.3, 594 S.E.2d 478, 482 n.3; Johnson v. Johnson, 310 S.C. 44, 46-47, 425 S.E.2d 46, 47.

39 Jones & Parker v. Webb, 8 S.C. (8 Rich.) 202, 206 (1876) (1876 WL 5996, *4, filed 31 October 1876).

precisely the same factual circumstances as this one. On the other hand, Mr. Clemons has consistently demonstrated a meaningful tension between South Carolina's appellate rules, appellate decisions, and appellate policy:

> (a) which allow the appeal of preceding intermediate non-final orders only after the entry of a final judgment,
>
> (b) which liberally construe a party's right to appeal,**40** and
>
> (c) which recognize that consent judgments are amenable to an appeal in certain circumstances.

Moreover, it is axiomatic that legal standards evolve by case-by-case adjudication.**41** This case should constitute one of those "evolving" circumstances since it involves a consent judgment Mrs. Johnson obtained after

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

41 *See, e.g.,* Anderson v. The Augusta Chronicle, 355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003) (citing United States Supreme Court cases on the evolution of the reckless disregard standard in defamation cases, and noting that the term "cannot be fully encompassed in one infallible definition."). *See also* Hull v. Hull, 3 (Rich Eq.) 65, 1850 WL 2781 (Ct.App. Eq. 1850). In that case, the then-existing original South Carolina Court of Appeals stated:

> What is a Court to do? It is its shame, if possessing light, it does not exercise its duty; and, if possessing the power, it does not employ it to the purposes for which it was created. It is its glory, if calling into exercise the great principles at its command, it so employs them as to advance the remedies within its jurisdiction.
>
> Such an exercise of power has been called legislation-bench-made law. It is unjustly so denominated. It does not originate policy, but perfects it. It does not generate reforms, but carries them out. It does not create principles, but develops them. It is bench-declared law, not inferior in authority, or in excellence, to any others. Its progress is gradual, and occasions no sudden revolutions, to the surprise, or ruin, of the interest of society. Being the offspring of acknowledged principles, it commends itself, by the power of those principles, to those to whom it is applied. And being tested, at each step of its development, by practical experience, it may be modified, restricted or amplified, as that experience dictates.

Hull v. Hull, 3 (Rich Eq.) 65, ___, 1850 WL 2781, *12.

arbitrarily and unilaterally rescinding a settlement agreement made on the record in Probate Court and where the consent judgment amount is more than 120 times the amount Mrs. Johnson advised the Probate Court she would accept from Mr. Clemons' liability insurer. Moreover, Mr. Clemons is not asking to be relieved of an obligation while simultaneously retaining a benefit – the roadblock to the amendment of the judgment in *Jones & Parker*. Instead, Mr. Clemons asks only that this Supreme Court to recognize his right to appeal the two intermediate non-final orders (App.30-35, 36-37), a right which could not and did not arise until there was entry of a final judgment – albeit a consent judgment.

In recognizing such a right this Supreme Court will be affording both Mr. Clemons and Mrs. Johnson their respective full appellate opportunities to present their legal positions as to the enforceability, or not, of their prior settlement agreement. Thus far, Mr. Clemons has heretofore been incorrectly and improperly denied that opportunity.

F. THIS SUPREME COURT SHOULD PRESERVE MR. CLEMONS' APPELLATE RIGHTS UNDER *S. C. CODE ANN.* § 14-3-330(2)

Mrs. Johnson argues that Mr. Clemons could have refused the offer of judgment (App.195-196) and proceeded to trial. (*Respondent's Brief*, pp.24-25). She also disputes that the most expedient manner to obtain review of the two 2008 intermediate/non-final orders was to agree to the "consent" judgment, instead of going to trial. (*Respondent's Brief*, pp.24-25).**42** Mrs. Johnson also

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42 Mrs. Johnson devotes a lengthy discussion to the California Supreme Court's decision in Norgart v. Upjohn Co., 21 Cal.4th 383, 981 P.2d 79 (1999). (*Respondent's Brief*, pp.30-34). He then asserts there is nothing in the record to show that Mrs. Johnson understood and/or agreed that the consent judgment was being entered solely to facilitate appeal of the two non-final orders. Mr. Clemons readily admits that the record is sparse regarding the motivations

states that Mr. Clemons could have, himself, tried to condition the judgment with an express preservation of his appellate rights and, moreover, asserts Mr. Clemons was not faced with any type of "Hobson's choice" when considering whether or not to accept Mrs. Johnson' offer of judgment. (*Respondent's Brief*, pp.24-25). Interestingly, Mrs. Johnson indulges in a bit of speculation herself by these assertions since it is hard to imagine that the two non-final intermediate 2008 orders (App.30-35, 36-37) would have reached appellate review sooner than the actual appeal lodged after the consent judgment (App.195-196; App.197) was entered. Moreover, Mrs. Johnson's argument that Mr. Clemons should have "conditioned the judgment" is the flip-side of what Mr. Clemons has urged in this review – that this Supreme Court should recognize that a party in Mr. Clemons' position is authorized to appeal any intermediate non-final orders once a consent judgment has been entered unless the consent judgment specifically precludes pursuing an appeal.

