

**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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2007-CP-38-0573
Case No. 2007-CP-38-0574

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

v.

Michael Lee Clemons, ... Appellant.

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

v.

Michael Lee Clemons, ... Appellant.

MOTION TO DISMISS APPEALS

Pursuant to Rule 240, SCACR, Respondents Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson, and Eddie Williams, as Conservator for Catina W. Nelson, move to dismiss the appeals in these cases on the ground that the appeals are from confessions of judgment that are not appealable rulings under Section 14-3-330 of the South Carolina Code.

/

RELEVANT BACKGROUND

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. Mr. Nelson was killed; Catina, his wife, sustained a catastrophic brain injury. Mr. Clemons is incarcerated for felony DUI because of this wreck.

Mr. Clemons was insured by Viking Insurance. 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.

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.

Junell W. Johnson, as Personal Representative of the Estate of Mr. Nelson, brought a tort action against Mr. Clemons. Eddie Williams, as Conservator for Catina W. Nelson, also brought a tort action against Mr. Clemons. These matters were filed in Orangeburg County.

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. The motions also sought enforcement of those purported settlements of each action.

On October 13, 2008, the trial court entered one order covering both matters, and denied the motions to dismiss and the motions to enforce the purported settlements. The court ruled that there was no compliance with Rule 43(k), SCRPC, as construed by *Farnsworth v. Davis Heating & Air*, 367 S.C. 634, 627 S.E.2d 724 (2006). These cases predate the 2009 amendment

to Rule 43(k), so that the version at issue in *Farnesworth* applied to these cases.

On October 28, 2008, Mr. Horger filed a motion to reconsider pursuant to Rule 59(e), SCRCP. 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.

On December 31, 2008, the circuit court issued its order denying the motion to reconsider. That order was entered on January 13, 2009.

Over two years later, on January 14, 2011, counsel for Catina Nelson and for Mr. Nelson’s estate served two offers of judgment on James Walsh, Esquire, who was hired as independent counsel for Mr. Clemons by his insurer, Viking. The offers were in the amount of \$6,000,000.00 for Catina Nelson and \$3,000,000.00 for Mr. Nelson’s estate. On February 4, 2011, Mr. Walsh accepted the offers of judgment in each case on behalf of the defendant, Mr. Clemons.

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 an insurance company (Peak Property and Casualty)¹ 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.” There was no mention of Mr. Horger’s involvement on behalf of

¹ Apparently, Viking is the parent company of Peak.

Mr. Clemons.

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

- A) Judge Goodstein's order of September 30, 2008, denying Mr. Clemons' motion to dismiss pursuant to Rule 12(b), SCRCF;
- B) Judge Goodstein's order of December 31, 2008, denying Mr. Clemons' motion to reconsider pursuant to Rule 59, SCRCF; and
- C) The confessions of judgment dated February 4, 2011, and entered on the Judgment Rolls on February 7, 2011.

(Notices of Appeal, attached as Exhibits). These lawyers represented in the notices that "Counsel for Mr. Clemons received filed and stamped copies of the Judgment no earlier than 7 February 2011." There is no mention of when Mr. Horger, who was Mr. Clemons's counsel at the time the 2008 orders were entered, or Mr. Walsh, counsel at the time of the confessions of judgment, received written notice of the rulings that this new group of lawyers have purported to appeal.

DISCUSSION

The February 2011 judgments, which the "appellant" himself confessed, are not appealable orders. Accordingly, this Court should dismiss these appeals and remit these matters immediately.

The notices of appeal filed by Peak's lawyers purportedly on behalf of Mr. Clemons purport to appeal the entry of the judgments under the confessions of judgment executed by Mr.

Clemons through his attorney, Mr. Walsh, in February 2011. Those judgments, however, are not appealable.

The confessions of judgment are binding on Mr. Clemons as they were 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). 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 by Mr. Clemons, and executed by his attorney, Mr. Walsh. This is not an appealable decision. What attorneys Groves, Waring, and Dominick have attempted to do on behalf of an insurer, not Mr. Clemons, is directly appeal the confessions without first seeking to be relieved of their effect. There is no mechanism under Section 14-3-330 for the appeal they are attempting to pursue. S.C. Code Ann. § 14-3-330 (Supp. 2010) (general appealability statute).

Furthermore, while they assert in filings that they are "counsel for Mr. Clemons," Mr. Walsh is the attorney who served in that capacity (and still serves 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. (Copy attached as Exhibit). In sum, Mr. Clemons is satisfied with the confessions, as evidenced by the fact that he authorized his real attorney, Mr. Walsh, to execute them. The ink was not dry on those documents before Peak's lawyers filed these notices of appeal.

In any event, a voluntary confession of judgment may not be directly appealed under Section 14-3-330, and the Court should dismiss these appeals as improper.

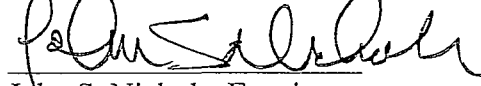
CONCLUSION

These appeals were initiated by the lawyers for an insurance company that is not and has never been a party to these cases. The appeals are purportedly from (a) a voluntary confession of judgment entered under the advice of counsel; (b) an order denying a motion to dismiss; and (c) an order denying the motion to reconsider the denial of the motion to dismiss. A voluntary confessions of judgment that the purported appellant himself freely entered is not an appealable judgment.

It has long been the rule that 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 Section 14-3-330, this Court lacks jurisdiction over the purported appeal in this matter.

For the reasons stated, the Court should dismiss this appeal and remit the matter to the circuit court.

Respectfully submitted,



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April 15, 2011

Exhibit 1

Notices of Appeal

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0573

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

NOTICE OF APPEAL

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*Attorneys for the Appellant,
Michael Lee Clemons*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS:

COMES NOW the Appellant, Michael Lee Clemons ("Mr. Clemons"), pursuant to Rule 203 of the South Carolina Appellate Court Rules, and respectfully hereby serves his Notice of Appeal showing he is appealing the below-listed orders and judgments in this matter:

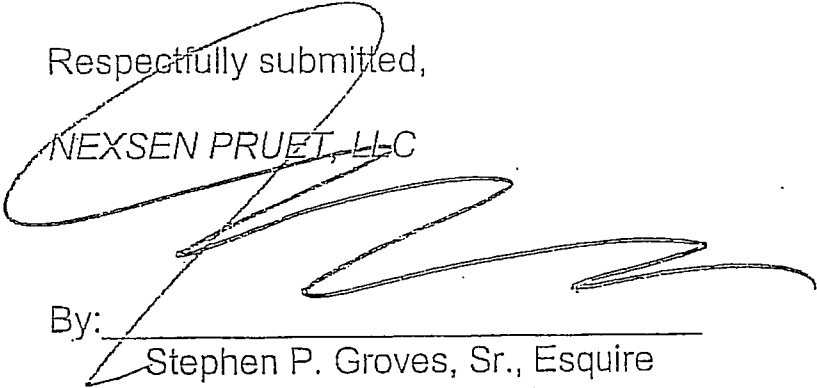
- a. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondent's Complaint;

- b. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motion to Reconsider or Later or Amend; and
- c. Judgment dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$3,000,000.00.

Counsel for Mr. Clemons received filed and stamped copies of the Judgment on 7 February 2011. Copies of the Judgment and the Circuit Court orders appealed from are collectively attached hereto as Exhibit "A" and is incorporated herein by reference.

Respectfully submitted,

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7 March 2011

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STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

ORDER DENYING
MOTION TO DISMISS

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

ORDER DENYING
MOTION TO DISMISS

These matters came before me on June 11, 2008, upon motions of the Defendant to dismiss each case based on an agreement to settle the Plaintiffs' claims reached between the Defendant's insurance carrier and Plaintiffs' counsel. Essentially, the Defendant asks this Court to enforce these agreements to settle and dismiss Plaintiffs'

ATTEST TRUE COPY

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JAMES L. HOSCHER
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

complaints.¹ At the hearing both sides were represented by their respective counsel.

These claims arise out of an automobile collision which occurred in Orangeburg County on the morning of March 25, 2006. At that time, the Nelsons were hit head-on by Michael Lee Clemons. Woodrow Nelson died as a result of the wreck. His young wife, Catina Nelson, sustained a catastrophic brain injury. The Nelsons had two small children.

Defendant Clemons was insured by Viking Insurance. However, Viking Insurance did not pay its available liability coverage to the Plaintiffs' attorney or into the court. This motion essentially now seeks to force Plaintiffs to accept that coverage.

Additionally, the Nelsons had purchased underinsured coverage from State Farm Insurance Company. As a result of the wreck, State Farm offered and paid its underinsured coverage to Nelsons.

On September 13, 2006, a hearing was scheduled before the Orangeburg Probate Court to approve the settlement of Woodrow Nelson's death claims (wrongful death and survival) as well as to appoint a conservator for Catina Nelson. Plaintiffs' counsel argued and it appears from a review of the transcript of the probate hearing that it was initially setup to approve only the payment of State Farm's coverage because Viking had not paid

¹ In case number 07-CP-38-574, Eddie Williams as Conservator for Catina W. Nelson v. Michael Lee Clemons, in his written motion counsel for the Defendant also moved to dismiss that case pursuant to Rule 12(b)(7) for the failure to join the South Carolina Department of Health and Human Services as a necessary and indispensable party under Rule 19. At the hearing, counsel did not argue anything with respect to this ground for dismissal. Therefore, the Court assumes that this ground is abandoned. Nonetheless, even if it were not abandoned, the Court does not believe that the South Carolina Department of Health and Human Services is required to be joined in this matter under Rule 19 and would so rule. Accordingly, if the argument is not abandoned, the motion on this basis is denied.

its coverage.² Nonetheless, the transcript indicates that the hearing went forward to approve the settlement of the death claims of Woodrow Nelson with Viking's coverage to be included in that agreement and approval. The transcript does not contain any direct reference to an approval of the claims of Catina Nelson by the Probate Court nor does it specifically reflect the terms of any agreement relating to Catina Nelson's claim.

The dispute here arises concerning the payment of the liability proceeds by Viking for the Nelsons' claims. Counsel for Defendant Nelson argues that Viking did not pay, because it did not have all the information it needed. Plaintiffs' counsel argues that repeated demands for the payment were made on the insurance company during the six months following the September 13, 2006, hearing and for it to send the checks to the Plaintiffs' lawyer's office. Ultimately, the Plaintiffs contend that they withdrew their assent to the agreement because the money was not paid. Essentially, Plaintiffs do not contest that at one time they had agreed to and would have accepted the limited coverage; instead, they maintain that the agreement was that the money would be paid and that it was not.

Rule 43(k), SCRCP, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation. Ashcroft v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (S.C. 1995). Before the Court can enforce an agreement, the existence and the terms of the agreement must be reduced to the form of a consent order

² For instance, on page 5 of the transcript, counsel for Defendant Clemons indicates that the petition that was being presented to the court was filed by State Farm and did not include Viking's coverage. Counsel then goes on to state that he doesn't know how Viking got "behind" the UIM. Further, counsel for Defendant Clemons indicated that he "would prepare" an amended petition that would include Viking's coverage.

or written stipulation signed by counsel and entered on the record, or made in open court and noted upon the record. Substantial compliance with the rule does not work and is insufficient. Id. at 495, 458 S.E.2d at 535, citing Lyons Enter., Inc. v. Custer, 168 Ariz. 439, 814 P.2d 780 (Ct. App. 1991) ("A stipulation that simply states that a settlement has been reached, but does not set forth the terms of the settlement does not serve the purpose of the rule."). See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (S.C. 1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRPC.").

Essential terms of a settlement include the amount of payment as well as the time and manner of payment. "This 'meeting of the minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (S.C. 1989). Further, there can be no enforceable duty to perform so long as, in contemplation of the parties thereto, something remains to be done to establish a duty to perform. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (S.C. 1975).

In Reed v. Associated Investments, 339 S.C. 148, 154, 528 S.E.2d 94, 97 (S.C. Ct. App. 2000), a case where the parties agreed on the settlement amount but not the terms of the settlement, the court held:

Where the parties agree on the amount of the settlement, but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. See, Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997). As we read the record, we find the trial court erred in concluding that Reed and Associated reached an agreement about the terms

of the settlement. 'Because the conditions upon which an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement on the terms of the settlement is fatal . . . To conclude otherwise would largely render meaningless the requirements that settlement agreements be in writing.' Id. at 546, 481 S.E.2d at 716.

Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the requirements of Rule 43(k) preclude enforcement of the settlement.

See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 460 S.E.2d 396 (S.C. 1995)(holding that "a settlement order is unenforceable where it fails to set forth the terms of the settlement and required by Rule 43(k).")(emphasis added); Farnsworth v. Davis Heating & Air, 367 S.C. 634, 627 S.E.2d 724(S.C. 2006)(holding until the terms of an agreement satisfy Rule 43(k), the agreement is non-binding and until a party is bound, she is entitled to withdraw her assent).

In these matters, the offers to settle were conditioned on the payment of Viking Insurance's coverage. For whatever reason, that payment did not occur as contemplated by the parties. Moreover, the transcript of the probate hearing fails to set forth when or how the money would be paid to the Plaintiffs.³ Therefore, there is no enforceable agreement and Plaintiffs were entitled to withdraw their assent. See e.g., Young v. Cooler, 347 S.C. 362, 555 S.E.2d 410(S.C. Ct. App. 2001)(holding that there is no meeting of the minds where the parties envisioned that further work was needed to finalize a settlement agreement and that even if there was an intent to be bound and an attempt to announce

³ In any event, there is nothing in the transcript of the probate hearing specifically about the settlement of Catina Nelson's claims. Moreover, the Court finds there is no enforceable agreement under Rule 43(k) with respect to her claim even if the insurance company's failure to pay was excused.

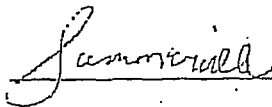
to the court that a settlement had been reached, the failure to put the essential terms of the purported settlement on the record prevent the requirements of Rule 43(k) from being met and the settlement from being enforced by the court). Cf. Cheap-O's Truck Sto, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (S.C. Ct. App. 2002)(finding that where the material terms of the settlement agreement, namely the amount of the settlement, the time for payment, and the conditions of the payment, were read into the record, it complied with Rule 43(k) and was enforceable by the court).

Accordingly, Defendant's motions are hereby DENIED.

IT IS SO ORDERED, this 30 day of Sept, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit



Sumner, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CF-38-573

ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

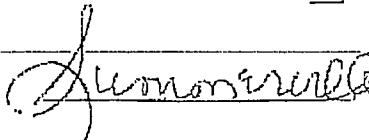
ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND

On September 30, 2008, this Court issued its order in these matters denying Defendant's motions to dismiss. The order was filed on October 13, 2008. Subsequently, Defendant filed an Amended Notice of Motion and Motion for Reconsideration or In The Alternative to Alter or Amend the Order Pursuant to Rule 59(e), SCRCP, which presently before me.

After reviewing my Order and everything presented to the Court, it does not appear that the motion to reconsider raises any issue that was not previously considered by and ruled upon by the Court. Moreover, there is no reason to alter or amend the order and none has been presented. Accordingly, Defendant's motions to reconsider or alter or amend are hereby DENIED.

IT IS SO ORDERED, this 31 day of Oct, 2003.


Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

 South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

COUNTY OF ORANGEBURG)

JUNELL W. JOHNSON as Personal)
Representative of the Estate of)
WOODROW C. NELSON,)

Plaintiff,)

OFFER OF JUDGMENT

vs.)

MICHAEL LEE CLEMONS,)

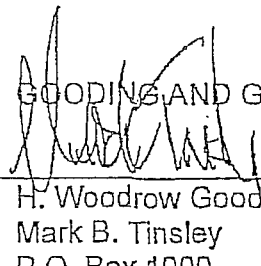
Defendant.)

TO: JAMES P. WALSH, ESQUIRE, ATTORNEY FOR DEFENDANT:

Plaintiff, pursuant to Rule 68 of the South Carolina Rules of Civil Procedure,

hereby offers to take judgment in the Plaintiff's favor for a total of Three Million and No/100 (\$3,000,000.00) Dollars, included herein costs now accrued. Should this offer not be accepted within twenty (20) days, it is deemed withdrawn and Plaintiff shall proceed with preparation for trial. Furthermore, if this offer is not accepted and Plaintiff obtains a verdict of determination at least as favorable as this offer, Plaintiff shall recover from Defendant any administrative, filing, or other court costs from the date of this offer until the entry of the judgment, and (7.25%) percent interest computed on the amount of the verdict award from the date of the offer to the entry of judgment.

GOODING AND GOODING, P.A.

By: 

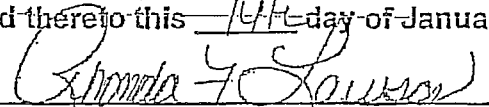
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

CERTIFICATE OF SERVICE BY MAIL

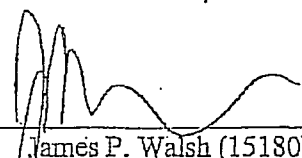
I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14th day of January, 2011.

By: 

Rhonda F. Lawson, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
Junell W. Johnson as Personal	)	
Representative of the Estate of	)	
Woodrow C. Nelson,	)	
	)	ACCEPTANCE OF SCRCP 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	
_____	)	

The Defendant Michael Lee Clemons by and through his undersigned counsel in
~~accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby~~
accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of
\$3,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: 
James P. Walsh (15180)
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606
(864) 232-4400
(864) 235-4399 (fax)
Attorneys for the Defendant

February 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0573

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

PROOF OF SERVICE
for the
NOTICE OF APPEAL

Stephen P. Groves, Sr., 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
E-Mail: pdominick@nexsenpruet.com

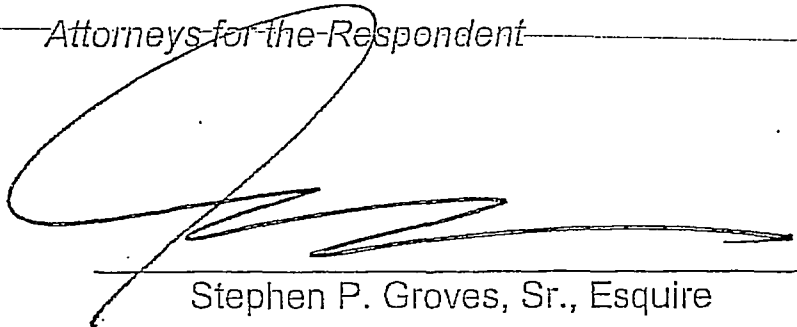
*Attorneys for the Appellant,
Michael Lee Clemons*

24

I, Stephen P. Groves, Esquire, hereby certify that on 7 March 2011, I served a copy of the Notice of Appeal submitted by the Appellant, Michael Lee Clemons, on counsel for the Respondent via United States Mail, postage pre-paid, and addressed as follows:

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A.
Post Office Box 1000
Allendale, South Carolina 29810
Telephone: 803.584.7676

~~Attorneys for the Respondent~~



Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

7 March 2011

NPCHAR1:638554.1-NC-(SPG) 022447-00005

25²

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

NOTICE OF APPEAL

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

*Attorneys for the Appellant,
Michael Lee Clemons*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS:

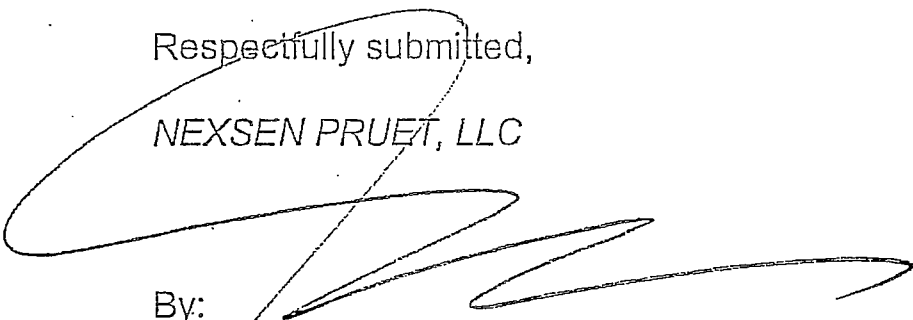
COMES NOW the Appellant, Michael Lee Clemons ("Mr. Clemons"), pursuant to Rule 203 of the South Carolina Appellate Court Rules, and respectfully hereby serves his Notice of Appeal showing he is appealing the below-listed orders and judgments in this matter:

- a. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondent's Complaint;
- b. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motion to Reconsider or Later or Amend; and
- c. Judgment dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$6,000,000.00.

Counsel for Mr. Clemons received filed and stamped copies of the Judgment no earlier than 7 February 2011. Copies of the Judgment and the Circuit Court orders appealed from are collectively attached hereto as Exhibit "A" and is incorporated herein by reference.

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

*Attorneys for the Appellant,
Michael Lee Clemons*

Charleston, South Carolina

7 March 2011

NPCHAR1:638567,1-NC-(SPG) 022447-00005

OTHER COUNSEL OF RECORD ARE:

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A
Post Office Box 1000
Allendale, South Carolina 29810
Telephone: 803.584.7676

Attorneys for the Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

ORDER DENYING
MOTION TO DISMISS

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

ORDER DENYING
MOTION TO DISMISS

These matters came before me on June 11, 2008, upon motions of the Defendant to dismiss each case based on an agreement to settle the Plaintiffs' claims reached between the Defendant's insurance carrier and Plaintiffs' counsel. Essentially, the Defendant asks this Court to enforce these agreements to settle and dismiss Plaintiffs'

ATTEST: TRUE COPY

[Signature]
CLERK OF COURT
TRANSPORTATION COURT CAROLINA

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complaints.¹ At the hearing both sides were represented by their respective counsel.

These claims arise out of an automobile collision which occurred in Orangeburg County on the morning of March 25, 2006. At that time, the Nelsons were hit head-on by Michael Lee Clemons. Woodrow Nelson died as a result of the wreck. His young wife, Catina Nelson, sustained a catastrophic brain injury. The Nelsons had two small children.

Defendant Clemons was insured by Viking Insurance. However, Viking Insurance did not pay its available liability coverage to the Plaintiffs' attorney or into the court. This motion essentially now seeks to force Plaintiffs to accept that coverage.

Additionally, the Nelsons had purchased underinsured coverage from State Farm Insurance Company. As a result of the wreck, State Farm offered and paid its underinsured coverage to Nelsons.

On September 13, 2006, a hearing was scheduled before the Orangeburg Probate Court to approve the settlement of Woodrow Nelson's death claims (wrongful death and survival) as well as to appoint a conservator for Catina Nelson. Plaintiffs' counsel argued and it appears from a review of the transcript of the probate hearing that it was initially setup to approve only the payment of State Farm's coverage because Viking had not paid

¹ In case number 07-CP-38-574, Eddie Williams as Conservator for Catina W. Nelson v. Michael Lee Clemons, in his written motion counsel for the Defendant also moved to dismiss that case pursuant to Rule 12(b)(7) for the failure to join the South Carolina Department of Health and Human Services as a necessary and indispensable party under Rule 19. At the hearing, counsel did not argue anything with respect to this ground for dismissal. Therefore, the Court assumes that this ground is abandoned. Nonetheless, even if it were not abandoned, the Court does not believe that the South Carolina Department of Health and Human Services is required to be joined in this matter under Rule 19 and would so rule. Accordingly, if the argument is not abandoned, the motion on this basis is denied.

its coverage.² Nonetheless, the transcript indicates that the hearing went forward to approve the settlement of the death claims of Woodrow Nelson with Viking's coverage to be included in that agreement and approval. The transcript does not contain any direct reference to an approval of the claims of Catina Nelson by the Probate Court nor does it specifically reflect the terms of any agreement relating to Catina Nelson's claim.

The dispute here arises concerning the payment of the liability proceeds by Viking for the Nelsons' claims. Counsel for Defendant Nelson argues that Viking did not pay, because it did not have all the information it needed. Plaintiffs' counsel argues that repeated demands for the payment were made on the insurance company during the six months following the September 13, 2006, hearing and for it to send the checks to the Plaintiffs' lawyer's office. Ultimately, the Plaintiffs contend that they withdrew their assent to the agreement because the money was not paid. Essentially, Plaintiffs do not contest that at one time they had agreed to and would have accepted the limited coverage; instead, they maintain that the agreement was that the money would be paid and that it was not.

Rule 43(k), SCRPC, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation. Ashcroft v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (S.C. 1995). Before the Court can enforce an agreement, the existence and the terms of the agreement must be reduced to the form of a consent order

² For instance, on page 5 of the transcript, counsel for Defendant Clemons indicates that the petition that was being presented to the court was filed by State Farm and did not include Viking's coverage. Counsel then goes on to state that he doesn't know how Viking got "behind" the UIM. Further, counsel for Defendant Clemons indicated that he "would prepare" an amended petition that would include Viking's coverage.

or written stipulation signed by counsel and entered on the record, or made in open court and noted upon the record. Substantial compliance with the rule does not work and is insufficient. Id. at 495, 458 S.E.2d at 535, citing Lyons Enter., Inc. v. Custer, 168 Ariz. 439, 814 P.2d 780 (Ct. App. 1991) ("A stipulation that simply states that a settlement has been

reached, but does not set forth the terms of the settlement does not serve the purpose of the rule."). See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (S.C. 1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRPC.").

Essential terms of a settlement include the amount of payment as well as the time and manner of payment. "This 'meeting of the minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (S.C. 1989). Further, there can be no enforceable duty to perform so long as, in contemplation of the parties thereto, something remains to be done to establish a duty to perform. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (S.C. 1975).

In Reed v. Associated Investments, 339 S.C. 148, 154, 528 S.E.2d 94, 97 (S.C. Ct. App. 2000), a case where the parties agreed on the settlement amount but not the terms of the settlement, the court held:

Where the parties agree on the amount of the settlement, but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. See, Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997). As we read the record, we find the trial court erred in concluding that Reed and Associated reached an agreement about the terms

of the settlement. 'Because the conditions upon which an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement on the terms of the settlement is fatal . . . To conclude otherwise would largely render meaningless the requirements that settlement agreements be in writing.' Id. at 546, 481 S.E.2d at 716.

Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the requirements of Rule 43(k) preclude enforcement of the settlement.

See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 460 S.E.2d 396 (S.C. 1995)(holding that "a settlement order is unenforceable where it fails to set forth the terms of the settlement and required by Rule 43(k)."(emphasis added); Farnsworth v. Davis Heating & Air, 367 S.C. 634, 627 S.E.2d 724(S.C. 2006)(holding until the terms of an agreement satisfy Rule 43(k), the agreement is non-binding and until a party is bound, she is entitled to withdraw her assent).

In these matters, the offers to settle were conditioned on the payment of Viking Insurance's coverage. For whatever reason, that payment did not occur as contemplated by the parties. Moreover, the transcript of the probate hearing fails to set forth when or how the money would be paid to the Plaintiffs.³ Therefore, there is no enforceable agreement and Plaintiffs were entitled to withdraw their assent. See e.g., Young v. Cooler, 347 S.C. 362, 555 S.E.2d 410(S.C. Ct. App. 2001)(holding that there is no meeting of the minds where the parties envisioned that further work was needed to finalize a settlement agreement and that even if there was an intent to be bound and an attempt to announce

³ In any event, there is nothing in the transcript of the probate hearing specifically about the settlement of Catina Nelson's claims. Moreover, the Court finds there is no enforceable agreement under Rule 43(k) with respect to her claim even if the insurance company's failure to pay was excused.

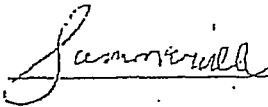
to the court that a settlement had been reached, the failure to put the essential terms of the purported settlement on the record prevent the requirements of Rule 43(k) from being met and the settlement from being enforced by the court). Cf. Cheap-O's Truck Sto. Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (S.C. Ct. App. 2002)(finding that where the material terms of the settlement agreement, namely the amount of the settlement, the time for payment, and the conditions of the payment, were read into the record, it complied with Rule 43(k) and was enforceable by the court).

... Accordingly, Defendant's motions are hereby DENIED. ...

IT IS SO ORDERED, this 30 day of Sept, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit



Sumner, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CF-38-573

ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND

On September 30, 2008, this Court issued its order in these matters denying Defendant's motions to dismiss. The order was filed on October 13, 2008. Subsequently, Defendant filed an Amended Notice of Motion and Motion for Reconsideration or In The Alternative to Alter or Amend the Order Pursuant to Rule 59(e), SCRCP, which presently before me.

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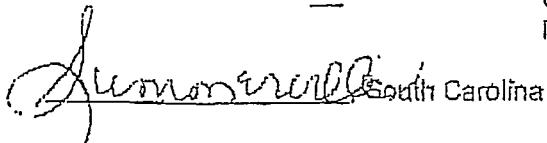
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After reviewing my Order and everything presented to the Court, it does not appear that the motion to reconsider raises any issue that was not previously considered by and ruled upon by the Court. Moreover, there is no reason to alter or amend the order and none has been presented. Accordingly, Defendant's motions to reconsider or alter or amend are hereby DENIED.

IT IS SO ORDERED, this 31 day of Dec, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

 Sumnerville South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
EDDIE WILLIAMS as Conservator)
for CATINA W. NELSON,)

Plaintiff,)

VS.)

MICHAEL LEE CLEMONS,

Defendant.

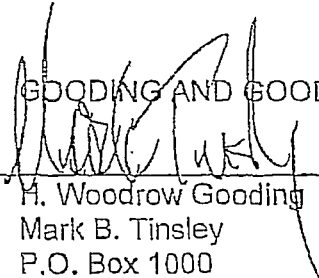
IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

OFFER OF JUDGMENT

TO: JAMES P. WALSH, ESQUIRE, ATTORNEY FOR DEFENDANT:

Plaintiff, pursuant to Rule 68 of the South Carolina Rules of Civil Procedure, hereby offers to take judgment in the Plaintiff's favor for a total of Six Million and No/100 (\$6,000,000.00) Dollars, included herein costs now accrued. Should this offer not be accepted within twenty (20) days, it is deemed withdrawn and Plaintiff shall proceed with preparation for trial. Furthermore, if this offer is not accepted and Plaintiff obtains a verdict of determination at least as favorable as this offer, Plaintiff shall recover from Defendant any administrative, filing, or other court costs from the date of this offer until the entry of the judgment, and (7.25%) percent interest computed on the amount of the verdict award from the date of the offer to the entry of judgment.

GOODING AND GOODING, P.A.

By: 

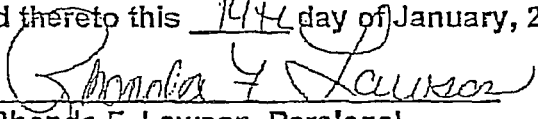
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14 day of January, 2011.

By: 

Rhonda F. Lawson, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-574
COUNTY OF ORANGEBURG	)	
	)	
Eddie Williams as Conservator for	)	
Catina W. Nelson,	)	
	)	ACCEPTANCE OF SCRCP 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	

The Defendant Michael Lee Clemons by and through his undersigned counsel in accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of \$6,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: _____

James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for the Defendant

February 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

PROOF OF SERVICE
for the
NOTICE OF APPEAL

Stephen P. Groves, Sr., 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
E-Mail: pdominick@nexsenpruet.com

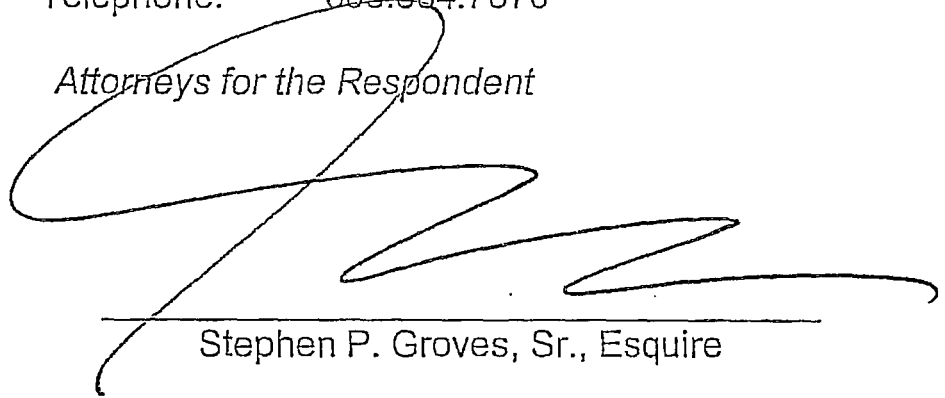
*Attorneys for the Appellant,
Michael Lee Clemons*

41

I, Stephen P. Groves, Esquire, hereby certify that on 7 March 2011, I served a copy of the Notice of Appeal submitted by the Appellant, Michael Lee Clemons, on counsel for the Respondent via United States Mail, postage pre-paid, and addressed as follows:

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A.
Post Office Box 1000
Allendale, South Carolina 29810
Telephone: 803.584.7676

Attorneys for the Respondent



Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

7 March 2011

NPCHAR1:638587.1-NC-(SPG) 022447-00005

Exhibit 2
Motion to Intervene

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

JUNELL W. JOHNSON, as Personal Representative
of the Estate of Woodrow C. Nelson

☐ Plaintiff

v.

Michael Lee Clemons

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2007-CP-38-0573

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
H. Woodrow Gooding, Esq., Bar No.
Address:
phone: fax:
e-mail: other:

Defendant's Attorney:
Stephen P. Groves, Bar No. 7254
Address:
Nexsen Pruet, LLC, 205 King Street, Suite 400
Charleston, SC 29401
phone: 577-9440 fax: 720-1777
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Intervene

Estimated Time Needed: 15 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0573

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

Plaintiff,

v.

Michael Lee Clemons,

Defendant.

***MOTION TO INTERVENE
VIA RULE 24, SCRCivP***

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0574

Eddie Williams, as Conservator
for Catina W. Nelson,

Plaintiff,

v.

Michael Lee Clemons,

Defendant.

***MOTION TO INTERVENE
VIA RULE 24, SCRCivP***

TO: H. WOODROW GOODING, ESQ. and MARK B. TINSLEY, ESQ.
Of Gooding and Gooding, P.A.

*Attorneys for the Plaintiffs, Junell W. Johnson, as Personal
Representative of the Estate of Woodrow C. Nelson*

And

Eddie Williams, as Conservator for Catina W. Nelson:

YOU WILL PLEASE TAKE NOTICE that the proposed intervenor, Peak Property and Casualty Insurance Corp. ("Peak Property and Casualty"), will respectfully move this Circuit Court on the tenth day after service hereof or as soon thereafter as counsel may be heard for an Order, pursuant to Rule 24, SCRCivP, allowing Peak Property and Casualty to intervene in these two civil actions as an intervenor-party for the following reasons:

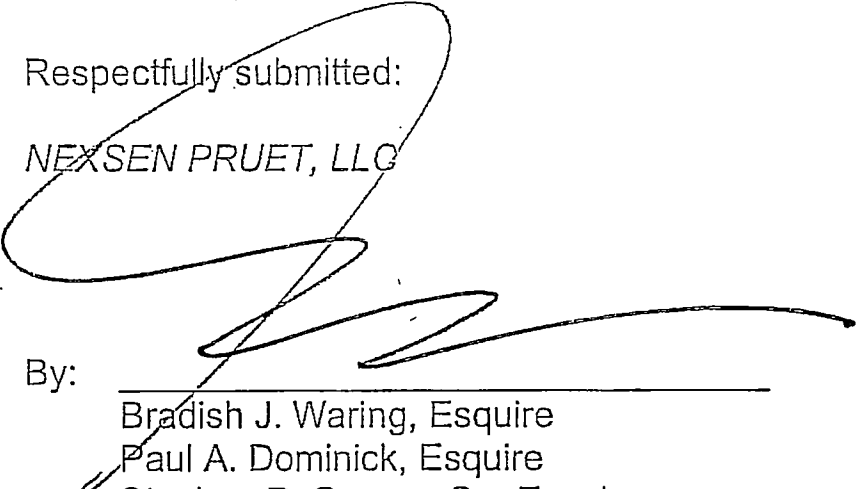
- (a) Peak Property and Casualty claims a substantial and significant interest relating to the property or transaction which is the subject of these two actions in that Peak P&C issued the automobile liability insurance policy involved in these two matters to the Defendant, Michael Lee Clemons ("Mr. Clemons");
- (b) Peak Property and Casualty is so situated that the current disposition of these actions in which Mr. Clemons has previously agreed with, accepted, and consented to Offers of Judgment in the amount of \$3,000,000.00 in Johnson v. Nelson ("Case No. 573") and in the amount of \$6,000,000.00 in Williams v. Nelson ("Case No. 574") which actions may, as practical matter impair or impede Peak Property and Casualty's ability to protect its interests herein;
- (c) Judgments have already been entered on or about 7 February 2011, against Mr. Clemons in the respective amounts of \$3,000,000.00 in Case No. 573 and \$6,000,000.00 in Case No. 574; and

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- (d) In view of Mr. Clemons' actions in both cases and the subsequent enrolled judgments, Peak Property and Casualty's interests herein are not and have not been adequately represented by any of the existing parties to these two actions.

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

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*Attorneys for the Intervenor,
Peak Property and Casualty Insurance Corp.*

Charleston, South Carolina

7 March 2011

NPCHAR1:638541.1-MO-(SPG) 022447-00005

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No. 2007-CP-38-0573
Case No. 2007-CP-38-0574

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

v.

Michael Lee Clemons, ... Appellant.

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

v.

Michael Lee Clemons, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appeals on Appellant, Michael Lee Clemons, by depositing a copy of it in the United States Mail, postage prepaid, on April 15, 2011, addressed to their attorneys of record as follows:

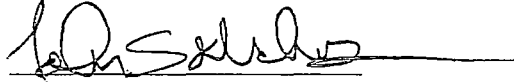
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Counsel for Respondents.

April 15, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574
Civil Action No.: 2007-CP-38-0573

RECEIVED

MAY 12 2011

Eddie Williams, as Conservator for
Catina W. Nelson,

SC Court of Appeals

Respondent,

v.

Michael Lee Clemons,

Appellant.

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

**APPELLANT'S RETURN TO
RESPONDENTS' JOINT
MOTION TO DISMISS APPEALS**

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*Attorneys for the Appellant,
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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES NOW the Appellant, Michael Lee Clemons,¹ pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, and respectfully submits his Return/Response to the *Respondents' [Joint] Motion to Dismiss Appeals* submitted by the Respondents, Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson, and Eddie Williams, as Conservator for Catina W. Nelson (collectively the "Respondents") and challenging this Court's subject matter jurisdiction. Mr. Clemons respectfully requests this Court to deny the Motion to Dismiss Appeals because subject matter jurisdiction exists under S. C. Code Ann. § 14-3-330 and, therefore, these appeals should be allowed to proceed. The appeals are timely, and while they arise ultimately from consent judgments, they also encompass prior, non-final orders, and are permitted under well-recognized and well-settled South Carolina law.

¹ The Respondents assert Mr. Clemons' appellate counsel are somehow not really representing Mr. Clemons. (Motion to Dismiss Appeals, pp.4-5). This assertion is a "red herring" offered to cloud this Court's view of Mr. Clemons' valid position on appeal. Mr. Clemons' trial counsel, James P. Walsh, Esquire remains fully participating in this appeal and is a signatory hereto. The fact that Mr. Clemons' insurance carrier, Viking Insurance Company, by and through its parent, Peak Property and Casualty Company, has retained the undersigned, including Attorney Walsh, to represent Mr. Clemons is of no consequence to the substantive and procedural validity of these appeals. The Respondents attached a copy of Peak Property & Casualty's Motion to Intervene filed in the Circuit Court, but omitted the fact that Peak later filed a First Amended Motion to Intervene which specifically withdrew and modified Peak's original motion. See First Amended Motion to Intervene via Rule 24, SCRCivP, dated 10 March 2011, and filed 14 March 2011. A copy of the Amended Intervention Motion is attached hereto as Exhibit "A" and incorporated herein by reference.

I. STATEMENT OF THE CASE

The Respondents filed their respective actions against Mr. Clemons on 10 May 2007.² (Appx.1-2, 5-6).³ Ms. Johnson asserted a wrongful death claim (Appx.2-4, paras. 1-5), while Mr. Williams asserted an automobile negligence/personal injury claim. (Appx.6-8, paras. 1-6).⁴ On 6 June 2007, Mr. Clemons moved to dismiss and/or enforce the settlements which had been reached, as both actions then were barred due to the parties' previously agreed-upon settlement. (Appx.9-10; Appx.11-11A). Mr. Clemons' lawyer at the time, Michael P. Horger, Esquire⁵ contemporaneously filed an affidavit supporting the motions. (Appx.14-17). In response, Paul W. Owen, Jr., Esquire,⁶ legal counsel for Ms. Johnson and Mr. Williams (Appx.14, para. 2), submitted an affidavit in opposition to Mr. Clemons' motions to dismiss, as did

² There are two separate appeals at issue, arising from Junell W. Johnson as Personal Representative of the Estate of Woodrow C. Nelson v. Michael Lee Clemons, Civil Action No. 2007-CP-02-573 ("Case No. 573") and Eddie Williams as Conservator for Catina W. Nelson v. Michael Lee Clemons, Civil Action No. 2007-CP-02-574 ("Case No. 574"). Both cases, and both appeals, are grounded in the same set of facts and circumstances, and are discussed jointly herein.

³ All of the documents Mr. Clemons references herein are contained in an Appendix to this Return to Motion to Dismiss Appeals.

⁴ Mr. Clemons was served with copies of the Summonses and Complaints in both cases on 23 May 2007, by the Orangeburg Sheriff's Office. (Appx.12-13; Appx.29, para. 4). Mr. Clemons was incarcerated at the time in the Orangeburg-Calhoun Detention Center. (Appx.29, para. 4).

⁵ Attorney Horger of Michael P. Horger, P.A. originally represented Mr. Clemons. Later, James P. Walsh, Esquire of Clarkson, Walsh, Terrell & Coulter, P.A. was substituted as Mr. Clemons' legal counsel.

⁶ Attorney Owen represented Ms. Johnson in her capacity as the Personal Representative of the Estate of Woodrow C. Nelson and Mr. Williams in his capacity as the Conservator for Catina W. Nelson. (Appx.14, para. 2; Appx.28, para. 1).

Attorney Owen's associated counsel, Shane M. Burroughs, Esquire (Appx.28-34)⁷ and an employee in Attorney Burroughs' office, Rachael M. Estok. (Appx.35).⁸

The Honorable Diane S. Goodstein, Circuit Court Judge, heard Mr. Clemons' motions on 11 June 2008, and took the matters under advisement. (Appx.36). The Circuit Court subsequently issued its written order on 30 September 2008, denying both motions to dismiss. (Appx.36-41). Mr. Clemons timely moved for reconsideration or to alter/amend both judgments. (Appx.42-43). Mr. Clemons later filed an amended reconsideration motion. (Appx.44-45). The Circuit Court denied reconsideration. (Appx.46-47).

Mr. Clemons filed his answers to both complaints on 8 April 2009. (Appx.48-57).⁹ The Respondents moved to strike the answers and to have default judgments entered against Mr. Clemons. (App.58-65). Mr. Clemons opposed the motions and preemptively moved to set aside any entry of default. (Appx.66-67). On 4 December 2009, the Circuit Court issued its order setting aside any default against Mr. Clemons in either case. (Appx.68). The Respondents moved for reconsideration on 15 December 2009. (Appx.68-69).

⁷ Attorney Burroughs of Lanier & Burroughs, LLC also represented Ms. Johnson and Mr. Williams. (Appx.28, para. 1).

⁸ Ms. Estok was a legal assistant in Attorney Burroughs' office. (Appx.35, para. 1).

⁹ At this point in time, Mr. Clemons was being represented by Attorney Walsh. (Appx.52, 57).

On 14 January 2011, Mr. Williams sent Mr. Clemons an Offer of Judgment in the amount of Six Million Dollars (\$6,000,000.00). (Appx.72-73; 134-135). Similarly, Ms. Johnson sent Mr. Clemons an Offer of Judgment in the amount of Three Million Dollars (\$3,000,000.00). (Appx.70-71, 117-118). Mr. Clemons accepted both offers on 4 February 2011 (Appx.74-75, 119, 136), and the acceptances were filed with the Circuit Court on 7 February 2011. (Appx.74-75, 119, 136).

These appeals followed. (Appx.105-136). The Respondents have filed their Motions to Dismiss seeking to have this Court dismiss the appeals. Mr. Clemons now files his return.

II. STATEMENT OF THE FACTS

A. The Accident

These actions arise out of a tragic three-vehicle accident which occurred on 25 March 2006, in the City of Orangeburg, South Carolina. (Appx.2-3, para. 3; Appx.6, para. 3; Appx.18, para. 1; Appx.78, lines 14-18). Mr. Clemons was operating his vehicle and heading east on Chestnut Street in Orangeburg while, at the same time, Woodrow C. Nelson was heading west also on Chestnut Street. (Appx.2-3, para. 3; Appx.6, para. 3). Mr. Nelson's wife, Catina W. Nelson, was riding in her husband's vehicle. (Appx.6, para. 3; Appx.78, lines 14-18). Unfortunately, Mr. Clemons was driving while under the influence of alcohol and crossed the center line of

Chestnut Street, hitting Mr. Nelson's vehicle head on. (Appx.2-3, para. 3; Appx.6, para. 3; Appx.18, paras. 1-2; Appx.78, lines 14-18).¹⁰ As a result of the collision, Mr. Nelson was killed and Ms. Nelson suffered significant debilitating injuries.¹¹ (Appx.2-3, paras. 3-4; Appx.6-7, paras. 4; Appx.18-19, para. 3; Appx.78, lines 18-20). The driver of a third vehicle involved in the accident, Wendell Hamilton, also sustained personal injuries from the collision. (Appx.14, para. 2).

At the time of the accident, Mr. Clemons was insured by Viking Insurance Company through an automobile liability insurance policy in the amount of \$15,000.00 per person per accident and \$30,000.00 for two or more persons per accident. (Appx.19, para. 6). Mr. Nelson had underinsured motorists' coverage ("UIM") with State Farm Mutual Automobile Insurance Company in the sum of \$150,000.00. (Appx.19, paras. 5, 7).