In effect, both sides herein argue for this Supreme Court to set out a "default rule".**43** The rule Mr. Clemons seeks, however, offers more clarity and should lead to less litigation because of that very same added clarity.**44**

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of any of the parties at several junctures in this case. Significantly, however, the record for this appeal is comprised of the facts and circumstances surrounding the parties' settlement agreement placed on the Probate Court's record which Mrs. Johnson rescinded at the point Mr. Clemons' counsel was ready to deliver the settlement check. The legal question presented in this matter is relatively straightforward – ***Does or should South Carolina law recognize a right to appeal non-final orders which could have provided a complete defense, when the orders are only appealable after final judgment is entered, even if that is a consent judgment which did not expressly provide whether appellate rights would be preserved or precluded?***

43 Mrs. Johnson' discussion of other cases cited in Mr. Clemons' opening brief (*Respondent's Brief*, pp.26-27), fails to offer meaningful distinctions beyond what Mr. Clemons has already described, against the backdrop of the actual issue presented.

CONCLUSION

After Mr. Clemons unsuccessfully moved to enforce the parties' settlement he was prohibited from appealing those decisions until after a final judgment. Mrs. Johnson' counsel then presented Mr. Clemons with an offer of judgment in an amount 120 times the parties' agreed-upon $25,000.00 settlement. That $3 million offer, which Mr. Clemons' attorney signed, did not waive or preclude Mr. Clemons' appellate rights authorized under *S.C. Code Ann.* § 14-3-330, which includes the post-judgment appeal of non-final orders. Nevertheless, the Court of Appeals dismissed Mr. Clemons' appeal without considering the merits.

This Supreme Court has an array of options to recognize Mr. Clemons' right to appeal in this case, whether broadly from consent judgments in general, or more narrowly from intermediate non-final orders denying an absolute defense, or even to the point of requiring that parties (or the drafter) to a consent judgment specify whether particular appellate rights are preserved or precluded. Any one of these options will add clarity to the law, encourage knowing settlements, and yield less litigation.

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44 Mrs. Johnson, in a needless parting shot at both Peak and Mr. Clemons' appellate counsel herein, asserts this appeal has not been presented to protect Mr. Clemons, but solely to protect Peak. (*Respondent's Brief*, p.35 n.5). Mrs. Johnson asserts, ***albeit without any factual basis whatsoever***, that "Peak . . persuaded Mr. Clemons' lawyer, [James P.] Walsh[, Esquire,] to permit Peak's lawyers to represent to the Court of Appeals and to this [Supreme] Court that these lawyers *also* represent Mr. Clemons, even though everything [these lawyers] are attempting here is adverse to Mr. Clemons' wished and the agreement he freely entered into under Mr. Walsh's advice." (*Respondent's Brief*, p.35 n.5) (Emphasis in original). It does not appear, however, that either Mrs. Johnson or his attorneys are in a position to determine whether this appeal is adverse to and/or detrimental to Mr. Clemons. Moreover, there is ***absolutely*** nothing in this record which indicates and/or even infers that the appellate attorneys (other than Mr. Walsh and/or Amy M. Snyder, Esquire) herein are acting in any manner adverse to Mr. Clemons' wishes or that Mr. Walsh had to be "persuaded" to allow them to "represent" Mr. Clemons. Mrs. Johnson's "assertions" are disingenuous, baseless, speculative, and completely unsupported. Mr. Clemons' counsel herein categorically deny all of Mrs. Johnson' speculative and baseless assertions. This brings to mind the axiom that "people who live in glass houses should not throw stones".

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

Respectfully submitted,

NEXSEN PRUET, LLC

By:_____

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

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

Attorneys for the Appellant, Michael Lee Clemons

Charleston, South Carolina

12 August 2013

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

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

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

Respondent,

v.

Michael Lee Clemons,

Petitioner.

PROOF OF SERVICE
FOR THE
PETITIONER'S REPLY BRIEF ON CERTIORARI

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

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

Attorneys for the Petitioner, Michael Lee Clemons

I, Stephen P. Groves, Esquire, hereby certify that on 12 August 2013, I served two copies of the ***Reply Brief of the Petitioner on Certiorari*** submitted by the Petitioner, Michael Lee Clemons, on counsel for the Respondent Junell Johnson, as Personal Representative of the Estate of Woodrow C. Nelson, via United States Mail, postage pre-paid, and addressed as follows:

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

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

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

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

12 August 2013

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