B. The Settlement

Not too long after the accident, Viking Insurance, on behalf of Mr. Clemons, and counsel for the two plaintiffs reached a settlement "whereby the insurance coverage [for Mr. Clemons] would be exhausted by the payment of the applicable [\$30,000.00] limits with \$5,000.00 allocated to the claim of [Mr.] Hamilton and \$12,500.00 [each] being allocated to the claim[s] of Catina W. Nelson and . . . the Estate of Woodrow C. Nelson" (Appx.14-16, paras.

¹⁰ On 17 April 2007, Mr. Clemons ultimately "plead guilty to felony DUI and was sentenced to 11 years in prison" (Appx.21, para. 26).

¹¹ Ms. Nelson has been determined to be *non compos mentis*. (Appx.78, lines 14-20).

2, 5; Appx.19, paras. 8-10).¹² Due to the circumstances, the parties agreed the settlement required approval of the Orangeburg County Probate Court. (Appx.14, para. 2; Appx.19, para. 9). Viking Insurance retained Attorney Horger to represent Mr. Clemons and "to see that the appropriate Petition, Order[,] and Release were obtained from the Estate of Woodrow C. Nelson and on behalf of Catina W. Nelson upon a conservator being appointed for her." (Appx.15, para. 3). Attorney Owen, plaintiffs' counsel, ultimately scheduled a hearing in the Probate Court before the Honorable Pandora Jones-Glover, Probate Judge, for 13 September 2006. (Appx.15, para. 4; Appx.19, para. 9). The purpose of the hearing was to have the Probate Court approve the death settlement between Mr. Nelson's Estate and Viking Insurance (on behalf of Mr. Clemons) and to have a conservator appointed for Ms. Nelson. (Appx.15, para. 4; Appx.19, paras. 9-10; Appx.78, line 14 – Appx.79, line 22).¹³

Attorney Owen placed the settlement on the Probate Court record and Attorney Horger confirmed the terms. (Appx.14-16, paras. 2, 5; Appx.19, paras. 9-10; Appx.78, line 18 – Appx.79, line 22; Appx.80, line 5 – Appx.81, line 5).¹⁴ Ms. Johnson, the Personal Representative, testified that she

¹² State Farm agreed to pay the UIM coverage of \$150,000.00 to Mr. Nelson's Estate and to Ms. Nelson on a 50/50 basis - \$75,000.00 to each. (Appx.19, paras. 7, 10; Appx.79, lines 1-9). Viking Insurance settled with Mr. Hamilton for \$5,000.00. (Appx.19, para. 8).

¹³ Contemporaneously with approving the insurance allocation settlement, the Probate Court also appointed Mr. Williams as Ms. Nelson's conservator. (Appx.19, para. 11; Appx.97, line 15 – Appx.103, line 24).

¹⁴ Attorney Horger had contacted Attorney Owen on 17 August 2006, almost a month before the hearing and requested certain "information [in order to be

believed the settlement as described was in the best interests of her client, Mr. Nelson's Estate (Appx.81, line 17 – Appx.83, line 14; Appx.95, lines 6-9) and constituted a final resolution of the obligations of Viking Insurance and State Farm (all on behalf of Mr. Clemons). (Appx.93, line 22 – Appx.95, line 5). Based upon the parties' agreement, the amount of available liability insurance coverage, and Ms. Johnson's agreement, the Probate Court "approve[d] the settlement [as] reasonable, and in light of all [of the] circumstances [as being] in the best interest of the [E]state [of Woodrow C. Nelson]." (Appx.95, lines 10-13).¹⁵

Given the possible claim for the significant expenses of Mr. Nelson's funeral, Attorney Owen advised the Probate Court he would hold any funds from the insurance settlement in trust until the claim period expired. That waiting period would allow Attorney Owen to learn whether the funeral home or Mr. Nelson's parents actually filed a claim against Mr. Nelson's Estate for the funeral expenses. (Appx.15-16, para. 5; Appx.91, lines 21-24). The Probate Court approved this arrangement. (Appx.94, line 20 – Appx.95, line 13). Attorney Horger agreed to prepare a comprehensive final order

able] to prepare the appropriate Petition, Order[,] and Release for the [Probate] [C]ourt['s] approval of the death settlement." (Appx.15-16, para. 5). Attorney Horger did not receive any information and/or documentation until the day of the scheduled Probate Court hearing. (Appx.15-16, para. 5).

¹⁵ During the Probate Court hearing, it was determined that claims could be made against Mr. Nelson's Estate up through 10 February 2007, and, therefore, all funds would have to be held in trust until the claims period ended. (Appx.86, line 23 – Appx.87, line 25; Appx.89, line 21 – Appx.93, line 14). The major potential outstanding claim was the approximately \$16,000.00 funeral bill for Mr. Nelson's funeral (Appx.86, line 23 – Appx.87, line 25; Appx.89, line 21 – Appx.93, line 14).

"encompassing the terms of the settlement as to all parties and [all of the liability] insurance carriers." (Appx.19, para. 12; Appx.94, line 20 – Appx.95, line 15). Based upon the information he had as of the end of the Probate Court hearing, Attorney Horger, as had been agreed, "drafted [the appropriate] documents in regard to the settlements." (Appx.15-16, para. 5).

C. Settlement Or Settlement Revocation

On or about 28 December 2006, Attorney Owen sent Attorney Horger a letter requesting payment of Viking Insurance's \$25,000.00 and submission of the final order to the Probate Court. (Appx.16, para. 6; Appx.20, para. 21; Appx.23). Upon receipt of the letter, Attorney Horger contacted Attorney Owen to advise him that he "still had not received a certified copy of the appointment of a conservator for [Ms.] Nelson and that the claim period had not run for a decision to be made on the payment of the funeral bill."¹⁶ (Appx.16, para. 6). Attorney Owen advised told Attorney Horger that there was " 'no problem of time demand.' " (Appx.16, para. 6).¹⁷

Apparently nothing happened until 27 February 2007, when Attorney Owen sent Attorney Horger another letter demanding payment of the \$25,000.00 by 10:00 a.m. the next day. (Appx.16, para. 7; Appx.21, para. 25; Appx.26). Attorney Horger advised Attorney Owen that delivery of the funds

¹⁶ Attorney Owen contests the assertion that Attorney Horger had not received a copy of the conservator appointment form. (Appx.20, paras. 16-17, 24-25).

¹⁷ At this point, Attorney Owen retained Attorney Burroughs to assist him in obtaining the settlement funds from Attorney Horger. (Appx.21, para. 23). Attorney Owen asserts he did not receive any response, telephonically or otherwise, from Attorney Horger to the 29 December 2006, letter. (Appx.21, para. 23).

on the prescribed time frame was physically impossible, but that he would have the check issued and sent as quickly as possible. (Appx.16, para. 7). The settlement checks were issued on 28 February 2007, and Attorney Horger received them the next day – 1 March 2007. (Appx.16, para. 8). Attorney Horger contacted Attorney Owen on 1 March 2007, “and offered to hand deliver the checks, but [Attorney Owen] stated that was not necessary.” (Appx.16, para. 8). Attorney Owen, by letter dated 30 April 2007, rescinded the Estate’s settlement agreement with Viking Insurance. (Appx.21, para. 28; Appx.27; Appx.32). Attorney Burroughs thereafter filed these actions against Mr. Clemons. (Appx.21, para. 29; Appx.29, para. 4).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Appeals Are Proper Under S.C. Code Ann. § 14-3-330

The Respondents assert, albeit incorrectly, that Mr. Clemons’ two Notices of Appeals in these cases represent appeals of orders or judgments which cannot be appealed under South Carolina law and therefore that subject matter jurisdiction is lacking. The Respondents’ position is meritless as they have misconstrued the facts and misinterpreted the applicable law. Mr. Clemons’ appeal of the relevant decisions in these cases is timely and should be allowed to proceed.

1. Judgments/Orders Appealed

As shown in Mr. Clemons’ two Notices of Appeal (Appx.105-136), he has appealed the following orders and judgments:

- a. Circuit Court Order dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondents' Complaints;
- b. Circuit Court Order dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motions to Reconsider or Alter or Amend the 13 October 2008, Circuit Court Order; and
- c. Judgment in favor of Ms. Nelson dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$6,000,000.00; and Judgment in favor of Mr. Nelson's Estate dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$3,000,000.00.

(Appx.105-136).

Admittedly, the judgments herein resulted from Mr. Clemons accepting an Offer of Judgment from Ms. Nelson for \$6,000,000.00 and an Offer of Judgment from Mr. Nelson's Estate for \$3,000,000.00. (Appx.70-75, 117-119, 134-136).¹⁸ There is no dispute that these are final judgments. This Court, in Johnson v. Johnson,¹⁹ stated that "[o]rdinarily, 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."²⁰ Nevertheless, this Court acknowledged that "a consent order is an agreement

¹⁸ Other than pursuant to an amicable settlement, our courts have acknowledged that cases are disposed of by judgments for one party or another through either "a jury verdict, [an] order of judgment, or [a] confession of judgment . . ." Wade v. Berkeley County, 348 S.C. 224, 227, 559 S.E.2d 586, 587 (2002), (*quoting Wade v. Berkeley County (Wade III)*, 339 S.C. 513, 518-519, 529 S.E.2d 743, 746 (Ct.App. 2000) (*en banc*)).

¹⁹ Johnson v. Johnson, 310 S.C. 44, 425 S.E.2d 46 (Ct.App. 1992).

²⁰ Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (*citing Jones & Parker v. Webb*, 8 S.C. 202 (1876)).

of the parties, under the sanction of the court, and is to be interpreted as an agreement [which may be set aside or modified under the appropriate circumstances]."²¹ In that case, the parties had consented to vacate one order, but not a related order. Similarly, our Supreme Court, in Raby Construction, LLP v. Orr, ²² specifically interpreting the Johnson v. Johnson holding, stated even consent judgments are subject to attack under particular circumstances.²³ Here, the consent judgments are appealable because, among other reasons, the two prior orders which set the stage for the Offers of Judgment and ultimate consent judgments, were legally flawed.

The Respondents' Motions completely miss the central point of Mr. Clemons' appeals in these cases. They have attacked and questioned only the appealability of Mr. Clemons' acceptances of the Offers of Judgment. The Respondents have not, however, challenged any other aspect of the Notices of Appeal. They have completely ignored the fact that aside from the appealability of Mr. Clemons' acceptances of the Offers of Judgment, the final judgments which concluded these two cases rendered the two earlier Circuit Court orders (i.e.; denying enforcement of the settlement,²⁴ denying

²¹ Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (citing Jones & Parker v. Webb, 8 S.C. 202).

²² Raby Construction, LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004).

²³ Raby Construction, LLP v. Orr, 358 S.C. 10, 18 n.3, 594 S.E.2d 478, 482 n.3 (Second emphasis added). See also Lanier v. Lanier, 364 S.C. 211, 216, 612 S.E.2d 456, 459 (Ct.App. 2005).

²⁴ Mr. Clemons' motions specifically asked the Circuit Court to enforce the settlements previously reached by Viking Insurance with Ms. Nelson and Mr. Nelson's Estate, respectively.

reconsideration/alter or amend judgment) appealable.²⁵ Tellingly, the Respondents have failed to directly challenge, raise issue with, and/or question the appealability of the Circuit Court's two earlier orders in their Motion to Dismiss Appeals. Their lack of challenge should be deemed a concession as to the appealability of those two earlier orders.

South Carolina law provides, in pertinent part, as follows:

[South Carolina's appellate courts] shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order[,] or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from . . . ²⁶

²⁵ In Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), our Supreme Court concluded an appellant who appealed from an interlocutory order was not required to make any arguments supporting reversal of the final judgment "in order to [be able to] contest an intermediate judgment or order under S.C. Code Ann. § 14-3-330(1)." Link v. School District of Pickens County, 302 S.C. 1, 7, 393 S.E.2d 176, 179. See also Lancaster v. Fielder, 305 S. C. 418, 422, 409 S.E.2d 375, 377 (1991) (Emphasis added) (The Supreme Court acknowledged that in Link v. School District of Pickens County, the Court had concluded "that under S.C. Code Ann. § 14-3-330(1), a party need not challenge the final judgment itself in order to contest an intermediate judgment.").

²⁶ See S.C. Code Ann. § 14-3-330(1) (Thomson/Reuters/West 2010). See also Ashenfelder v. City of Georgetown, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (Ct.App. 2010) (citing S.C. Code Ann. § 14-8-200(a) (Thomson/Reuters/West 2010). ("This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case.").

Even though our appellate courts will sometimes entertain the appeal of an interlocutory order, it is clear that "South Carolina adheres to the final judgment rule[, and therefore], with certain exceptions, an appeal lies only from a final judgment."²⁷ Given this proposition, the two earlier orders (Appx.36-41, 46-47, 109-116, 126-133) could not have been appealed as of right until these cases were ended in a final judgment. As noted in S.C. Code Ann. § 14-3-330(1), since there was no prior appeal of any interlocutory orders in these cases, this Court may now properly entertain an "appeal from such final judgment [in order to] review any intermediate order or decree necessarily affecting the judgment not before appealed from . . ."²⁸

That is precisely the situation Mr. Clemons faced when initiating the two appeals in these cases. (Appx.105-136). Under South Carolina law, Mr. Clemons could not appeal either (a) the Circuit Court's 13 October 2008 Order denying his motions to dismiss/enforce the settlement between Viking Insurance and the Respondents (Appx.36-41, 109-114, 126-131) or (b) the Circuit Court's 13 January 2009 Order denying his motion for

²⁷ Brunson v. American Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct.App. 2005) (*citing* Hagood v. Somerville, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1) (1976 and Supp.2004); Rule 72, SCRCivP; Rule 201(a), SCACR).

²⁸ See S.C. Code Ann. § 14-3-330(1). See generally Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (The appealability of intermediate orders attaches when the rights of the parties have finally been determined by some action of the court.); Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) (When "there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under [S.C. Code Ann. §] 14-3-330(1), [our appellate] [c]ourt[s] can review any intermediate order or decree necessarily affecting the judgment not before appealed from.").

reconsideration/alter or amend judgment. (Appx.46-47, 115-116, 131-133). Both of those previous Circuit Court orders (Appx.46-47, 115-116, 131-133) were interlocutory and unappealable when issued.²⁹

On the other hand, once there were final judgments in these cases, as evidenced by Mr. Clemons' acceptances of the respective Offers of Judgment (Appx.74-75, 119, 136), then the two prior orders (Appx.46-47, 115-116, 131-133) were ripe for appeal as they constituted "intermediate order[s] or decree[s] [which] necessarily affect[ed] the judgment not before appealed from . . ."³⁰ The two prior orders (Appx.46-47, 115-116, 131-133) clearly and unequivocally affected Mr. Clemons' decision to ultimately accept the Offers of Judgment. In this vein, if Mr. Clemons' argument that the original settlement between Viking Insurance and Ms. Nelson and Mr. Nelson's Estate

²⁹ See generally S.C. Code Ann. § 14-3-330. See Capell v. Moses, 36 S.C. 559, 15 S.E. 711 (1892). An order denying summary judgment is not immediately appealable. Thornton v. South Carolina Electric and Gas Company, 391 S.C. 297, 308, 705 S.E.2d 475, 481 (Ct.App. 2011). An order denying a motion to dismiss is not immediately appealable. Moyd v. Johnson, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986). See also generally Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93-94, 529 S.E.2d 11, 13 (2000) (Listing of unappealable motions under Rule 12(b), SCRCivP).

³⁰ See S.C. Code Ann. § 14-3-330(1). In Link v. School District of Pickens County, the Supreme Court noted:

[S.C. Code Ann. § 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders 'necessarily affecting the judgment not before appealed from.' We have long ago held that the phrase 'necessarily affecting the judgment' has the equivalent meaning as the phrase 'involving the merits', and that the legislature meant to use these phrases interchangeably.

Link v. School District of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (citing Blakely & Copeland v. Frazier, 11 S.C. 122 (1878)).

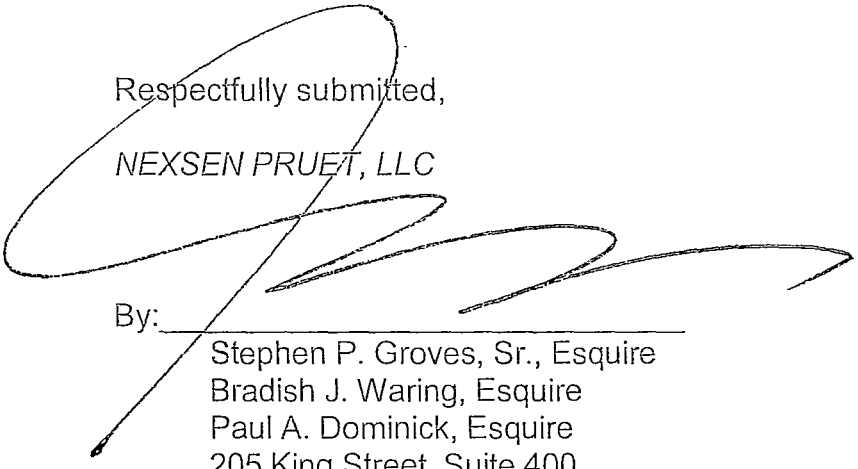
should have been enforced by the Circuit Court in 2008 is endorsed on appeal, then these two cases should have ended in 2008, and Mr. Clemons would never have been faced with the decision of whether to accept the Offers of Judgment.

In sum, Mr. Clemons properly noticed his appeal from the two intermediate Circuit Court orders issued on 13 October 2008, and 13 January 2009, respectively. He also properly noticed his appeal from the two judgments entered against him by the Circuit Court on or about 4 February 2011. The Respondents' Motion to Dismiss Appeals offers an incomplete view of the relevant facts and an erroneous view of the applicable law, and should be denied. These appeals should be allowed to proceed in the normal course

65A

Respectfully submitted,

NEXSEN PRUET, LLC

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*Attorneys for the Appellant,
Michael Lee Clemons*

Charleston, South Carolina

11 May 2011

NPCHAR1:653219.1-MO-(SPG) 022447-00005

Exhibit A

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0573

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

Plaintiff,

v.

Michael Lee Clemons,

Defendant.

FIRST AMENDED
MOTION TO INTERVENE
VIA RULE 24, SCRCivP

FOR RECORD
CLERK
COURT
MAR 14 2011

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0574

Eddie Williams, as Conservator
for Catina W. Nelson,

Plaintiff,

v.

Michael Lee Clemons,

Defendant.

FIRST AMENDED
MOTION TO INTERVENE
VIA RULE 24, SCRCivP

TO: H. WOODROW GOODING, ESQ. and MARK B. TINSLEY, ESQ.
Of Gooding and Gooding, P.A.

*Attorneys for the Plaintiffs, Junell W. Johnson, as Personal
Representative of the Estate of Woodrow C. Nelson*

And

Eddie Williams, as Conservator for Catina W. Nelson:

67

YOU WILL PLEASE TAKE NOTICE that the proposed intervenor, Peak Property and Casualty Insurance Corp. ("Peak Property and Casualty"), by and through this First Amended motion, specifically withdrawing and modifying the verbiage previously used in the original filed motion, will respectfully move this Circuit Court on the tenth day after service hereof or as soon thereafter as counsel may be heard for an Order, pursuant to Rule 24, SCRCivP, allowing Peak Property and Casualty to intervene in these two civil actions as an intervenor-party for the following reasons:

- (a) Peak Property and Casualty claims a substantial and significant interest relating to the property or transaction which is the subject of these two actions in that Peak Property and Casualty issued the automobile liability insurance policy involved in these two matters to the Defendant, Michael Lee Clemons ("Mr. Clemons"), who is an insured of Peak Property and Casualty;
- (b) Peak Property and Casualty is so situated presently that the current disposition of these actions in which there are accepted Offers of Judgment in the amount of \$3,000,000.00 in Johnson v. Nelson ("Case No. 573") and in the amount of \$6,000,000.00 in Williams v. Nelson ("Case No. 574") which judgments may, as practical matter impair or impede Peak Property and Casualty's ability to protect its interests herein;

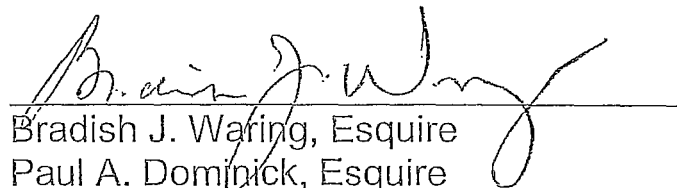
68

- (c) The judgments have already been entered on or about 7 February 2011, against Mr. Clemons in the respective amounts of \$3,000,000.00 in Case No. 573 and \$6,000,000.00 in Case No. 574 (collectively the "Enrolled Judgments");
- (d) In view of the Enrolled Judgments, Peak Property and Casualty's interests herein are in common with the law and the facts contained in Case No. 573 and Case No. 574 in that Peak Property and Casualty's obligation, if any, to respond, in any degree to the Enrolled Judgments, are intertwined with the law and the facts of Case No. 573 and Case No. 574.

Respectfully submitted:

NEXSEN PRUET, LLC

By:



Bradish J. Waring, Esquire

Paul A. Dominick, Esquire

Stephen P. Groves, Sr., Esquire

205 King Street, Suite 400

Charleston, South Carolina 29401

Telephone: 843.720.1725

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E-Mail: SGroves@nexsenpruet.com

Attorneys for the Intervenor,

Peak Property and Casualty Insurance Corp.

Charleston, South Carolina

10 March 2011

NPCHAR1:639392.1-MO-(SPG) 022447-00005

69

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
Junell W. Johnson, as Personal)
Representative of the Estate of)
Woodrow C. Nelson,)
)
Plaintiff,)
v.)
)
Michael Lee Clemons,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0573

**FIRST AMENDED
MOTION TO INTERVENE
VIA RULE 24, SCRCivP**

Certificate of Service

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
Eddie Williams, as Conservator)
for Catina W. Nelson,)
)
Plaintiff,)
v.)
)
Michael Lee Clemons,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
C/A NO.: 2007-CP-38-0574

**FIRST AMENDED
MOTION TO INTERVENE
VIA RULE 24, SCRCivP**

Certificate of Service

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FILED FOR
WINNIE
CLERK OF
ORANGEBURG

I, Stephen P. Groves, Sr. , Esquire certify that on 10 March 2011, a copy of the foregoing **First Amended Motion to Intervene** submitted by the prospective Intervenor, Peak Property and Casualty Insurance Corp. was served on all Counsel of Record herein via the United States Postal Service, postage prepaid and properly addressed as follows.

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Mark B. Tinsley, Esquire
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Junell Johnson as Personal Representative
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and
Eddie Williams as Conservator
for Catina W. Nelson*

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*Attorneys for the Defendant,
Michael Lee Clemons*

Signed: Stephen P. Groves, Sr.
Stephen P. Groves, Sr.

Charleston, South Carolina

10 March 2011

NPCHAR1:639392.1-MO-(SPG) 022447-00005

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574
Civil Action No.: 2007-CP-38-0573

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

**APPENDIX TO
APPELLANT'S RETURN TO
RESPONDENTS' JOINT
MOTION TO DISMISS APPEALS**

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*Attorneys for the Appellant,
Michael Lee Clemons*

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4647 2078

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
C/A NO.: 07-cp-38-573

JUNELL W. JOHNSON)
AS PERSONAL REPRESENTATIVE)
OF THE ESTATE OF)
WOODROW C. NELSON)
Plaintiff,)

v.)

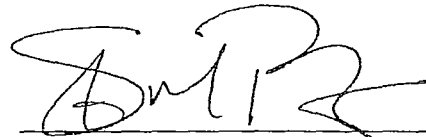
MICHAEL LEE CLEMONS)
Defendant.)

SUMMONS
(Jury Trial Demanded)
(Wrongful Death)

2007 MAY 10 PM 1:47

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices located at 450 Summers Avenue, Orangeburg, SC 29115, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the aforesaid time, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint, and a judgment by default will be rendered against you for the relief demanded in this Complaint.

LANIER & BURROUGHS, L.L.C.



Shane M. Burroughs, Esquire
Attorney for the Plaintiff
Post Office Drawer 2789
Orangeburg, South Carolina 29116
(803)268-9800

May 10, 2007

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

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

Plaintiff,)

v.)

MICHAEL LEE CLEMONS)

Defendant.)

IN THE COURT OF COMMON PLEAS
C/A NO.: 07-cp-38-573

COMPLAINT
(Jury Trial Demanded)
(Wrongful Death)

2007 MAY 10 PM 1:47

Now comes the Plaintiff, Junell W. Johnson, personal representative of the Estate of Woodrow C. Nelson, complaining of the Defendant who would allege and state as follows:

1. That the Plaintiff Junell W. Johnson is a citizen and resident of the County of Orangeburg, State of South Carolina and is the duly appointed personal representative of the Estate of Woodrow C. Nelson (Nelson) and brings this action on behalf of the Estate of Woodrow C. Nelson to recover damages for conscious pain and suffering endured by the decedent, funeral expenses, and other damages to be proven at trial; this action is also brought on behalf of the beneficiaries of Woodrow C. Nelson for his wrongful death.

2. That the Defendant, Michael Lee Clemons (Clemons), is a citizen and resident of the County of Orangeburg, State of South Carolina.

3. That on or about March 25, 2006, the Plaintiff Nelson was operating a vehicle in a westerly manner on Chestnut Street in Orangeburg, South Carolina; the

Defendant, operating his vehicle in an easterly manner on Chestnut Street in Orangeburg, South Carolina and under the influence of alcohol, crossed the center line and struck the Plaintiff's vehicle head-on causing the Plaintiff multiple injuries which led to his untimely death.

4. That as a result of this collision, the Plaintiff suffered multiple injuries which led to his untimely death. That prior to the decedent's death, he suffered as a result of this collision, injuries to his back, neck, head, sternum and other parts of his body which caused him to endure great physical pain, suffering, mental anguish, and emotional distress. That the beneficiaries of the decedent have lost the financial support of the decedent and been made to endure grief, sorrow, loss of companionship and wounded feelings.

5. The Defendant was negligent, careless, reckless, grossly negligent, wilful and wanton at the time and place above-mentioned in the following particulars, to wit:

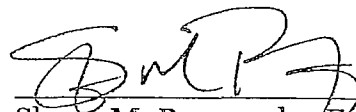
- a) In operating his vehicle while under the influence of alcohol;
- b) In failing to maintain a proper lookout;
- c) In failing to keep proper control of his vehicle;
- d) In failing to apply his brakes, if any he had;
- e) In failing to take evasive action to avoid the collision;
- f) In driving too fast for the conditions then and there prevailing;
- g) In operating his vehicle in utter disregard for the safety of others on the highway, specifically the Plaintiff herein;
- h) In such other and further particulars that the evidence in the trial may show;

all of which combined and concurred as a direct and proximate cause of the injuries and

damages sustained by the Plaintiff as set out above.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in the sum sufficient to adequately compensate for actual damages, for such punitive damages as a jury may reasonably award, for the cost of this action and for such other and further relief as this Court may deem just and proper.

LANIER & BURROUGHS, L.L.C.



Shane M. Burroughs, Esquire
Attorney for the Plaintiff
Post Office Drawer 2789
450 Summers Avenue
Orangeburg, South Carolina 29116
(803)268-9800

May 10, 2007

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

EDDIE WILLIAMS
AS CONSERVATOR FOR
CATINA W. NELSON

Plaintiff,

v.

MICHAEL LEE CLEMONS

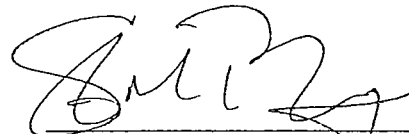
Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO.: 07-02-EX-374

SUMMONS
(Jury Trial Demanded)

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices located at 450 Summers Avenue, Orangeburg, SC 29115, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the aforesaid time, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint, and a judgment by default will be rendered against you for the relief demanded in this Complaint.

LANIER & BURROUGHS, L.L.C.



Shane M. Burroughs, Esquire
Attorney for the Plaintiff
Post Office Drawer 2789
Orangeburg, South Carolina 29116
(803)268-9800

May 10, 2007

Orangeburg, South Carolina

82

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

EDDIE WILLIAMS
AS CONSERVATOR FOR
CATINA W. NELSON

Plaintiff,

v.

MICHAEL LEE CLEMONS

Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO.: 001 72-58-774/

COMPLAINT
(Jury Trial Demanded)

2007 MAY 17 PM 1:49

Now comes the Plaintiff complaining of the Defendant who would allege and state as follows:

1. That the Plaintiff is a citizen and resident of the County of Bamberg, State of South Carolina and is the duly appointed Conservator of Catina W. Nelson (Nelson), an incapacitated individual.

2. That the Defendant, Michael Lee Clemons (Clemons), is a citizen and resident of the County of Orangeburg, State of South Carolina.

3. That on or about March 25, 2006, the Plaintiff Nelson was a passenger in a vehicle being operated in a westerly manner on Chestnut Street in Orangeburg, South Carolina; the Defendant, operating his vehicle in an easterly manner on Chestnut Street in Orangeburg, South Carolina and under the influence of alcohol, crossed the center line and struck the Plaintiff's vehicle head-on causing the Plaintiff's vehicle collide with another vehicle, overturn, and ultimately caused the Plaintiff Nelson to be ejected.

4. That as a result of this collision, the Plaintiff suffered injuries to her back,

neck, chest, and other parts of her body which have caused and will in the future cause her to endure great physical pain, suffering, mental anguish, emotional distress, an impairment of health and bodily efficiency; have caused Plaintiff to spend money for medical services; have caused Plaintiff to incur expenses; have caused Plaintiff to incur loss wages; and have caused permanent disability.

5. The Defendant was negligent, careless, reckless, grossly negligent, wilful and wanton at the time and place above-mentioned in the following particulars, to wit:

- a) In operating his vehicle while under the influence of alcohol;
- b) In failing to maintain a proper lookout;
- c) In failing to keep proper control of his vehicle;
- d) In failing to apply his brakes, if any he had;
- e) In failing to take evasive action to avoid the collision;
- f) In driving too fast for the conditions then and there prevailing;
- g) In operating his vehicle in utter disregard for the safety of others on the highway, specifically the Plaintiff herein;
- h) In such other and further particulars that the evidence in the trial may show;

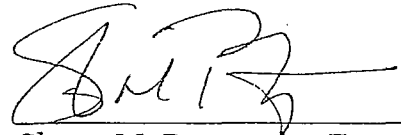
all of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by the Plaintiff as set out above.

6. That as a direct and proximate cause of the aforementioned negligence, carelessness, recklessness, wilfulness, and wantonness of the Defendant, the Plaintiff was caused to sustain severe, permanent and debilitating injuries, including great pain and suffering, past, present and future, causing her to incur medical expenses past, present, and future, shock, embarrassment, and mental distress past, present and

future, that her injuries are permanent in nature and pursuant to Section 19-1-150 of the Code of Laws of the State of South Carolina, she will continue to incur damages into the future all to the Plaintiff's damages in an amount to be determined by the trier of fact.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in the sum sufficient to adequately compensate for actual damages, for such punitive damages as a jury may reasonably award, for the cost of this action and for such other and further relief as this Court may deem just and proper.

LANIER & BURROUGHS, L.L.C.



Shane M. Burroughs, Esquire
Attorney for the Plaintiff
Post Office Drawer 2789
450 Summers Avenue
Orangeburg, South Carolina 29116
(803)268-9800

May 10, 2007

Orangeburg, South Carolina

85

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	C/A NO.: 07-CP-38-573
	)	
JUNELL W. JOHNSON AS	)	
PERSONAL REPRESENTATIVE	)	
OF THE ESTATE OF	)	
WOODROW C. NELSON,	)	
	)	
PLAINTIFF,	)	NOTICE OF MOTION AND
	)	MOTION TO DISMISS
vs.	)	(SPECIAL APPEARANCE)
	)	
MICHAEL LEE CLEMONS,	)	
	)	
<u>DEFENDANT.</u>	)	

2007-09-06 PM 4:26

TO: SHANE M. BURROUGHS, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney making a special appearance on behalf of the Defendant, Michael Lee Clemons, will move before the Presiding Judge of the First Judicial Circuit, in his chambers in the Orangeburg County Courthouse, Orangeburg, South Carolina, on the tenth (10th) day after service hereof or at such time and place as the Court may designate to enforce the settlement reached between the defendant's insurance carrier and former counsel for the plaintiff which was presented to the Probate Judge for Orangeburg County at a hearing on September 13, 2006 and tentatively approved subject to the filing of a Petition to encompass the settlement of all claims by payment of the liability coverage and UIM Coverage with the Appointment of a Conservator on behalf of Catina Nelson to receive the proceeds of the settlement payable to her as beneficiary, the appointment of a Guardian ad Litem to concur in the settlement on behalf of Woodrow Antonio Nelson, a minor, the appointment of Guardian ad Litem to concur in the settlement on behalf of

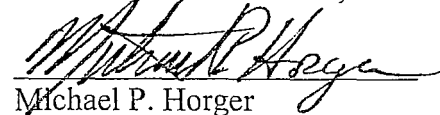
Justin Nelson, a minor, and the expiration of the claims period against the estate or the resolution of the amount of the funeral bill contested by the Personal Representative.

Said motion is based upon the record in the Probate Court for Orangeburg County, the insurance of the balance of the liability coverage afforded to the defendant by its insurance carrier by check number 61030052 dated 2/28/2007 payable to Junell Johnson as Personal Representative of the Estate of Woodrow Nelson and Paul W. Owen Jr. LLC in the amount of \$12,500.00.

Counsel for the moving parties hereby affirms that he has called opposing counsel to attempt to communicate orally, in good faith, to resolve the matter contained in the motion, but to no avail.

June 6, 2007

MICHAEL P. HORGER, P.A.



Michael P. Horger
160 Centre Street
Orangeburg, SC 29115
803.531.1700
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	C/A NO.: 07-CP-38-574
	)	
EDDIE WILLIAMS AS	)	
CONSERVATOR FOR	)	
CATINA W. NELSON	)	
	)	
PLAINTIFF,	)	NOTICE OF MOTION AND
	)	MOTION TO DISMISS
vs.	)	AND ENFORCE SETTLEMENT
	)	(SPECIAL APPEARANCE)
MICHAEL LEE CLEMONS,	)	
	)	
<u>DEFENDANT.</u>	)	

TO: SHANE M. BURROUGHS, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney making a special appearance on behalf of the Defendant, Michael Lee Clemons, will move before the Presiding Judge of the First Judicial Circuit, in his chambers in the Orangeburg County Courthouse, Orangeburg, South Carolina, on the tenth (10th) day after service hereof or at such time and place as the Court may designate, pursuant to SCRCP 12 (b)(7) to dismiss the Summons and Complaint for failure to join as a party under Rule (19) the South Carolina Department of Health and Human Services (hereinafter SCDHHS) which has the right in conjunction with the Plaintiff as a recipient of medical treatment paid by Medicaid to prosecute an action against the Defendant or alone commence an action against the Defendant pursuant to §43-7-440 1976 S.C. Code Ann. because in its absence complete relief cannot be accorded among those already parties, or it claims an interest relating to the subject of this action and is so situated that the disposition of the act or in its absence will (i) as a practical matter impair or impede its interest to protect that

interest, or (ii) leave the Defendant subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of its claimed interest.

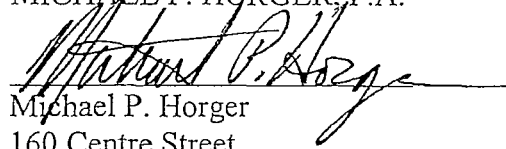
FURTHER, the undersigned attorney making a special appearance on behalf of the Defendant, Michael Lee Clemons, will move to enforce the settlement reached between the defendant's insurance carrier and former counsel for the plaintiff which was presented to the Probate Judge for Orangeburg County at a hearing on September 13, 2006 and tentatively approved subject to the filing of a Petition to encompass the settlement of all claims by payment of the liability coverage and UIM Coverage with the Appointment of a Conservator on behalf of Catina Nelson and the waiver of the lien / subrogation right to SCDHHS with the establishment of a special needs trust for Catina Nelson.

Said motion is based upon the record in the Probate Court for Orangeburg County, the insurance of the balance of the liability coverage afforded to the defendant by its insurance carrier by check number 61030053 dated 2/28/2007 payable to Eddie Williams as Conservator for Catina Nelson and Paul W. Owen Jr. LLC in the amount of \$12,500.00.

Counsel for the moving parties hereby affirms that he has called opposing counsel to attempt to communicate orally, in good faith, to resolve the matter contained in the motion, but to no avail.

June 6, 2007

MICHAEL P. HORGER, P.A.


Michael P. Horger
160 Centre Street
Orangeburg, SC 29115
803.531.1700

Attorney for Defendant

89



#150 023718

ORANGEBURG COUNTY SHERIFF'S OFFICE

P.O. Box 9000
Orangeburg, S.C. 29116

Larry Williams, SHERIFF
Office Phone: 531-4647

AFFIDAVIT OF SERVICE

2007038573

Junell W. Johnson as Personal

Representative Estate Woodrow C. Nelson

-VS-

Michael Lee Clemons

1520 Ellis Ave. (OCDC)

Orangeburg, SC 29115

DEFENDANT,

The undersigned Lt. Felder, being duly sworn, says on oath that

he served the Summons and Complaint

in this action on the defendant Michael Lee Clemons

by delivering to :

(☒) The defendant Michael Lee Clemons, personally :

() () a person of discretion residing
(note relation to defendant) at the defendant's residence.

() the
(person served if corporate defendant) (Title)

at its place of business.

and leaving with (him ☒) (her ☐) one copy of same at 1520 ELLIS AVE.

ORANGEBURG, SC. on the 23RD day of MAY, 2007,
at 3:20 (AM ☐) (PM ☒) , and that deponent knows the person so served to be the defendant

mentioned and described in the pleadings served, and that deponent is not a party to,
nor interested in the action.

Signed:

Luther C. Kessam, III
Deputy Sheriff
Orangeburg, S.C.

Sworn to before me this 23rd day
of MAY, 2007.

Benjamin W. [Signature]
Notary Public, S.C.

My Commission Expires August 4, 2009

2008 OCT 17 P 4
FILED FOR RECORD
LISA WILHELM
CLERK OF COURT
ORANGEBURG, S.C.
JUN 5 2007

070273

70



#150 023717

ORANGEBURG COUNTY SHERIFF'S OFFICE

P.O. Box 9000
Orangeburg, S.C. 29116Larry Williams, SHERIFF
Office Phone: 531-4647

AFFIDAVIT OF SERVICE

Eddie Williams as Conservator ForCatina W. Nelson

-VS-

Michael Lee Clemons1520 Ellis Ave (OCDC)Orangeburg, SC 29115

DEFENDANT,

The undersigned Lt. Felder, being duly sworn, says on oath that
he served the Summons and Complaintin this action on the defendant Michael Lee Clemons

by delivering to :

☒ The defendant Michael Clemons, personally :☐ () () a person of discretion residing
(note relation to defendant) at the defendant's residence.☐ () the (Title)
(person served if corporate defendant)

at its place of business.

and leaving with (him ☒) (her ☐) one copy of same at 1520 ELLIS AVE.ORANGEBURG, SC on the 28th day of MAY, 2007,at 3:20 (AM ☐) (PM ☒) , and that deponent knows the person so served to be the defendant

mentioned and described in the pleadings served, and that deponent is not a party to,

nor interested in the action.

Signed:

Luther C. Kwan
Deputy Sheriff
Orangeburg, S.C.Sworn to before me this 28th day
of MAY, 2007.Gregory A. E.
Notary Public, S.C. My Commission Expires August 4, 2018

91

574
2007 OCT 1 P 4:34
THIS FOR RECORD
JUN 5
ORANGEBURG, SC

070272

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

CASE NUMBER: 2007-CP-38-573

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

Plaintiff,)

vs.)

Michael Lee Clemons,)

Defendant.)

Eddie Williams as Conservator for)
Catina W. Nelson)

Plaintiff,)

vs.)

Michael Lee Clemons,)

Defendant.)

AFFIDAVIT

CASE NUMBER: 2007-CP-38-573

2008 JUN-6 A 11:40
FILED FOR RECORD
JISAN MIZELL
CLERK OF COURT
ORANGEBURG, SC

PERSONALLY APPEARED before me, Michael P. Horger, Esquire, who being duly sworn deposes and states as follows:

1. That he provides this affidavit to establish a record of facts in support of the Motion to Dismiss and Enforce Settlement in the above-captioned actions.

2. That Paul W. Owen, Jr. as Attorney for Catina W. Nelson and the Estate of Woodrow C. Nelson reached a settlement agreement with the insurance carrier for Michael Clemons whereby the insurance coverage would be exhausted by the payment of the applicable limits with \$5,000.00 allocated to the claim of Wendell Hamilton and \$12,500.00 being allocated to the claim of Catina W. Nelson and \$12,500.00 being allocated to the claim of the Estate of Woodrow C. Nelson with the understanding that the settlement be court approved.

3. That the undersigned was hired by the insurance carrier for Michael Clemons to see that the appropriate Petition, Order and Release were obtained from the Estate of Woodrow C. Nelson and on behalf of Catina W. Nelson upon a conservator being appointed for her.

4. That Paul W. Owen, Jr. scheduled a hearing in the Probate Court for Orangeburg County on September 13, 2006 at 3:30 p.m. for approval of the death settlement in regard to the Estate of Woodrow C. Nelson and the appointment of a conservator for Catina W. Nelson.

5. That the undersigned called Paul W. Owen, Jr. on August 17, 2006 to obtain information to prepare the appropriate Petition, Order and Release for the court approval of the death settlement. On the day of the hearing the undersigned received by fax disbursement sheets regarding fees and costs and a copy of the funeral bill. Therefore, the undersigned attended the hearing to confirm and have approved the settlement agreements reached between the insurance carrier for Michael Clemons and Paul W. Owen, Jr. as Attorney for Catina W. Nelson and the Estate of Woodrow C. Nelson whereby the insurance coverage would be exhausted with \$12,500.00 being paid on the claim of Catina W. Nelson and \$12,500.00 being paid on the claim of the Estate of Woodrow C. Nelson and to obtain information to prepare the appropriate Petition, Order and Release for the death settlement and settlement on behalf of Catina W. Nelson. At the hearing the undersigned requested the court to proceed with a hearing on the approval of the Non compos mentis settlement regarding Catina W. Nelson to issue its ruling Nunc pro tunc upon filing of a petition. Also, at the hearing Paul W. Owen, Jr. advised the court that he wanted to wait until the claims period ended on February 10, 2007 to see if the decedent's parents paid the funeral bill and whether the decedent's parents filed a claim against the estate to be repaid for paying the funeral bill; although, he acknowledged the funeral bill is a priority lien

under 1976 S. C. Code Section 62-3-805. With the information available, the undersigned drafted documents in regard to the settlements.

6. That upon receipt of the letter of Paul W. Owen, Jr. dated December 28, 2006 the undersigned called Paul W. Owen, Jr. to advise him that the undersigned still had not received a certified copy of the appointment of a conservator for Catina W. Nelson and that the claim period had not run for a decision to be made on the payment of the funeral bill. When reminded of the status Paul W. Owen, Jr. stated "no problem of time demand".

7. That when the undersigned received a fax from Paul W. Owen, Jr. on February 27, 2007 stating and that the undersigned had until 10:00 a.m. the next day to deliver the settlement checks to him, the undersigned called Paul W. Owen, Jr. to explain it would be physically impossible to have the checks to him, but the checks could be issued the next day and the undersigned would contact him upon receipt.

8. That the settlement checks were issued on February 28, 2007 and upon receipt by the undersigned on March 1, 2007 he called Paul W. Owen, Jr. and offered to hand deliver the checks, but Paul W. Owen, Jr. stated that was not necessary.

9. That the only information provided to the undersigned by Paul W. Owen, Jr. about the claim of Catina W. Nelson was a note from a doctor at The Medical College of Georgia dated 11/16/06 faxed to the undersigned on March 2, 2007, and the undersigned has never been advised of any resolution of the payment of the funeral bill.

10. That the undersigned has not been able to engage conversation with Paul W. Owen, Jr. after March 1, 2007 to move forward on the settlements approved by the Probate Court on September 13, 2006.

FURTHER DEPONENT SAYETH NAUGHT.

SWORN to before me this 6th)
day of June, 2008.)

Virginia E. Over)
Notary Public for S C)
My Comm. Expires: 8/30/2014)

Michael P. Hörger
Michael P. Hörger

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) CASE NUMBER 07-CP-38-573

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

Plaintiff,)

v.)

Michael Lee Clemons,)

Defendant,)

AFFIDAVIT

Eddie Williams as Conservator for Catina W.)
Nelson,)

v.)

Michael Lee Clemons,)

Defendant,)

PERSONALLY APPEARED before me, Paul W. Owen, Jr., who being duly sworn does
hereby depose as follows:

1. That on March 25, 2006 a head-on collision occurred between when a vehicle driven
by Michael Lee Clemons crossed the center line on Chestnut Street in the City of Orangeburg
striking a vehicle driven by Woodrow C. Nelson in which his wife Catina W. Nelson was a
passenger.

2. That at the time of the collision Michael Lee Clemons was driving under the influence
of alcohol and other drugs.

3. That as a result of the collision Woodrow C. Nelson was killed and his wife, Catina

W. Nelson became totally disabled and incurred medical bills in excess of \$1,000,000.00.

4. That Woodrow and Catina Nelson were the parents of two minor children, Antonio and Justin Nelson.

5. That there were several policies of insurance in place at the time of the accident.

6. That at the time of the accident, Michael Lee Clemons vehicle was insured by Viking Insurance with minimum limits coverage of 15/30K.

7. That State Farm insurance covered the Nelson vehicles and State Farm insurance immediately agreed to tender their policy limits on the underinsured coverage in the amount of \$150,000.00.

8. Viking Insurance settled with the owner of a third vehicle who was struck by Michael Lee Clemons's vehicle for \$5,000.00 leaving \$25,000.00 to be paid to the Estate of Woodrow C. Nelson and to Catina W. Nelson on 50/50 basis.

9. On September 13, 2006 at 3:30 p.m. a hearing was held in the Probate Court for Orangeburg County for approval of the settlement as to the Estate of Woodrow C. Nelson and to appoint a conservator for Catina W. Nelson.

10. The terms of the settlement were for Viking Insurance to pay the sum of \$12,500.00 to the Estate of Woodrow C. Nelson with State Farm Insurance paying the sum of \$75,000.00 to the Estate of Woodrow C. Nelson.

11. Eddie Williams had petitioned to be appointed to be Conservator for Catina W. Nelson and would be approved pending issuance of a bond.

12. Michael P. Horger volunteered to draft a "global" order encompassing the terms of settlement as to all parties and insurance carriers.

13. Given the late hour, Mr. Williams could not obtain a bond on the date of the hearing.
14. A fiduciary bond on Eddie Williams was obtained from the Bryant Insurance Agency in Orangeburg, South Carolina on September 21, 2006.
15. Upon receipt of the bond Eddie Williams and myself delivered same to the Orangeburg County Probate Court.
16. The Orangeburg County Probate Court issued the order appointing Eddie Williams as Conservator for Catina W. Nelson on the same day the bond was issued, September 21, 2006.
17. Being that I was already in Orangeburg, I hand delivered a certified true copy of Eddie Williams' appointment as conservator for Catina W. Nelson directly to Michael P. Horger.
18. I then drove to my office in Columbia, which is two doors down from the Offices of Brown and Brehmer, and hand delivered a certified true copy of Eddie Williams' appointment as conservator for Catina W. Nelson to Darby Plexico.
19. The funds to settle the State Farm claims were duly paid in September, 2006.
20. In regards to settlement with the liability carrier, I telephoned Michael P. Horger's office several times in October and November, 2006 and was told that Mr. Horger was working on the settlement documents.
21. On December 29, 2006, I wrote a letter to Michael P. Horger demanding payment of the settlement funds as evidenced by the letter of same date attached hereto and incorporated herein as Exhibit "A".
22. On February 16, 2007 I received a letter from Darby Plexico (a copy of which is attached hereto and incorporated herein as Exhibit "B"), documenting my difficulties with the liability carrier and its counsel.

23. After receiving no response to my letter of December 29, 2006 with the permission of the Nelson Estate, Shane Burroughs was retained to assist in obtaining the settlement funds from Viking.

24. On February 14, 2007 Shane Burroughs wrote a letter to Michael P. Horger demanding payment of the liability coverage and was informed by Mr. Horger that he had not received the Order Appointing Conservator which had been hand delivered to him on the same day the Court issued the Order.

25. On February 29, 2007 I sent a fax to Michael P. Horger reminding him that I had hand delivered the Order of Appointment of Conservator. The fax (a copy of which is attached hereto and incorporated herein as Exhibit "C") did contain a mistake in that the actual day was September 21, 2006 rather than September 18, 2006.

26. On April 17, 2007 Michael Lee Clemons plead guilty to Felony DUI and was sentenced to 11 years in prison, Viking had still not paid the liability coverage.

28. After neither Shane Burroughs nor I had any success in arranging payment of the liability coverage to the Estate of Woodrow C. Nelson and to Catina W. Nelson I rescinded acceptance via a letter faxed and mailed to Jodi Johnson dated April 30, 2007, (a copy of which is attached hereto and incorporated herein as Exhibit "D").

29. On May 16, 2007 a civil suit was filed against the insured, Michael Lee Clemons, due to the failure of his liability carrier to act in good faith, to respond to time demands or to fulfill its contractual obligation to its insured.

FURTHER DEPONENT SAYETH NAUGHT.

Sworn to before me this 9th Day of
June, 2008.

Sonya Hancock
Notary Public for South Carolina

My Commission expires: 12/2/2012

Paul W. Owen, Jr.

Exhibit "A"

Paul W. Owen, Jr., L.L.C.

Attorney at Law

P. O. Box 1418
1728 Main Street
Columbia, SC 29202-1418
(803)799-5006
Facsimile: (803)799-5158

December 29, 2006

Michael P. Horger, Esquire
Horger & Horger
P. O. Box 518
Orangeburg, SC 29116-0518

Re: Estate of Woodrow C. Nelson and Catina W. Nelson vs. Michael Lee Clemons

Dear Michael:

I am still awaiting payment of the \$25,000.00 from your client, Viking Insurance, and submission of the "global" order to the Probate Court. The underinsured carrier has paid their \$150,000.00 to satisfy their obligation. I have provided you with a certified copy of the appointment of a conservator for Catina W. Nelson.

Catina Nelson's medicals now exceed \$1,000,000.00 and she will need care for the remainder of her natural life. She is only 32 years old. Additionally, Woodrow Nelson lost his life due to your insured's reckless and drunken driving. In addition to her medical damages, Catina lost her husband and the father of her two sons, Antonio and Justin. The liability is clear and the damages are immense. Based upon the above, I believe an Orangeburg County jury would return a verdict far in excess of your client's policy limits. Unless I receive payment with a copy of the insurance policy verifying the amount of coverage within ten (10) days of your receipt of this letter, I will have no choice but to withdraw my offer and initiate a civil action against your insured, attaching his assets and any other assets within the jurisdiction of the Court.

Sincerely,



Paul W. Owen, Jr.

PWO/bvs

cc: Darby Plexico, Esquire

101

Exhibit "B"

BROWN & BREHMER

Attorneys at Law

1720 MAIN STREET, SUITE 201

POST OFFICE BOX 7966

COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE: (803) 771-6600

FACSIMILE: (803) 252-1620

ROBERT C. BROWN
KARL S. BREHMER
CHAD E. POTEAT
E. DALE LANG, JR.
J. AUSTIN HOOD
L. DARBY PLEXICO, III

OF COUNSEL
MICHAEL M. LUMPKIN

E-MAIL

LAWFIRM@BROWNBREHMER.COM
BOB.BROWN@BROWNBREHMER.COM
KARL.BREHMER@BROWNBREHMER.COM
CHAD.POTEAT@BROWNBREHMER.COM
DALE.LANG@BROWNBREHMER.COM
AUSTIN.HOOD@BROWNBREHMER.COM
LDP@BROWNBREHMER.COM

February 16, 2007

Paul W. Owen, Jr., Esquire
Attorney at Law
Post Office Box 1418
Columbia, South Carolina 29202-1418

Re: Junell Johnson as Personal Representative of the Estate of Woodrow
Nelson vs. Michael Clemmons

Eddie Williams, Jr. as Conservator of Catina Nelson & Paul Owen

Dear Paul:

I am writing to follow up on our conversation in Monks Corner on February 15 regarding the above-referenced matters. I looked in my file for Woodrow Nelson and I actually have one original Petition for Approval of Settlement, Order Approving Settlement, and a Receipt and Satisfaction that Junell Johnson already executed in this case. This paperwork does not mention a liability carrier or any settlement with them. I have enclosed a copy of this original document as well as two copies for your review and then to send on to Judge Jones Glover in Orangeburg County to see if she will sign the Order approving the settlement as she has already approved it.

In regards to the Catina Nelson case, I do not believe that we need any probate court paperwork for the settlement. I have all of the uninsured motorist Releases signed by Eddie Williams in this case and I believe that is all that we need for our files in this case. If you have a different understanding of this, please let me know in regards to Catina Nelson. Therefore, it looks like you should be able to disburse the \$75,000.00 and underinsured motorist funds for Catina Nelson at this time.

It's unfortunate that Mike Horger is taking so long on this case but as we discussed, we will try to move forward without him.

Should you have any questions regarding any of these documents or my suggestions, please do not hesitate to give me or Austin Hood a call.

With warmest personal regards, I am

Sincerely yours,

A handwritten signature in cursive script, appearing to read "L. Darby Pléxico, III".

L. Darby Pléxico, III

LDB/nem
Enclosures

Feb-27-2007 10:41 AM

1/1

Exhibit "C"

FAX TRANSMISSION

PAUL W. OWEN, JR., L.L.C.
200 Arbor Lake Drive, Suite 100
Columbia, SC 29223
803-714-7606
Fax: 803-7

To: Michael P. Horger Date: February 27, 2007
Fax #: 1-803-531-0160 Pages: 1
From: Paul Owen
Subject: Estate of Woodrow Nelson v. Michael Lee Clemons
Catina Nelson v. Michael Lee Clemons

COMMENTS

I hand delivered a copy of the appointment of Eddie Williams as conservator for Catina Nelson to your office on September 18, 2006. You have until 10:00 a.m. tomorrow to deliver a check in the amount of \$12,500.00 payable to my trust account and Eddie Williams as conservator for Catina Nelson. The other check in the amount of \$12,500.00 should be payable to the Estate of Woodrow Nelson and my trust account. If the checks are not received by my office by the specified time we will file suit against Michael Lee Clemons and have him served at the jail. Please note my new address.

Paul W. Owen, Jr.

THIS TELECOPY CONTAINS CONFIDENTIAL INFORMATION INTENDED EXCLUSIVELY FOR THE USE OF THE PERSON(S) ABOVE-NAMED. IT MAY ALSO BE ATTORNEY CLIENT PRIVILEGED. ANY DISTRIBUTION OR DISCLOSURE OF THE INFORMATION OR ATTACHMENTS CONTAINED HEREIN AS WELL AS ANY UNAUTHORIZED COPYING TO ANYONE OTHER THAN THE PERSON ABOVE-NAMED IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS FAX IN ERROR, PLEASE NOTIFY THE OPERATOR SPECIFIED ABOVE BY TELEPHONE COLLECT AND RETURN THE ORIGINAL TRANSMISSION TO US BY MAIL WITHOUT MAKING A COPY. WE WILL BE GLAD TO REIMBURSE YOU FOR ANY POSTAGE OR TELEPHONE EXPENSES. THANK YOU.

104

hp LaserJet 4345mfp series

Exhibit "D"



Fax Call Report

1

Allen Kopet & Associates - Columbia, SC
(803) 714-9607
Apr-30-2007 07:33 AM

Job	Date/Time	Type	Identification	Duration	Pages	Result
2605	Apr-30-2007 07:32 AM	Send	9,18035313465	0:36	1	Success

Paul W. Owen, Jr., L.L.C.

Attorney at Law

P. O. Box 1418
1728 Main Street
Columbia, SC 29202-1418
(803)799-5005
Facsimile: (803)799-5158

April 30, 2007

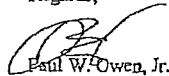
Viking Insurance
Attn: Jodi Johnson
PO Drawer 2027
Goldsboro, NC 27533-2027

My Client: Catina Nelson and the Estate of Woodrow C. Nelson
Claim No.: 2390109517
DOL: 3/25/06
Claim No.: 408058-985

Dear Jodi:

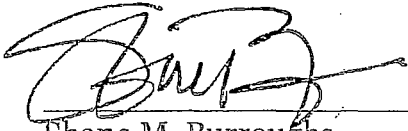
In that I have not received the funds or settlement documents in the above-referenced claim, I must rescind my offer to accept \$25,000.00 to settle this claim. The interest, investment and other opportunities that have bypassed my clients have been multiple and I cannot represent my clients' best interests as the funds sit on someone else's desk. I have referred this matter to Shane Burroughs or Lanier & Burroughs in Orangeburg, South Carolina. His telephone number is 803-268-9800.

Regards,

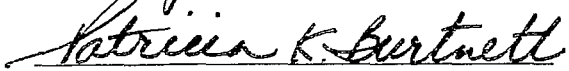

Paul W. Owen, Jr.

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4. That subsequent to the offers to settle being withdrawn, suit was filed and the individual defendant, Clemons, was served at the Orangeburg-Calhoun Detention Center, where he was incarcerated.


Shane M. Burroughs

SWORN to before me this 9th
day of June, 2008


Notary Public for South Carolina
My Commission Expires 5/23/13



LAW OFFICES
THE LANIER LAW FIRM
450 SUMMERS AVENUE
POST OFFICE DRAWER 2789
ORANGEBURG, SOUTH CAROLINA 29116

EXHIBIT A

LEWIS C. LANIER
SHANE M. BURROUGHS
CHARLES J. MCCUTCHEN

TELEPHONE:
(803) 268-9800

February 14, 2007

FAX: (803) 531-3465

Viking Insurance
Attn: Jodi Johnson
PO Drawer 2027
Goldsboro, NC 27533-2027

RE: Catina Nelson and the Estate of Woodrow C. Nelson
Claim #: 2390109517
Date of Loss: 3/25/06

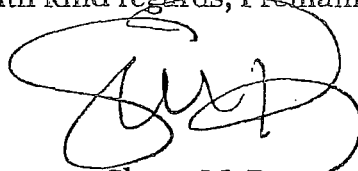
Dear Jodi:

I hope this letter finds you doing well. Please be advised that I have been retained to represent the above-referenced individuals and their respective claims against Michael Lee Clemons in the accident which occurred on March 25, 2006 in Orangeburg County. As you are aware, this wreck occurred on Chestnut Street wherein your insured, Michael Lee Clemons, while driving under the influence, crossed the median and struck my clients head-on killing Woodrow Wilson and completely disabling Catina Nelson. Ms. Nelson's medical specials are currently in excess of \$1,000,000.00 (one million dollars). She requires 24 hour care and will need this for the remainder of her natural life. As you are further aware, there are two minor sons, Antonio and Justin, who lost their father and essentially lost their mother due to her incapacitated state. I am informed and believe that your client's primary liability limits are insufficient to compensate my clients for the damages sustained.

This is a clear case of liability and while you have insufficient liability limits to compensate my clients they are willing to accept the policy limits in exchange for a covenant. I am informed and believe that the UIM has already tendered their coverage while the primary insurer, Viking Insurance, has done nothing. Due to the clear case of liability accompanied by my clients' enormous damages, I feel it that a reasonable Orangeburg Jury would return a verdict in excess of your policy limits. I understand that you have had plenty of time to evaluate this claim and therefore I will give you ten (10) days to tender the policy limits to my office along with a copy of the insurance policy verifying the coverage. Should you fail to tender the limits on or before February 24, 2007 I will seek a verdict in excess of your policy limits and seek to levy and execute

on the personal assets of your insured. Thank you for your prompt attention in this matter.

With kind regards, I remain truly yours,

A handwritten signature in black ink, appearing to read 'Shane M. Burroughs', with a large, stylized loop at the end.

Shane M. Burroughs

SMB\rme

LAW OFFICES
LANIER & BURROUGHS, LLC
450 SUMMERS AVENUE
POST OFFICE DRAWER 2789
ORANGEBURG, SOUTH CAROLINA 29116
www.landblawfirm.com

EXHIBIT B

LEWIS C. LANIER
SHANE M. BURROUGHS
CHARLES J. MCCUTCHEN

TELEPHONE:
(803) 268-9800

May 16, 2007

FAX: (803) 531-3465

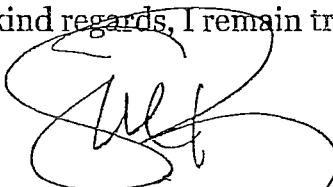
Viking Insurance
Attn: Jodi Johnson
PO Drawer 2027
Goldsboro, NC 27533-2027

RE: Junell W. Johnson, as Personal Representative of the Estate of Woodrow
C. Nelson v. Michael Lee Clemons
C/A No.: 07-CP-38-573
Eddie Williams as Conservator for Catina Nelson v. Michael Lee Clemons
C/A No.: 07-CP-38-574
Claim #: 2390109517
Date of Loss: 3/25/06

Dear Jodi:

I hope this letter finds you doing well. I am informed and believe that you received a letter from Paul Owen dated April 30, 2007 withdrawing his offer to settle the above-captioned matters, a copy of which is hereby enclosed. Please find enclosed courtesy copies of the Summons and Complaints filed against your insured, Michael Lee Clemons. Please be advised that Mr. Clemons has been personally served at the Orangeburg-Calhoun Detention Center. I look forward to working with you in these matters.

With kind regards, I remain truly yours,



Shane M. Burroughs

SMB\rme
enclosures

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ORANGEBURG, SOUTH CAROLINA 29116
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EXHIBIT C

LEWIS C. LANIER
SHANE M. BURROUGHS
CHARLES J. MCCUTCHEN

TELEPHONE:
(803) 268-9800

May 24, 2007

FAX: (803) 531-3465

VIA FAX 531-0160 AND REGULAR MAIL

Michael P. Horger, PA
160 Centre Street
Orangeburg, SC 29116

RE: Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson v. Michael Lee Clemons C/A No.: 07-CP-38-573
Eddie Williams as Conservator for Catina Nelson v. Michael Lee Clemons C/A No.: 07-CP-38-574
Claim #: 2390109517
Date of Loss: 3/25/06

Dear Mike:

This correspondence is in response to our conversation on May 23, 2007 wherein your client offered to tender the limits of liability coverage on behalf of Michael Lee Clemons at this time. I have conveyed this offer to my clients and they have instructed me to reject it in accordance with our settlement demand that was given to Viking Insurance on February 14, 2007.

In our conversation, you stated that Viking Insurance **intended to offer** \$25,000.00, which represents the existing liability limits, to my clients. While that may be the case, Paul Owen sent a time sensitive demand on December 29, 2006 demanding this payment that he has yet to receive. Additionally, my demand on February 14, 2007 along with Paul's February 27, 2007 letter gave Viking ample time to send the checks and consummate the settlement. Viking did neither.

Without question, Viking Insurance did not meet any demand to settle this matter. Therefore, I am of the opinion that Viking Insurance is now liable to pay whatever verdict my clients receive in excess of the policy limits available to Mr. Clemons. Moreover, I am firmly convinced that the case law supports my position. In that regard, please read Mayes v. Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993) (where the check was mailed the day after the deadline passed) and Andrews v. Central Surety Ins. Co., 271 F.Supp 814 (D.S.C. 1967) (where the offer was made 4 days after the deadline). Our settlement demand has not been met even today. Your client is not 1 day late or

///

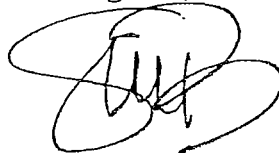
even 4 days past the deadline, but rather closer to 4 months without satisfaction of the demand.

The egregious conduct on the part of your drunken insured accompanied with the aggravating circumstances surrounding the collision in this case leave no room for doubt that the negligence, recklessness, wilfulness and wantonness of Michael Lee Clemons was the sole proximate cause of the collision and the injuries suffered by Catina and the loss of her husband. Furthermore, the fact that there are two minor children, Antonio and Justin, who have lost their father and essentially their mother (due to her traumatic brain injury) are circumstances that demanded an immediate settlement to protect not only Mr. Clemons' interests, but to also financially provide the necessities for the children. These facts and circumstances were forcefully brought to Viking Insurance's attention at a time when it repeatedly had a full opportunity to compromise and settle these claims within the policy limits. Moreover, Viking Insurance surely knew, or reasonably should have known, that its failure to settle would most probably result in an excess judgment against Mr. Clemons. Viking Insurance's unwarranted negligent and cavalier disregard of this claim to time and time again fail to meet the requirements of the time-sensitive demands violated its contractual duties and obligations to Mr. Clemons and amounted to bad faith.

As you know, the law does not allow an insurer to forsake or abandon the interests of its insured and to further its own interests by rejecting an opportunity to settle within the policy limits when the circumstances compel such action on its part as the only reasonable course to follow, *unless* the insurer is also willing to absorb any losses resulting from such conduct to its insured. Therefore, please allow us to hear from your company with a more reasonable offer as we remain willing to settle these cases; just not for the coverage amounts.

Thank you for your prompt attention to this matter.

With kind regards, I remain truly yours,

A handwritten signature in black ink, appearing to read 'Shane M. Burroughs', enclosed within a large, loopy oval flourish.

Shane M. Burroughs

SMB\rme

cc: Paul Owen

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
JUNELL W. JOHNSON AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

**ORDER DENYING
MOTION TO DISMISS**

2008 OCT 13 P 12:05
FILED FOR RECORD
LISA W. HIZELL
CLERK OF COURT
ORANGEBURG, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

**ORDER DENYING
MOTION TO DISMISS**

These matters came before me on June 11, 2008, upon motions of the Defendant to dismiss each case based on an agreement to settle the Plaintiffs' claims reached between the Defendant's insurance carrier and Plaintiffs' counsel. Essentially, the Defendant asks this Court to enforce these agreements to settle and dismiss Plaintiffs'

complaints.¹ At the hearing both sides were represented by their respective counsel.

These claims arise out of an automobile collision which occurred in Orangeburg County on the morning of March 25, 2006. At that time, the Nelsons were hit head-on by Michael Lee Clemons. Woodrow Nelson died as a result of the wreck. His young wife, Catina Nelson, sustained a catastrophic brain injury. The Nelsons had two small children.

Defendant Clemons was insured by Viking Insurance. However, Viking Insurance did not pay its available liability coverage to the Plaintiffs' attorney or into the court. This motion essentially now seeks to force Plaintiffs to accept that coverage.

Additionally, the Nelsons had purchased underinsured coverage from State Farm Insurance Company. As a result of the wreck, State Farm offered and paid its underinsured coverage to Nelsons.

On September 13, 2006, a hearing was scheduled before the Orangeburg Probate Court to approve the settlement of Woodrow Nelson's death claims (wrongful death and survival) as well as to appoint a conservator for Catina Nelson. Plaintiffs' counsel argued and it appears from a review of the transcript of the probate hearing that it was initially setup to approve only the payment of State Farm's coverage because Viking had not paid

¹ In case number 07-CP-38-574, Eddie Willaims as Conservator for Catina W. Nelson v. Michael Lee Clemons, in his written motion counsel for the Defendant also moved to dismiss that case pursuant to Rule 12(b)(7) for the failure to join the South Carolina Department of Health and Human Services as a necessary and indispensable party under Rule 19. At the hearing, counsel did not argue anything with respect to this ground for dismissal. Therefore, the Court assumes that this ground is abandoned. Nonetheless, even if it were not abandoned, the Court does not believe that the South Carolina Department of Health and Human Services is required to be joined in this matter under Rule 19 and would so rule. Accordingly, if the argument is not abandoned, the motion on this basis is denied.

its coverage.² Nonetheless, the transcript indicates that the hearing went forward to approve the settlement of the death claims of Woodrow Nelson with Viking's coverage to be included in that agreement and approval. The transcript does not contain any direct reference to an approval of the claims of Catina Nelson by the Probate Court nor does it specifically reflect the terms of any agreement relating to Catina Nelson's claim.

The dispute here arises concerning the payment of the liability proceeds by Viking for the Nelsons' claims. Counsel for Defendant Nelson argues that Viking did not pay, because it did not have all the information it needed. Plaintiffs' counsel argues that repeated demands for the payment were made on the insurance company during the six months following the September 13, 2006, hearing and for it to send the checks to the Plaintiffs' lawyer's office. Ultimately, the Plaintiffs contend that they withdrew their assent to the agreement because the money was not paid. Essentially, Plaintiffs do not contest that at one time they had agreed to and would have accepted the limited coverage; instead, they maintain that the agreement was that the money would be paid and that it was not.

Rule 43(k), SCRCP, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation. Ashcroft v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (S.C. 1995). Before the Court can enforce an agreement, the existence and the terms of the agreement must be reduced to the form of a consent order

² For instance, on page 5 of the transcript, counsel for Defendant Clemons indicates that the petition that was being presented to the court was filed by State Farm and did not include Viking's coverage. Counsel then goes on to state that he doesn't know how Viking got "behind" the UIM. Further, counsel for Defendant Clemons indicated that he "would prepare" an amended petition that would include Viking's coverage.

or written stipulation signed by counsel and entered on the record, or made in open court and noted upon the record. Substantial compliance with the rule does not work and is insufficient. Id. at 495, 458 S.E.2d at 535, citing Lyons Enter., Inc. v. Custer, 168 Ariz. 439, 814 P.2d 780 (Ct. App. 1991) ("A stipulation that simply states that a settlement has been reached, but does not set forth the terms of the settlement does not serve the purpose of the rule."). See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (S.C. 1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRCP.").

Essential terms of a settlement include the amount of payment as well as the time and manner of payment. "This 'meeting of the minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (S.C. 1989). Further, there can be no enforceable duty to perform so long as, in contemplation of the parties thereto, something remains to be done to establish a duty to perform. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (S.C. 1975).

In Reed v. Associated Investments, 339 S.C. 148, 154, 528 S.E.2d 94, 97 (S.C. Ct. App. 2000), a case where the parties agreed on the settlement amount but not the terms of the settlement, the court held:

Where the parties agree on the amount of the settlement, but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. See, Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997). As we read the record, we find the trial court erred in concluding that Reed and Associated reached an agreement about the terms

of the settlement. 'Because the conditions upon which an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement on the terms of the settlement is fatal . . . To conclude otherwise would largely render meaningless the requirements that settlement agreements be in writing.' Id. at 546, 481 S.E.2d at 716.

Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the . . . requirements of Rule 43(k) preclude enforcement of the settlement.

See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 460 S.E.2d 396 (S.C. 1995)(holding that "a **settlement order** is unenforceable where it fails to set forth the terms of the settlement and required by Rule 43(k).")(emphasis added); Farnsworth v. Davis Heating & Air, 367 S.C. 634, 627 S.E.2d 724(S.C. 2006)(holding until the terms of an agreement satisfy Rule 43(k), the agreement is non-binding and until a party is bound, she is entitled to withdraw her assent).

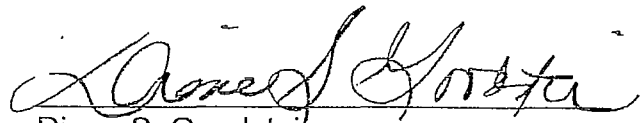
In these matters, the offers to settle were conditioned on the payment of Viking Insurance's coverage. For whatever reason, that payment did not occur as contemplated by the parties. Moreover, the transcript of the probate hearing fails to set forth when or how the money would be paid to the Plaintiffs.³ Therefore, there is no enforceable agreement and Plaintiffs were entitled to withdraw their assent. See e.g., Young v. Cooler, 347 S.C. 362, 555 S.E.2d 410(S.C. Ct. App. 2001)(holding that there is no meeting of the minds where the parties envisioned that further work was needed to finalize a settlement agreement and that even if there was an intent to be bound and an attempt to announce

³ In any event, there is nothing in the transcript of the probate hearing specifically about the settlement of Catina Nelson's claims. Moreover, the Court finds there is no enforceable agreement under Rule 43(k) with respect to her claim even if the insurance company's failure to pay was excused.

to the court that a settlement had been reached, the failure to put the essential terms of the purported settlement on the record prevent the requirements of Rule 43(k) from being met and the settlement from being enforced by the court). Cf. Cheap-O's Truck Sto, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (S.C. Ct. App. 2002)(finding that where the material terms of the settlement agreement, namely the amount of the settlement, the time for payment, and the conditions of the payment, were read into the record, it complied with Rule 43(k) and was enforceable by the court).

Accordingly, Defendant's motions are hereby DENIED.

IT IS SO ORDERED, this 30 day of Sept, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

Summerville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
JUNELL W. JOHNSON AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON,

Plaintiff,

vs.

MICHAEL LEE CLEMONS,

Defendant.

EDDIE WILLIAMS AS CONSERVATOR,
FOR CATINA W. NELSON,

Plaintiff,

vs.

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER: 07-CP-38-573

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OR IN THE
ALTERNATIVE TO ALTER OR AMEND
THE ORDER PURSUANT TO
RULE 59(b), SCRCF**

08 OCT 23 PM 3:35

CIVIL ACTION NUMBER: 07-CP-38-574

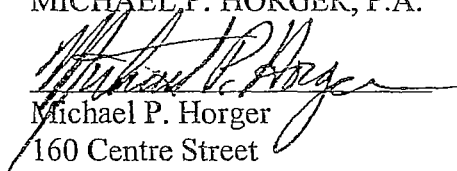
TO: MARK B. TINSLEY, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney will move before the Honorable Diane S. Goodstein, Chief Administrative Judge, First Judicial Circuit, at the Orangeburg County Courthouse, Orangeburg, South Carolina on the tenth day after service hereof at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard to reconsider her Order dated September 30, 2008 received by the undersigned on October 14, 2008 which denied the Motion to Dismiss or in the alternative to alter or amend the Order pursuant to Rule 59(b), SCRCF.

This motion is based on the evidence before the Court and the fact that the liability insurance carrier tendered its limits of liability insurance coverage and reached a settlement agreement of \$12,500.00 for Catina W. Nelson and a settlement of \$12,500.00 for The Estate of Woodrow C. Nelson with the understanding that the settlements would be Court approved and pursuant to S.C. Code Ann. Section 43-7-410 et. seq. 1976, as amended, the Department of Health & Human Services (DHHS) has subrogation and assignment rights, from the client, to the extent of the amount paid on his/her behalf by Medicaid.

October 23, 2008

MICHAEL P. HORGER, P.A.



Michael P. Horger
160 Centre Street

Orangeburg, SC 29115

Phone: 803.531.1700

Fax: 803-531-0160

mhorger@horgerlaw.com

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
JUNELL W. JOHNSON AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON,

Plaintiff,

vs.

MICHAEL LEE CLEMONS,

Defendant.

EDDIE WILLIAMS AS CONSERVATOR,
FOR CATINA W. NELSON,

Plaintiff,

vs.

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER: 07-CP-38-573

**AMENDED
NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OR IN THE
ALTERNATIVE TO ALTER OR AMEND
THE ORDER PURSUANT TO
RULE 59(e), SCRPC**

CIVIL ACTION NUMBER: 07-CP-38-574

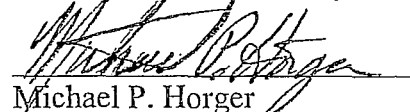
TO: MARK B. TINSLEY, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney will move before the Honorable Diane S. Goodstein, Chief Administrative Judge, First Judicial Circuit, at the Orangeburg County Courthouse, Orangeburg, South Carolina on the tenth day after service hereof at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard to reconsider her Order dated September 30, 2008 received by the undersigned on October 14, 2008 which denied the Motion to Dismiss or in the alternative to alter or amend the Order pursuant to Rule 59(e), SCRPC.

This motion is based on the evidence before the Court and the fact that the liability insurance carrier tendered its limits of liability insurance coverage and reached a settlement agreement of \$12,500.00 for Catina W. Nelson and a settlement of \$12,500.00 for The Estate of Woodrow C. Nelson with the understanding that the settlements would be Court approved and pursuant to S.C. Code Ann. Section 43-7-410 et. seq. 1976, as amended, the Department of Health & Human Services (DHHS) has subrogation and assignment rights, from the client, to the extent of the amount paid on his/her behalf by Medicaid.

October 24, 2008

MICHAEL P. HORGER, P.A.



Michael P. Horger
160 Centre Street
Orangeburg, SC 29115
Phone: 803.531.1700
Fax: 803-531-0160
mhorger@horgerlaw.com

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
JUNELL W. JOHNSON AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON,

COUNTY OF ORANGEBURG

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

Plaintiff,

VS

MICHAEL LEE CLEMONS,

Defendant.

ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

COUNTY OF ORANGEBURG

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

VS

MICHAEL LEE CLEMONS,

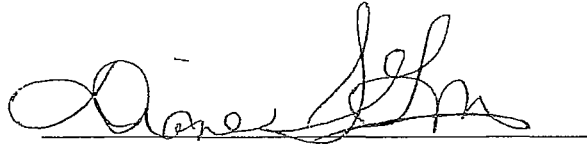
Defendant.

ORDER DENYING
MOTION TO RECONSIDER
OR ALTER OR AMEND:

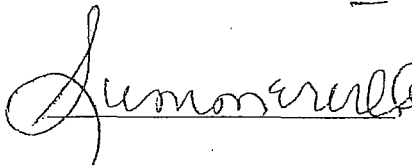
On September 30, 2008, this Court issued its order in these matters denying Defendant's motions to dismiss. The order was filed on October 13, 2008. Subsequently, Defendant filed an Amended Notice of Motion and Motion for Reconsideration or In The Alternative to Alter or Amend the Order Pursuant to Rule 59(e), SCRCP, which presently before me.

After reviewing my Order and everything presented to the Court, it does not appear that the motion to reconsider raises any issue that was not previously considered by and ruled upon by the Court. Moreover, there is no reason to alter or amend the order and none has been presented. Accordingly, Defendant's motions to reconsider or alter or amend are hereby DENIED.

IT IS SO ORDERED, this 31 day of Dec, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

 South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
Junell W. Johnson as Personal	)	
Representative of the Estate of	)	
Woodrow C. Nelson,	)	
	)	ANSWER
Plaintiff,	)	(Jury Trial Demanded)
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	
_____	)	

The defendant, Michael Lee Clemons, answering the Complaint of the plaintiff, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. The defendant lacks sufficient information to form a belief regarding the allegations of Paragraph 1, and therefore, denies them.
2. In response to the allegations of Paragraph 2, the defendant admits that he resides in Clarendon County, South Carolina. The defendant denies the remaining allegations of Paragraph 2.
3. In response to the allegations of Paragraph 3, the defendant admits that on or about March 25, 2006, he was involved in a motor vehicle accident in Orangeburg County, South Carolina. The defendant denies the remaining allegations of Paragraph 3.
4. In response to the allegations of Paragraph 4, the defendant is informed and believes that as a result of the accident that occurred on March 25, 2006, the plaintiff's decedent suffered certain injuries, but the defendant lacks sufficient information to respond

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to Paragraph 4 with regard to the extent of the plaintiff's decedent's injuries. The defendant denies the remaining allegations of Paragraph 4.

5. The defendant denies the allegations of Paragraph 5.

6. The defendant denies each and every allegation of the Complaint not specifically admitted, modified, or explained herein above.

FOR A SECOND DEFENSE

7. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

8. The defendant alleges that even assuming he was negligent, careless, grossly negligent, willful, wanton or reckless in any respect, and that any such conduct on his part operated as a proximate cause of the accident and plaintiff's decedent's resulting injuries and damages, if any, all of which is expressly denied and admitted solely for the purpose of this defense and no other, that plaintiff's decedent's negligent, grossly negligent, reckless, willful and wanton conduct contributed more than 50% to the cause of the accident and plaintiff's decedent's resulting injuries and damages, if any. For that reason, the defendant is not liable to plaintiff in any sum whatsoever.

FOR A THIRD DEFENSE

9. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

10. The defendant alleges that even if he was negligent, careless, grossly negligent, reckless, willful or wanton in any respect whatsoever, which is expressly denied and admitted solely for the purpose of this defense and no other, and even if any such conduct on his part operated as a greater than 50% cause of the accident and plaintiff's

decedent's resulting injuries and damages, if any, which is also expressly denied and admitted solely for the purpose of this defense and no other, he is entitled to a determination as to the percentage which plaintiff's decedent's negligent, grossly negligent, reckless, willful and wanton conduct contributed to the accident and to a reduction of any amount awarded to plaintiff in an amount equal to that percentage of plaintiff's decedent's own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A FOURTH DEFENSE

11. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

12. The defendant alleges that the Complaint of the plaintiff fails to state facts sufficient to constitute a cause of action against him and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

13. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

14. The defendant alleges that the plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against him since the plaintiff failed to timely file and serve the Summons and Complaint within the three-year statute of limitations.

FOR A SIXTH DEFENSE

15. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

16. The defendant alleges that an award of punitive damages would constitute an impermissible and excessive fine under the Eighth Amendment of the Constitution of the

United States, and such damages would further be a violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments, respectively, of the United States Constitution, as well as the applicable corresponding sections of the Constitution of the State of South Carolina, Article 1, Section 3.

17. The plaintiff's claim for punitive damages violates the defendant's right to access to the Courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the defendant's exercise of that right.

18. The plaintiff's claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:

(a) The standard or test for determining the requisite mental state of the defendant for imposition of punitive damages is void for vagueness; and

(b) Insofar as punitive damages are not measured against actual injury to the plaintiff and are left wholly to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damage that may be awarded is indeterminate at the time of the defendant's alleged conduct.

WHEREFORE, having fully answered the Complaint of the plaintiff, the defendant prays that the Complaint be dismissed, for the costs and disbursements of this action, and for any such other and further relief as this court shall deem just and proper.

By: _____

James P. Walsh (15180)
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606
(864) 232-4400
(864) 235-4399 (fax)
Attorneys for the defendant

JURY TRIAL DEMANDED

By: _____

James P. Walsh (15180)

April 7, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-574
COUNTY OF ORANGEBURG	)	
	)	
Eddie Williams as Conservator for	)	
Catina W. Nelson,	)	
	)	ANSWER
Plaintiff,	)	(Jury Trial Demanded)
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	
_____	)	

1011-3
P. 11
1011-3

The defendant, Michael Lee Clemons, answering the Complaint of the plaintiff, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. The defendant lacks sufficient information to form a belief regarding the allegations of Paragraph 1, and therefore, denies them.
2. In response to the allegations of Paragraph 2, the defendant admits that he resides in Clarendon County, South Carolina. The defendant denies the remaining allegations of Paragraph 2.
3. In response to the allegations of Paragraph 3, the defendant admits that on or about March 25, 2006, he was involved in a motor vehicle accident in Orangeburg County, South Carolina. The defendant denies the remaining allegations of Paragraph 3.
4. In response to the allegations of Paragraph 4, the defendant is informed and believes that as a result of the accident that occurred on March 25, 2006, plaintiff Nelson suffered certain injuries, but the defendant lacks sufficient information to respond to

Paragraph 4 with regard to the extent of plaintiff Nelson's injuries. The defendant denies the remaining allegations of Paragraph 4.

5. The defendant denies the allegations of Paragraph 5.

6. The defendant denies the allegations of Paragraph 6.

7. The defendant denies each and every allegation of the Complaint not specifically admitted, modified, or explained herein above.

FOR A SECOND DEFENSE

8. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

9. The defendant alleges that even assuming he was negligent, careless, grossly negligent, willful, wanton or reckless in any respect, and that any such conduct on his part operated as a proximate cause of the accident and plaintiff Nelson's resulting injuries and damages, if any, all of which is expressly denied and admitted solely for the purpose of this defense and no other, that plaintiff Nelson's negligent, grossly negligent, reckless, willful and wanton conduct contributed more than 50% to the cause of the accident and plaintiff Nelson's resulting injuries and damages, if any. For that reason, the defendant is not liable to plaintiff in any sum whatsoever.

FOR A THIRD DEFENSE

10. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

11. The defendant alleges that even if he was negligent, careless, grossly negligent, reckless, willful or wanton in any respect whatsoever, which is expressly denied and admitted solely for the purpose of this defense and no other, and even if any such

conduct on his part operated as a greater than 50% cause of the accident and plaintiff Nelson's resulting injuries and damages, if any, which is also expressly denied and admitted solely for the purpose of this defense and no other, he is entitled to a determination as to the percentage which plaintiff Nelson's negligent, grossly negligent, reckless, willful and wanton conduct contributed to the accident and to a reduction of any amount awarded to plaintiff in an amount equal to that percentage of plaintiff Nelson's own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A FOURTH DEFENSE

12. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

13. The defendant alleges that the Complaint of the plaintiff fails to state facts sufficient to constitute a cause of action against him and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

14. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

15. The defendant alleges that the plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against him since the plaintiff failed to timely file and serve the Summons and Complaint within the three-year statute of limitations.

FOR A SIXTH DEFENSE

16. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

17. The defendant alleges that an award of punitive damages would constitute an impermissible and excessive fine under the Eighth Amendment of the Constitution of the United States, and such damages would further be a violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments, respectively, of the United States Constitution, as well as the applicable corresponding sections of the Constitution of the State of South Carolina, Article 1, Section 3.

18. The plaintiff's claim for punitive damages violates the defendant's right to access to the Courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the defendant's exercise of that right.

19. The plaintiff's claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:

(a) The standard or test for determining the requisite mental state of the defendant for imposition of punitive damages is void for vagueness; and

(b) Insofar as punitive damages are not measured against actual injury to the plaintiff and are left wholly to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damage that may be awarded is indeterminate at the time of the defendant's alleged conduct.

FOR A SEVENTH DEFENSE

20. The defendant incorporates herein the allegations of his previous defenses which are consistent with this defense.

21. The defendant alleges that even if he was negligent or reckless in any respect which is expressly denied, and admitted solely for the purpose of this defense and

no other, he is not liable to plaintiff Nelson for the resulting damages of plaintiff Nelson, if any, because of the intervening negligent, grossly negligent, reckless, willful and wanton acts of an unknown third party, which negligent and reckless acts were not reasonably foreseeable and intervened and acted as a direct and proximate cause of the collision, and the resulting damages, if any, sustained by plaintiff Nelson.

WHEREFORE, having fully answered the Complaint of the plaintiff, the defendant prays that the Complaint be dismissed, for the costs and disbursements of this action, and for any such other and further relief as this court shall deem just and proper.

By: _____

James P. Walsh (15180)
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606
(864) 232-4400
(864) 235-4399 (fax)
Attorneys for the defendant

JURY TRIAL DEMANDED

By: _____

James P. Walsh (15180)

April 7, 2009

135

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

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

Plaintiff,

VS

MICHAEL LEE CLEMONS,

Defendant.

**NOTICE OF MOTION
AND
MOTION TO STRIKE ANSWER
AND
FOR DEFAULT JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that in ten (10) days or as soon as the Plaintiff may be heard in this matter, Plaintiff by and through her undersigned counsel, will move before the Court for an Order striking Defendant's Answer and for judgment by default against the Defendant, pursuant to the South Carolina Rules of Civil Procedure, specifically Rule 55(a) and (b), and Rule 12(f) on the grounds that more than thirty (30) days have elapsed since the service of the Summons and Complaint.

This motion is made on the grounds set forth in the attached Affidavit of Default and will be based on the pleadings, said affidavit, and other matters properly presented to the Court.

GOODING AND GOODING, P.A.

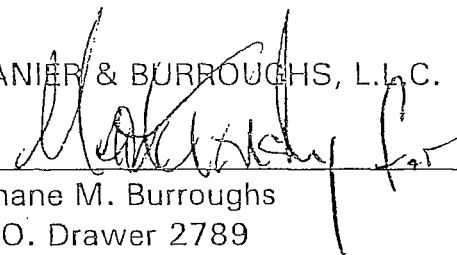
By:

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

136

LANIER & BURROUGHS, L.L.C.

By:


Shane M. Burroughs
P.O. Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

ATTORNEYS FOR PLAINTIFF

Dated: April 15, 2009

Allendale, SC 29810

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A#: 07-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
JUNELL W. JOHNSON AS	)	
PERSONAL REPRESENTATIVE	)	
OF THE ESTATE OF	)	
WOODROW C. NELSON,	)	
	)	AFFIDAVIT OF DEFAULT
Plaintiff,	)	
	)	
vs	)	
	)	
MICHAEL LEE CLEMONS,	)	
	)	
Defendant.	)	
_____	)	

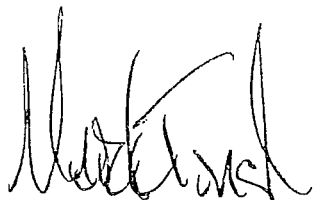
PERSONALLY, appeared before me, Mark B. Tinsley, who being first duly sworn, deposes and says:

That he is the attorney for Plaintiff in the above-captioned action; that the Summons and Complaint was filed with the Orangeburg County Clerk of Court on May 10, 2007, and was served personally on the Defendant by the Orangeburg County Sheriff's Office on May 23, 2007, as is evidenced by the Affidavit of Service that has been filed with the Clerk of Court and a copy of which is attached hereto as Exhibit "A"; that on April 7, 2009, almost two (2) years after the commencement of the action, counsel for Defendant mailed a copy of Defendant's Answer to Plaintiff's Counsel which represented Defendant's first appearance in the action; that no other Answer or responsive pleading has been filed or served by Defendant and Defendant is on default.

Based on this Affidavit, Plaintiff hereby requests the Court to enter Defendant's

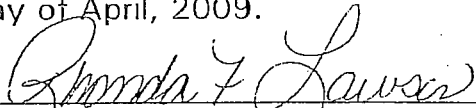
138

default upon the calendar pursuant to Rule 55(a) of the South Carolina Rules of Civil Procedure.



Mark B. Tinsley

Sworn to before me this 15th
day of April, 2009.



Notary Public for South Carolina

My Commission Expires: 1/23/2014

Defendant.

NOTICE OF MOTION
AND
MOTION TO STRIKE ANSWER
AND
FOR DEFAULT JUDGMENT

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

LANIER & BURROUGHS, L.L.C.

By: _____

Shane M. Burroughs
P.O. Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

ATTORNEYS FOR PLAINTIFF

Dated: April 15, 2009

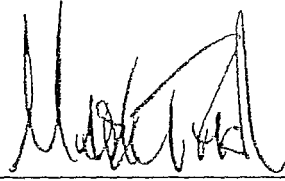
Allendale, SC 29810

[illegible]

AFFIDAVIT OF DEFAULT

Defendant.

default upon the calendar pursuant to Rule 55(a) of the South Carolina Rules of Civil Procedure.

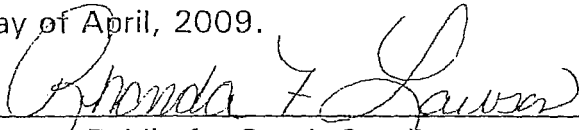


Mark B. Tinsley

Sworn to before me this

15th

day of April, 2009.



Notary Public for South Carolina

My Commission Expires:

1/22/2011

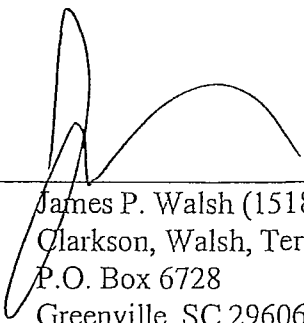
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
Junell W. Johnson as Personal	)	
Representative of the Estate of	)	
Woodrow C. Nelson,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	
	)	

**MOTION TO SET ASIDE
ENTRY OF DEFAULT**

2009 MAY -11 P 2 03
FILED
CLERK OF COURT
ORANGEBURG

TO: JUNELL JOHNSON AND MICHAEL TINSLEY, HER ATTORNEY

YOU WILL PLEASE TAKE NOTICE to the extent that the Court determines that Defendant is in default, which Defendant denies, Defendant Michael Lee Clemons hereby moves the Court for an Order, pursuant to Rules 6(b), 55(c), and 60 of the South Carolina Rules of Civil Procedure, setting aside default and enlarging time to answer the above-entitled action. Such motion will be heard in ten (10) days after the service hereof, or at such time and place as the Court may deem appropriate.

By: 
 James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for Defendant Michael Lee Clemons

Greenville, South Carolina
 May 1, 2009

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C.A. NO. 2007-CP-38-574
 COUNTY OF ORANGEBURG)
)
 Eddie Williams as Conservator for)
 Catina W. Nelson,)
)
 Plaintiff,)
)
 vs.)
)
 Michael Lee Clemons,)
)
 Defendant.)

**MOTION TO SET ASIDE
ENTRY OF DEFAULT**

2009 MAY -11 P 3:08
 FILED FOR
 WRIT OF HABEAS
 CORPUS
 ORANGEBURG

TO: EDDIE WILLIAMS AND MICHAEL TINSLEY, HIS ATTORNEY

YOU WILL PLEASE TAKE NOTICE to the extent that the Court determines that Defendant is in default, which Defendant denies, Defendant Michael Lee Clemons hereby moves the Court for an Order, pursuant to Rules 6(b), 55(c), and 60 of the South Carolina Rules of Civil Procedure, setting aside default and enlarging time to answer the above-entitled action. Such motion will be heard in ten (10) days after the service hereof, or at such time and place as the Court may deem appropriate.

By: _____

James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for Defendant Michael Lee Clemons

Greenville, South Carolina
 May 1, 2009

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

JUNELL W. JOHNSON
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON
Plaintiff,

v.

MICHAEL LEE CLEMONS
Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO.: 07-CP-38-573

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

EDDIE WILLIAMS
AS CONSERVATOR FOR
CATINA W. NELSON
Plaintiff,

v.

MICHAEL LEE CLEMONS
Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO.: 07-CP-38-574

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

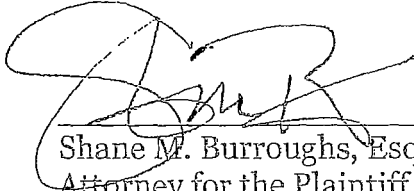
2009 DEC 15 A 10:15
FILED
CLERK
ORANGEBURG

TO: JAMES P. WALSH, ATTORNEY FOR DEFENDANT:

You are hereby notified that the undersigned will move ten (10) days after service of this Notice of Motion and Motion for an Order requesting the Circuit Judge to reconsider its Order to Set Aside Default dated December 4, 2009*. This Motion will be supported by oral argument, the transcript of the Motion hearing, and applicable case law.

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LANIER & BURROUGHS, LLC

A handwritten signature in black ink, appearing to read 'Shane M. Burroughs', is written over a horizontal line.

Shane M. Burroughs, Esquire
Attorney for the Plaintiff
Post Office Drawer 2789
250 Gibson Street
Orangeburg, SC 29116

December 15, 2009

*Plaintiff's counsel has been informed that the Order has been signed. However, the Plaintiff has yet to receive the signed Order and per the Clerk of Court, the Order has yet to be clocked in.

147

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GOODING AND GOODING, P.A.

By: _____

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

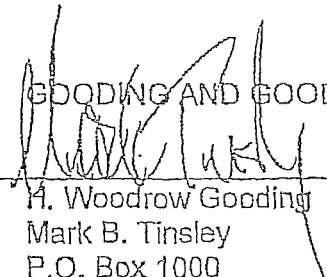
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14th day of January, 2011.

By: _____

Rhonda F. Lawson, Paralegal

GOODING AND GOODING, P.A.

By: 

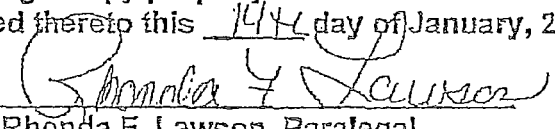
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14 day of January, 2011.

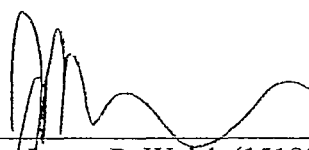
By: 

Rhonda F. Lawson, Paralegal

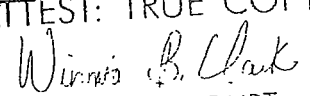
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
Junell W. Johnson as Personal	)	
Representative of the Estate of	)	
Woodrow C. Nelson,	)	
	)	ACCEPTANCE OF SCRCP 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	

FILED - 1 P 11:30
FEB 4 2011
CLERK OF COURT
ORANGEBURG COUNTY, SC

The Defendant Michael Lee Clemons by and through his undersigned counsel in accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of \$3,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: 
 James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for the Defendant

February 4, 2011

ATTEST: TRUE COPY

 CLERK OF COURT
 ORANGEBURG COUNTY, SC

152

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-574
COUNTY OF ORANGEBURG	)	
	)	
Eddie Williams as Conservator for	)	
Catina W. Nelson,	)	
	)	ACCEPTANCE OF SCRCP 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	

The Defendant Michael Lee Clemons by and through his undersigned counsel in accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of \$6,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: _____

James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for the Defendant

February 4, 2011

FILED
 CLERK OF COURT
 2011 FEB - 7 P 4:29

FILED
 CLERK OF COURT
 2011 FEB - 7 P 4:29

153

1 STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
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FILED FOR RECORD
JAN 12 2009
CLERK OF COURT
ORANGEBURG, SC

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

Plaintiff,

vs.

Michael Lee Clemons,

Defendant.

Eddie Williams, as Conservator for
Catina W. Nelson,

Plaintiff,

vs.

Michael Lee Clemons,

Defendant.

Transcript of Hearing

before The Honorable Pandora Jones-Glover, Probate Judge for
Orangeburg County.

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THE COURT: We will now open in the Estate of Woodrow C. Nelson. This is 2006 (inaudible). This matter is before the court for approval of the settlement. I'll have the attorney introduce themselves as well as their clients, please.

MR. OWEN: Paul Owen on behalf of the Estate of Woodrow Nelson.

MR. PLEXICO: I'm Darby Plexico here on behalf of, I guess, State Farm for the UIM coverage for Mr. Nelson.

THE COURT: Darby Plexo?

MR. PLEXICO: Plexico, P-l-e-x-i-c-o.

THE COURT: On behalf of who?

MR. PLEXICO: State Farm.

THE COURT: Ms. Ariel.

MS. ROSAMOND: Ariel Rosamond, Guardian for the minor children.

MS. OSBORNE: Janne Berry Osborne, Guardian for Catina Nelson.

MR. HORGER: Michael Horger. I'm here on behalf of Viking Insurance Company, which is the liability insurance carrier for the Defendant Michael Lee Clemons (inaudible) his claim for being discharged by approval of the settlement.

THE COURT: Okay. All right, your name,

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1 sir?

2 MR. WILLIAMS: My name is Eddie
3 Williams, Jr and I have been designated as Conservator for
4 Catina Nelson.

5 MRS. JOHNSON: My name is Junell
6 Johnson.

7 MR. OWEN: She's the personal
8 representative for the Estate of Woodrow Nelson.

9 THE COURT: Anyone else?

10 MS. WILLIAMS : (Inaudible).

11 THE COURT: Okay, what's your name?

12 MS. WILLIAMS : (Inaudible) Williams.

13 THE COURT: Okay, you may continue.

14 MR. OWEN : Your Honor, this case came
15 about as a result of an automobile accident on March 25th,
16 2006 in which Michael Lee Clemons crossed the center
17 line and collided with a car driven by Woodrow Nelson in
18 which his wife Catina Nelson was a passenger. Woodrow
19 Nelson was pronounced dead at the scene of the accident.
20 He is survived by his wife who is non compos mentis.
21 That's why we've got a conservator appointed and you've
22 got some disability forms and that is also on the agenda for
23 this afternoon where we're trying to get a conservator
24 appointed for her and two children, Antonio Nelson and
25 Justin Nelson, both who are minors and are represented by

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1 Ariel Townsend-Rosamond. And this settlement is for the
2 approval of payment of the policy limits by the two
3 carriers, the liability carrier being Viking Insurance who is
4 represented by Mr. Horger and by the State Farm paying
5 its policy limits under the under-insured provisions of the
6 motorist coverage of its policy which Mr. Nelson held on
7 his vehicles, and they are paying their policy limits as
8 well. The total amounts are 75,000 from State Farm being
9 paid in and 12,500 being paid by Viking Insurance. We
10 understand that we have some funeral expenses that are
11 part of the estate that need to be paid. There's been some
12 administrative costs and some attorney's fees associated
13 with it in bringing about this settlement and we would ask
14 the court to approve this settlement in that it represents the
15 payment of policy limits by State Farm. It is a
16 compromised amount paid by Viking because there was a
17 third victim who we let have a portion of the proceeds, in
18 this accident a third vehicle involved who was apportioned
19 \$5,000.00 of that policy limit. So based upon everything,
20 that's all the money available through the insurance
21 companies, automobile insurance companies involved in
22 this accident.

23 THE COURT: Do you have a statement
24 saying that this is in the best interest of the estate?

25 MR. OWEN: I don't have a statement, I

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1 did not file one but we believe it to be in the best interest
2 of the estate and we will certainly put up Ms. Junell
3 Johnson who will testify that it would be in the best
4 interest of the estate for the approval of the settlement.

5 MR. HORGER: If I may, Your Honor, and
6 just dovetailing that, you've got a petition filed by State
7 Farm and I'm preparing an amended petition which will
8 give all the insurance coverage because State Farm doesn't
9 address my carrier's coverage and I have the verification
10 in that statement for Mr. Owen. In the interest of time, I
11 would just ask that the court consider the full matter and
12 then let us just present this amended petition and have it
13 approved based upon that and I'll have an appropriate
14 order on that as well. Viking Insurance kinda, I don't
15 know how we got kinda behind the UIM but Mr. Owen is
16 correct, we've got \$25,000.00 per person, I think
17 \$50,000.00 per accident and I set that out. The total
18 insurance coverage is \$100,000.00; however, there were
19 other claims that were paid, so \$25,000.00 of the total
20 coverage that Viking had is being allocated twelve-five to
21 the death claim and twelve-five to the claim of Catina, and
22 so that is exhausting their coverage. It's not exhausting
23 their coverage totally in this settlement but their coverage
24 is being totally exhausted. That's just a little nuance that I
25 wanted the court to be familiar with. And in State Farm's

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1 petition, they break down a thousand dollars on the
2 survival action; I break down in what I'm preparing on an
3 amended petition is to consider sixteen-five on survival
4 and then the total balance on the other because that would
5 pay the funeral bill.

6 MR. OWEN: And all administrative
7 expenses thus far incurred.

8 THE COURT: Okay, Ms. Johnson, please
9 come forward and stand for me, please, and raise your
10 right hand for me. Do you affirm that the testimony in
11 regards to this is going to be the truth?

12 MS. JOHNSON: Yes.

13 THE COURT: All right, please be seated
14 and state your full name for the record for me.

15 MS. JOHNSON: My name is (inaudible)
16 Junell Johnson.

17 THE WITNESS, JUNELL JOHNSON, HAVING
18 BEEN DULY SWORN BY THE COURT, TESTIFIED AS
19 FOLLOWS:

20 DIRECT EXAMINATION BY

21 MR. OWEN:

22 Q: And, Ms. Johnson, you've been appointed personal
23 representative of the estate of Woodrow Nelson, correct?

24 A: Yes.

25 Q: Okay. Additionally, you have custody of Woodrow Antonio

Estate of Woodrow C. Nelson

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- 1 Nelson, the 10 year old son?
- 2 A: Yes.
- 3 Q: And Justin Nelson?
- 4 A: Yes.
- 5 Q: And you are the mother of Catina Nelson?
- 6 A: I'm the mother of Catina Nelson.
- 7 Q: Okay, and you've been watching after her and visiting her
- 8 frequently as well?
- 9 A: Yes.
- 10 Q: Okay, and I'm sorry we have to be here today because this was a
- 11 very tragic accident.
- 12 A: Yes, it sure was.
- 13 Q: And do you understand that we have done a diligent search for
- 14 all insurance carriers involved in this case and that basically
- 15 Woodrow has three vehicles insured with State Farm and they're
- 16 tendering all the monies available under those policies in
- 17 settlement of this case? You understand that?
- 18 A: Yes, I do.
- 19 Q: Okay. And that there was another policy that Mr. Clemons had
- 20 that had a total combined value of 30,000, 25,000 coming to
- 21 your family, essentially your family. twelve-five being to
- 22 Woodrow's estate and twelve-five going to Catina. The
- 23 remaining 5,000 went to a third driver who was also involved in
- 24 this accident and received permanent nerve damage to his leg,
- 25 okay—

Estate of Woodrow C. Nelson

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1 A: Yes.

2 Q: —and is represented by another party not present today,
3 represented by another attorney.

4 A: Yes.

5 Q: And that exhausted their coverage as well.

6 A: Okay.

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

10 A: Okay.

11 Q: Okay, and is it your testimony that this would be, accepting this
12 settlement and approving this settlement would be in the best
13 interest of Woodrow's estate?

14 A: Yes.

15 Q: Okay. Answer any questions any other attorney might have.

16 THE COURT: V.s. Rosamond.

17 CROSS EXAMINATION BY

18 MS. ROSAMOND:

19 Q: You have custody of, I think everybody calls him Antonio?

20 A: Yeah, they call him Antonio—

21 Q: Right.

22 A: —and Justin Nelson.

23 Q: And I mean I just wanted to make sure that you you certainly
24 believe that accepting these funds on behalf of the children, that
25 it is in their best interest—

Estate of Woodrow C. Nelson

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1 A: Yes.

2 Q: —to assist them with possibly going to college later on—

3 A: Yes.

4 Q: — to assist them with their education—

5 A: Right.

6 Q: —and to assist them in taking care of their basic needs and those
7 kind of things?

8 A: Yes, I do.

9 Q: All right, and you believe that you are more than capable of
10 administering those funds—

11 A: Yes.

12 Q: —using those funds on behalf of those two boys?

13 A: Yes.

14 Q: All right. I have no further questions.

15 THE COURT: Ms. Osborne.

16 CROSS EXAMINATION BY

17 MS. OSBORNE:

18 Q: Ms. Johnson, I'm Janne Osborne, I'm the guardian ad litem for
19 Catina.

20 A: Okay.

21 Q: And do you believe that settling this matter in this manner is also
22 in Catina's best interest?

23 A: Yes.

24 Q: And when was the last time you saw Catina?

25 A: Monday.

1 Q: And her condition is such that you could not even discuss this
2 with her?

3 A: Right. Well because last month they told her about her husband
4 and she had a back set when they told her about her husband.
5 She had gotten real sick (inaudible).

6 MS. OSBORNE: Are there no more funds
7 (inaudible) allocation of State Farm? Viking was—

8 MR. HORGER: I think I may have mis-
9 spoken. I think there was actually a 15/30 policy of which
10 five went to a third party who I presume probably would
11 be Mr. Wendell Hamilton who was involved in the other
12 vehicle?

13 MR. OWEN: That's correct. He was
14 represented by Glenn Walters.

15 MR. HORGER: Okay, and so the policy of
16 15/30 is being exhausted by five to Hamilton and then 25
17 being allocated fifty-fifty to Carina's claim and the estate's
18 claim.

19 THE COURT: That's Viking's claim?

20 MR. HORGER: That's Viking's coverage,
21 yes ma'am. I may have spoke--Viking Insurance
22 Company, liability.

23 THE COURT: Now you've got me
24 confused.

25 MS. : It wasn't in the petition.

1 MR. HORGER: I said before it was 25/50
2 but I mis-spoke. Paul corrected me, it's 15/30.

3 MR. OWEN: 15/30.

4 MR. HORGER: Which five went to a third
5 party which left 25 left out of the coverage. And I
6 apologize.

7 THE COURT: You did talk about State
8 Farm. That's what confused me.

9 MR. HORGER: And in addition to that,
10 State Farm has its 75,000 on top.

11 MR. OWEN : To the under-insured
12 coverage.

13 MR. PLEXICO : Yes, Your Honor, there
14 are three \$25,000.00 policies. All of that is being paid into
15 the estate of Mr. Nelson and that's the extent of the UIM
16 coverage available to him, and that's through his policy
17 that he has with State Farm.

18 THE COURT: And that's one thousand
19 (inaudible)

20 MR. OWEN: That's how, that's how this
21 particular has been split but I don't know if we're going to
22 do one global settlement.

23 MR. HORGER: I've prepared an amended
24 petition to do a global settlement, is a good expression,
25 and my thinking when I got the funeral bill was that we

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1 should cover the expenses and the funeral bill and
2 allocate—The total settlement is 87,500. That's Viking
3 and State Farm's money. What I propose is that we pay
4 sixteen five on the survival, to let that pay the funeral bill
5 and clear out the administrative costs and then the rest of
6 the money can go to the beneficiaries under the intestacy
7 whether it be under the wrongful death statute—

8 MR. OWEN: Right.

9 MR. HORGER: —which initiated my claim
10 and, which would be your client.

11 THE COURT: Okay, so eighty-seven five is
12 the total settlement, 1,650 for (inaudible).

13 MR. HORGER: Sixteen thousand five
14 hundred. The funeral bill is sixteen thousand—

15 MR. OWEN: Six dollars.

16 MR. HORGER: —six dollars and some odd
17 cents.

18 THE COURT: The funeral is sixteen
19 thousand?

20 MR. HORGER: It seemed a bit high, yes
21 ma'am.

22 MR. OWEN: It seemed a bit high.

23 MS. JOHNSON: I would like for that to be
24 paid, you know, so that I could settle that with the Nelson
25 family.

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1 MR. HORGER: And Mr. Owen showed
2 four hundred and something dollars in costs and my
3 thinking was that sixteen five on it would cover all those
4 expenses—

5 MR. OWEN: That's correct.

6 MR. HORGER: --and just let it clear
7 through the survival portion and it's paid out, and then the
8 attorney's fees can come from the other funds and the
9 balance just distributed directly to the (inaudible),
10 whatever it ends up being.

11 MR. : Okay, that would leave
12 \$71,000.00 in the other action.

13 THE COURT: Now does that include or
14 does not include the attorney's fees?

15 MR. OWEN: Does not include.

16 MR. HORGER: The attorney's fees would
17 have to come out of that.

18 MR. OWEN: Correct.

19 THE COURT: That's what I'm trying to
20 figure out. What's going to be the balance to the two
21 minor children?

22 MR. HORGER: I'll give you that figure in
23 a second. The net to the two children which would
24 be—Actually it would be split between half to the father
25 and the other half split between the children.

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THE COURT: To the mother—

MR. OWEN: To the mother.

THE COURT: —and half to the children.

MR. OWEN: That's right.

MR. HORGER: The father is dead. Half goes to the mother's conservatorship and half will go to the children. The total is 41,832—

MS. OSBORNE: (Inaudible)

MR. OWEN: Actually that is included in the administrative expenses. That four hundred over and above it is the guardian fees, and I split the guardian fees between the estate and the conservatorship since you're serving in both.

MS. OSBORNE: Okay

MR. HORGER: It appears about 20,900 will go to the wife's conservatorship and 20,900 will be split between the children.

MR. OWEN: I do have the original funeral home bill.

THE COURT: (Inaudible).

MR. OWEN: The Nelson family, of course they couldn't consult the wife, Your Honor, because she was hospitalized and comatose at the time the Nelson family arranged for the funeral. Nobody in this room had any say in the arrangements.

1 MS. OSBORNE: Paul—

2 MR. OWEN: Yeah.

3 MS. OSBORNE: —if the Nelson family
4 didn't have any authority to do that, why should the estate
5 pay for the Nelson family's expense.

6 MR. OWEN: I think there's a statutory
7 priority that they—

8 MS. OSBORNE: No, no, I argued that case
9 in this court. I can even tell you the name of the case.
10 (Inaudible). That's the auspicious, equity will not aid a
11 volunteer, and if they did not have the statute, if there was
12 a surviving spouse, even though she was comatose, they
13 do not have the authority to enter that expense.

14 MS. JOHNSON: Well, during the time, you
15 know, that my daughter was so critical, she was so critical
16 and so, you know, they wanted to go ahead on and bury
17 Woodrow, my son-in-law, and so since my daughter was
18 so critical, I told them if they found a nice place to put
19 Woodrow, then make it a plot for my daughter too, and
20 which you'll see that on there, on the burial. You know,
21 that was the best that I could do at that time. You know, it
22 was so tragic and so critical.

23 MR. OWEN: Yeah. No one in this room
24 associated with this case executed a contract to bury. It
25 was Mr. Nelson's father and mother who executed the

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contract with Wild's Funeral Home. Ms. Junell was at the hospital with her daughter, Richland Memorial, at this time, and of course, watching out for the two children. It was all she could do to make the funeral (inaudible).

MS. JOHNSON: (Inaudible) several times on the phone about this bill and they want this bill paid.

MS. OSBORNE: Who is the bill going to now?

(Inaudible colloquy)

MS. OSBORNE: But is this claim now from the Nelsons or is it from the funeral home?

MR. OWEN: Nobody's filed a claim in the estate.

MS. OSBORNE: But the claim period doesn't expire until February of '07.

MS. OSBORNE: Yeah, but have they already paid the funeral home?

MR. OWEN: No. No.

MS. OSBORNE: So this claim would be from Wild's Funeral Home?

MR. OWEN: What I can do is just hold that money in trust and if no claim is filed by either the Nelsons or the funeral home, then it would expire, and upon its expiration, I would pay it to the beneficiaries.

(Inaudible colloquy)

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1 MS. OSBORNE: Yeah, is that the Nelsons
2 may not have had the authority to bind the estate, and that
3 is—I mean a \$16,000.00 funeral?

4 MR. OWEN: I thought it was exorbitant as
5 well.

6 MS. OSBORNE: They didn't have the
7 authority to bind the estate and I don't see why the
8 estate—If that's what they wanted, then they should have
9 undertaken to pay for it. I mean, I know, I mean the last
10 time I was in this court I was arguing that case. No,
11 actually (inaudible). But I can pull my, I have a brief in
12 that case and I can pull it. I think the law is very clear that
13 they have no standing.

14 THE COURT: They were his parents?

15 MR. OWEN: Correct. They're from
16 Georgetown, and they were given the opportunity and
17 noticed when we petitioned to have Ms. Junell appointed
18 as the PR of the estate and they never responded in any
19 way, shape or fashion, so.

20 THE COURT: Ms. Rosamond.

21 MS. ROSAMOND: Your Honor, I'm going
22 to say since a claim has not been filed that this issue
23 regarding the funeral expenses perhaps should be held in
24 abeyance to see if a claim is going to be filed. I think Ms.
25 Osborne has raised a good point here regarding, you know,

1 who had the authority or whether there was authority to
2 incur that kind of expense for the funeral, and so I think,
3 I'll make a motion on behalf of the children, and I think
4 that's probably the proper way to do it, to hold that issue
5 in abeyance until the time for the claim, to file this claim
6 has expired.

7 THE COURT: Okay, we'll do that, and Mr.
8 Owen will hold the funds in escrow.

9 MR. OWEN: Correct, Your Honor.

10 THE COURT: All right, the claim period,
11 according to my records, is going to expire in February,
12 I'll give you the exact date. Let's see, the notices went out
13 on June 10th, 17th and 24th of 2006, so the claims period
14 will expire on June, I'm sorry, February 10th of 2007.

15 MS. ROSAMOND: And, Your Honor, may
16 I approach? I had done this report for the court.

17 MS. OSBORNE: Your Honor, I did not feel
18 it necessary to do a report because the statements of the
19 doctors and Catina's medical condition is so clear that I
20 didn't think it was necessary to file a report that she is
21 incapable of participating in any way.

22 THE COURT: Thank you. Anything else
23 from anyone? Ms. Johnson, you understand that these are
24 going to be final as to these two defendants, Viking and
25 State Farm?

1 MS. JOHNSON: Yes, ma'am.

2 MR. HORGER: I'd like to ask her, you
3 understand that if it's approved and the money is paid and
4 a release is executed by order of the court that there will be
5 no right to make any further claim against Mr. Clemons or
6 Viking Insurance Company or State Farm?

7 MS. JOHNSON: Yes, sir.

8 MR. HORGER: And that would be it, that
9 would be all and the matter could not go forward against
10 Mr. Clemons or either of those insurance companies?

11 MS. JOHNSON: Okay.

12 THE COURT: And do you understand what
13 we're saying, we're saying that the claims period does not
14 expire until February?

15 MS. JOHNSON: Until February. Okay,
16 yes, I understand.

17 THE COURT: Do you understand what that
18 means?

19 MS. JOHNSON: Yes, I do.

20 THE COURT: And, Mr. Horger, you said
21 that you're going to file an amended petition?

22 MR. HORGER: Yes.

23 THE COURT: And that is going to include
24 Mr. Owen's statement?

25 MR. OWEN: That's going to be I like to say

1 a global petition that's going to encompass all coverage,
2 expenses, et cetera of the estate and I think we'll include
3 the language holding the funeral expenses, final expenses,
4 in abeyance until such time as the claims period expires or
5 until such time as the claim is filed.

6 THE COURT: And for the record you feel
7 that this is in the best interest of the estate?

8 MR. OWEN: I feel that it is in the best
9 interest of the estate.

10 THE COURT: Okay. I will approve the
11 settlement, I find that it is reasonable, and in light of all
12 circumstances I find that it is in the best interest of the
13 estate. Mr. Horger is going to prepare the order.

14 MR. HORGER: I will be glad to, Your
15 Honor.

16 THE COURT: Nothing else?

17 MR. HORGER: I'm trying to add this
18 funeral bill and for the life of me I can't do it but just
19 looking at it, it didn't seem to me that it should add up to
20 \$16,000.00.

21 THE COURT: Okay.

22 MR. HORGER: I haven't done the math on
23 it.

24 THE COURT: We'll give you a moment.

25 MR. OWEN: I've got 15,611.45.

1 MR. HORGER: It's a little difference.

2 THE COURT: Not much.

3 MS. ROSAMOND: Your Honor, if I may,
4 I'd also request, and it may not be necessary, but that in
5 the order that there be some language that the estate would
6 (inaudible) any and all defenses regarding this funeral
7 home claim, that the estate may choose to waive at that
8 time if a claim is in fact filed.

9 THE COURT: Okay.

10 MR. OWEN: Okay, we reserve all defenses.

11 MR. HORGER: 15,386.45. So just the
12 math shaves \$700.00 off of it.

13 MS. OSBORNE: Is there a second page to
14 it?

15 MR. HORGER: (Inaudible).

16 THE COURT: On the bottom of this one it
17 has total.

18 MR. HORGER: Sixteen thousand, and in
19 adding that column I only come up with 15,386.

20 THE COURT: Anything else?

21 MR. OWEN: Nothing further, Your Honor,
22 I don't think.

23 THE COURT: Thank you, and good luck to
24 you all.

25 (HEARING ADJOURNED.)

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MR. OWEN: Actually, now we need a guardian for each of those, yeah, and I think the children have a right to be there.

THE COURT: Or my calendar yesterday.

MR. OWEN: I don't know where the confusion got it but I apologize for the confusion on that, but yeah, we had Eddie Williams, Jr. To be appointed as the conservator for Catina Nelson because she is non compos mentis and we have some funds coming into her estate, I mean her conservatorship.

THE COURT: Okay, we've got Ms. Rosamond (inaudible).

MR. OWEN: Uh-huh, Ms. Osborne and we have Mr. Williams here.

THE COURT: Okay, we're now on the record in the matter of Catina W. Nelson, 2006-38-18. This matter is before the court on petition for appointment of conservator. If you would introduce yourself and your client, please.

MR. OWEN: Paul Owen on behalf of Eddie Williams, Jr who we've nominated as conservator for Catina Nelson.

MS. ROSAMOND: Ariel Rosamond, I'm guardian ad litem for the minor children.

MS. OSBORNE: Janne Berry Osborne,

1 guardian ad litem for Catina Nelson.

2 THE COURT: All right, and we also have
3 the petitioner here, Mr. Eddie Williams?

4 MR. WILLIAMS: Yes.

5 THE COURT: All right. Mr. Owen, you
6 may proceed.

7 MR. OWEN: Your Honor, you've received
8 the documents. We petitioned to have Eddie Williams
9 appointed as conservator for Catina Nelson who is
10 incapacitated. The Affidavits of Incapacity have been
11 filed by her treating physicians in the court's file, I
12 believe. There are funds coming into her estate in the total
13 amount of \$87,500.00. Additionally, there's
14 approximately \$30,000.00 in life insurance funds which
15 are outside of the settlement with the under-insured carrier
16 and the liability carrier. We believe it to be in the best
17 interest of Catina W. Nelson being an incapacitated person
18 to have Eddie Williams be appointed as conservator for
19 her. He is a sheriff with the Barnberg County Sheriff's
20 office and he is a person who is (inaudible) and look after
21 her best interest and those of her children. We didn't feel
22 it appropriate, even though Junell is her mother, to have
23 her wear both the hat of the estate which Catina's interest
24 and the children's interest and also to have the person, that
25 same person being over her interest (inaudible), at some

1 point maybe those interests might collide, so Junell has
2 nominated Eddie, who is Catina's uncle, to be the
3 conservator for Catina Nelson.

4 THE COURT: Okay, Mr. Williams, please
5 come forward. Raise your right hand for me. Do you
6 affirm that the testimony you're going to give today to be
7 the truth?

8 MR. WILLIAMS: I do.

9 THE COURT: All right, please state your
10 full name for the record, please.

11 MR. WILLIAMS: Eddie Williams, Jr.

12 THE COURT: You may be seated.

13 THE WITNESS, EDDIE WILLIAMS, JR., FIRST
14 HAVING BEEN DULY SWORN, TESTIFIED AS
15 FOLLOWS:

16 DIRECT EXAMINATION BY

17 MR. OWEN:

18 Q: Okay, Mr. Williams, we've had some discussions on the
19 telephone and you understand your role as conservator would be
20 to look after the funds as if you were Catina herself, and that this
21 money is hers and it's to be used for her benefit and welfare,
22 correct?

23 A: Yes, sir.

24 Q: Okay, and that you have agreed to serve in this capacity. Could
25 you explain to the court your relationship to Catina?

1 A: She is my niece by marriage. My wife and her mother are
2 sisters.

3 Q: Okay. And besides being a sheriff's deputy for Bamberg
4 County, you are a reverend as well as I understand?

5 A: I pastor (inaudible) Baptist Church in Barnwell County.

6 Q: Okay, and you're a person, you have a great deal of
7 responsibility and trust that your congregation places in you as
8 well as the citizens of Bamberg County, correct?

9 A: Yes, sir.

10 Q: Okay. And you will execute the duties of conservator on behalf
11 of Catina with this same sense of responsibility?

12 A: To the best of my ability.

13 Q: Okay.

14 MR. OWEN: We request that he be
15 appointed as conservator for Catina Nelson and that he
16 answer any questions the guardian ad litem or the counsel
17 for the insurance carriers may have.

18 THE COURT: Okay, we'll start with you,
19 Ms. Rosamond.

20 MS. ROSAMOND: I have no questions,
21 Your Honor.

22 THE COURT: All right. Ms. Osborne.

23 MS. OSBORNE: I have none.

24 THE COURT: Okay. Mr. Williams, have
25 you ever—Did you have any questions?

1 MR. PLEXICO: No, ma'am.

2 MR. HORGER: I don't have any questions
3 about the appointment of conservator but I'd ask if we
4 could just have a hearing on the approval of the non
5 compos mentis and then you could issue your ruling nunc
6 pro tunc if we file an amended global settlement petition.
7 I mean we have everybody here, if you would consider
8 that.

9 THE COURT: Have you ever filed
10 bankruptcy?

11 A: No, ma'am.

12 THE COURT: Ever been convicted of any
13 felony?

14 A: No.

15 THE COURT: You've indicated in your
16 petition that her assets are \$25,000.00 personal effects.
17 The other assets would include, did you say approximately
18 20,000?

19 MR. OWEN: Well, eighty-seven five will
20 be coming subject to attorney's fees, so about fifty there
21 and I think there's an additional thirty, an amount looks
22 like \$116.00 interest, of life insurance proceeds from the
23 Woodrow Nelson through his employer's coverage.

24 THE COURT: Okay, I'm trying to get an—

25 MR. OWEN: Okay, I'm thinking, let's say

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1 \$80,000.00 would be about right.

2 THE COURT: You said insurance
3 proceeds?

4 MR. OWEN: Life insurance proceeds.

5 MR. : (Inaudible).

6 MR. OWEN: Right. It could be up to about
7 \$90,000.00. There's some bank accounts—

8 THE COURT: —life insurance proceeds?

9 MR. OWEN: Just over thirty, like 30,100.
10 According to Mr. Horger's calculations, about 58,000
11 would be the net of the insurance settlements with the
12 automobile insurance carriers, so it's going to be 30 plus
13 58, 88, and then her personal effects, somebody did rifle
14 the bank accounts for both Woodrow and Catina after
15 their, after the accident.

16 THE COURT: So about \$88,000.00?

17 MR. OWEN: It would be more in the
18 neighborhood of 90. She didn't have a vehicle or anything
19 and the only other thing would be out there that I'm aware
20 of is that unfortunately in Orangeburg County after the
21 tragic accident, someone broke into their home and stole,
22 basically emptied the home that Woodrow and Catina had,
23 so we have filed a claim with their property and casualty
24 insurance carrier, have not received any word on that, so
25 that would be kind of a mystery, so I would estimate

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90,000 or so.

THE COURT: Okay. Have you discussed a bond with your client?

MR. OWEN: We've talked about a bond. We, you know, weren't sure of how much it would be in place, but yeah, you understand that you'd be bonded and the bonding company would issue a bond, and if you do this correctly and everything and I do it on behalf of Catina just as if she were here, that it would be the conservatorship's expense to purchase the bond on your behalf, but in the event that they found that you misused funds or the court makes such finding, then the bonding company would sue you personally, and you understand being a deputy sheriff what bond is all about, I assume.

A: Right.

Q: Okay.

MR. OWEN: We could take the bond in about 90,000.

THE COURT: Okay. I'll find that Catina Nelson is an incapacitated person for whom conservatorship is necessary, (inaudible) bond in the amount of \$90,000.00 (inaudible). If you will prepare a brief order for me, Mr. Owen.

MR. OWEN: Yes.

THE COURT: We can go off the record.

1 STATE OF SOUTH CAROLINA) NOTARY CERTIFICATION
2 COUNTY OF LEXINGTON)

3 I, Annette L. Almond, Court Reporter and Notary Public, in and
4 for the State of South Carolina, hereby certify that the foregoing
5 transcript containing pages One (1) through Twenty-eight (28) is a
6 true, accurate and complete transcript of the official recorded tapes of
7 the Probate Court for Orangeburg County in the aforementioned case.

8 I further certify that I am not of counsel or kin to any of the
9 parties this cause of action nor am I interested in any manner in its
10 outcome.

11 I hereunto set my hand and seal this 9th day of January, 2008.

12

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Annette L. Almond

17

Notary Public for South Carolina

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My Commission Expires: 6/20/2013

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West Columbia, S. C.

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January 9, 2008

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Estate of Woodrow C. Nelson

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STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0573

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

NOTICE OF APPEAL

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS:

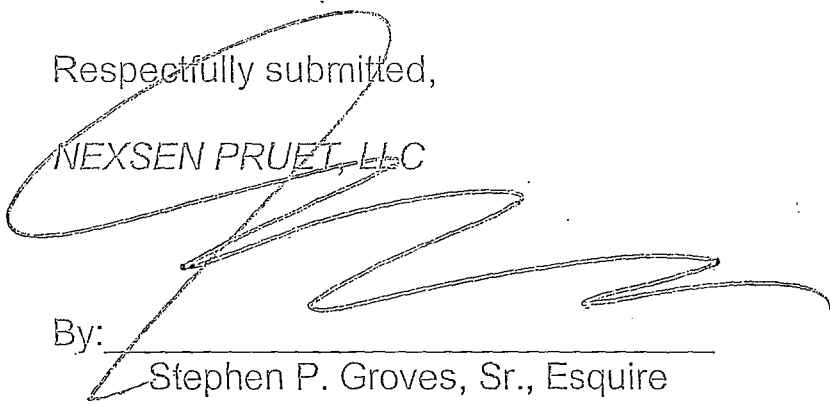
COMES NOW the Appellant, Michael Lee Clemons ("Mr. Clemons"), pursuant to Rule 203 of the South Carolina Appellate Court Rules, and respectfully hereby serves his Notice of Appeal showing he is appealing the below-listed orders and judgments in this matter:

- a. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondent's Complaint;
- b. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motion to Reconsider or Later or Amend; and
- c. Judgment dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$3,000,000.00.

Counsel for Mr. Clemons received filed and stamped copies of the Judgment on 7 February 2011. Copies of the Judgment and the Circuit Court orders appealed from are collectively attached hereto as Exhibit "A" and is incorporated herein by reference.

Respectfully submitted,

NEXSEN PRUET, LLC

By: 

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7 March 2011

NPCHAR1:638554.1-NC-(SPG) 022447-00005

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Attorneys for the Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

ORDER DENYING
MOTION TO DISMISS

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

ORDER DENYING
MOTION TO DISMISS

These matters came before me on June 11, 2008, upon motions of the Defendant to dismiss each case based on an agreement to settle the Plaintiffs' claims reached between the Defendant's insurance carrier and Plaintiffs' counsel. Essentially, the Defendant asks this Court to enforce these agreements to settle and dismiss Plaintiffs'

ATTEST TRUE COPY

Charles L. Williams
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

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HORGER000044

complaints.¹ At the hearing both sides were represented by their respective counsel.

These claims arise out of an automobile collision which occurred in Orangeburg County on the morning of March 25, 2006. At that time, the Nelsons were hit head-on by Michael Lee Clemons. Woodrow Nelson died as a result of the wreck. His young wife, Catina Nelson, sustained a catastrophic brain injury. The Nelsons had two small children.

Defendant Clemons was insured by Viking Insurance. However, Viking Insurance did not pay its available liability coverage to the Plaintiffs' attorney or into the court. This motion essentially now seeks to force Plaintiffs to accept that coverage.

Additionally, the Nelsons had purchased underinsured coverage from State Farm Insurance Company. As a result of the wreck, State Farm offered and paid its underinsured coverage to Nelsons.

On September 13, 2006, a hearing was scheduled before the Orangeburg Probate Court to approve the settlement of Woodrow Nelson's death claims (wrongful death and survival) as well as to appoint a conservator for Catina Nelson. Plaintiffs' counsel argued and it appears from a review of the transcript of the probate hearing that it was initially setup to approve only the payment of State Farm's coverage because Viking had not paid

¹ In case number 07-CP-38-574, Eddie Williams as Conservator for Catina W. Nelson v. Michael Lee Clemons, in his written motion counsel for the Defendant also moved to dismiss that case pursuant to Rule 12(b)(7) for the failure to join the South Carolina Department of Health and Human Services as a necessary and indispensable party under Rule 19. At the hearing, counsel did not argue anything with respect to this ground for dismissal. Therefore, the Court assumes that this ground is abandoned. Nonetheless, even if it were not abandoned, the Court does not believe that the South Carolina Department of Health and Human Services is required to be joined in this matter under Rule 19 and would so rule. Accordingly, if the argument is not abandoned, the motion on this basis is denied.

its coverage.² Nonetheless, the transcript indicates that the hearing went forward to approve the settlement of the death claims of Woodrow Nelson with Viking's coverage to be included in that agreement and approval. The transcript does not contain any direct reference to an approval of the claims of Catina Nelson by the Probate Court nor does it specifically reflect the terms of any agreement relating to Catina Nelson's claim.

The dispute here arises concerning the payment of the liability proceeds by Viking for the Nelsons' claims. Counsel for Defendant Nelson argues that Viking did not pay, because it did not have all the information it needed. Plaintiffs' counsel argues that repeated demands for the payment were made on the insurance company during the six months following the September 13, 2006, hearing and for it to send the checks to the Plaintiffs' lawyer's office. Ultimately, the Plaintiffs contend that they withdrew their assent to the agreement because the money was not paid. Essentially, Plaintiffs do not contest that at one time they had agreed to and would have accepted the limited coverage; instead, they maintain that the agreement was that the money would be paid and that it was not.

Rule 43(k), SCRCP, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation. Ashcroft v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (S.C. 1995). Before the Court can enforce an agreement, the existence and the terms of the agreement must be reduced to the form of a consent order

² For instance, on page 5 of the transcript, counsel for Defendant Clemons indicates that the petition that was being presented to the court was filed by State Farm and did not include Viking's coverage. Counsel then goes on to state that he doesn't know how Viking got "behind" the UIM. Further, counsel for Defendant Clemons indicated that he "would prepare" an amended petition that would include Viking's coverage.

or written stipulation signed by counsel and entered on the record, or made in open court and noted upon the record. Substantial compliance with the rule does not work and is insufficient. Id. at 495, 458 S.E.2d at 535, citing Lyons Enter., Inc. v. Custer, 168 Ariz. 439, 814 P.2d 780 (Ct. App. 1991) ("A stipulation that simply states that a settlement has been reached, but does not set forth the terms of the settlement does not serve the purpose of the rule."). See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (S.C. 1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRPC.").

Essential terms of a settlement include the amount of payment as well as the time and manner of payment. "This 'meeting of the minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (S.C. 1989). Further, there can be no enforceable duty to perform so long as, in contemplation of the parties thereto, something remains to be done to establish a duty to perform. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (S.C. 1975).

In Reed v. Associated Investments, 339 S.C. 148, 154, 528 S.E.2d 94, 97 (S.C. Ct. App. 2000), a case where the parties agreed on the settlement amount but not the terms of the settlement, the court held:

Where the parties agree on the amount of the settlement, but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. See, Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997). As we read the record, we find the trial court erred in concluding that Reed and Associated reached an agreement about the terms

of the settlement. 'Because the conditions upon which an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement on the terms of the settlement is fatal . . . To conclude otherwise would largely render meaningless the requirements that settlement agreements be in writing.' Id. at 546, 481 S.E.2d at 716.

Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the requirements of Rule 43(k) preclude enforcement of the settlement.

See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 460 S.E.2d 396 (S.C. 1995)(holding that "a settlement order is unenforceable where it fails to set forth the terms of the settlement and required by Rule 43(k).")(emphasis added); Farnsworth v. Davis Heating & Air, 367 S.C. 634, 627 S.E.2d 724(S.C. 2006)(holding until the terms of an agreement satisfy Rule 43(k), the agreement is non-binding and until a party is bound, she is entitled to withdraw her assent).

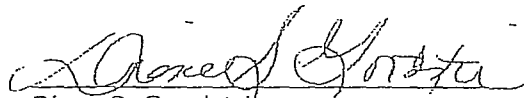
In these matters, the offers to settle were conditioned on the payment of Viking Insurance's coverage. For whatever reason, that payment did not occur as contemplated by the parties. Moreover, the transcript of the probate hearing fails to set forth when or how the money would be paid to the Plaintiffs.³ Therefore, there is no enforceable agreement and Plaintiffs were entitled to withdraw their assent. See e.g., Young v. Cooler, 347 S.C. 362, 555 S.E.2d 410(S.C. Ct. App. 2001)(holding that there is no meeting of the minds where the parties envisioned that further work was needed to finalize a settlement agreement and that even if there was an intent to be bound and an attempt to announce

³ In any event, there is nothing in the transcript of the probate hearing specifically about the settlement of Catina Nelson's claims. Moreover, the Court finds there is no enforceable agreement under Rule 43(k) with respect to her claim even if the insurance company's failure to pay was excused.

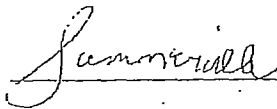
to the court that a settlement had been reached, the failure to put the essential terms of the purported settlement on the record prevent the requirements of Rule 43(k) from being met and the settlement from being enforced by the court). Cf. Cheap-O's Truck Sto. Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (S.C. Ct. App. 2002)(finding that where the material terms of the settlement agreement, namely the amount of the settlement, the time for payment, and the conditions of the payment, were read into the record, it complied with Rule 43(k) and was enforceable by the court).

... Accordingly, Defendant's motions are hereby DENIED.

IT IS SO ORDERED, this 30 day of Sept, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit



Samuel R. Williams, South Carolina

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG
 JUNELL W. JOHNSON AS
 PERSONAL REPRESENTATIVE
 OF THE ESTATE OF
 WOODROW C. NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
 C/A#: 07-CF-38-573

ORDER DENYING
 MOTION TO RECONSIDER
 OR ALTER OR AMEND

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG

EDDIE WILLIAMS AS
 CONSERVATOR FOR CATINA W.
 NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
 C/A#: 07-CP-38-574

ORDER DENYING
 MOTION TO RECONSIDER
 OR ALTER OR AMEND

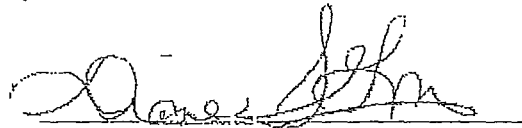
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On September 30, 2008, this Court issued its order in these matters denying Defendant's motions to dismiss. The order was filed on October 13, 2008. Subsequently, Defendant filed an Amended Notice of Motion and Motion for Reconsideration or In The Alternative to Alter or Amend the Order Pursuant to Rule 59(e), SCRCP, which presently before me.

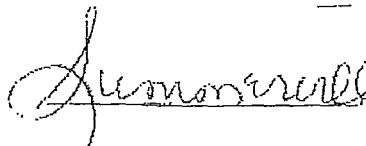
193

After reviewing my Order and everything presented to the Court, it does not appear that the motion to reconsider raises any issue that was not previously considered by and ruled upon by the Court. Moreover, there is no reason to alter or amend the order and none has been presented. Accordingly, Defendant's motions to reconsider or alter or amend are hereby DENIED.

IT IS SO ORDERED, this 31 day of Dec, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

 Sumner, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
JUNELL W. JOHNSON as Personal)
Representative of the Estate of)
WOODROW C. NELSON,)
)
Plaintiff,)
)
vs.)
)
MICHAEL LEE CLEMONS,)
)
Defendant.)
)

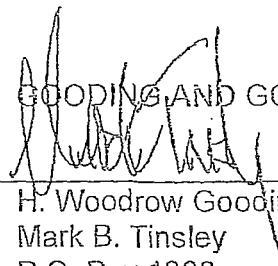
IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

OFFER OF JUDGMENT

OFFER OF JUDGMENT

Plaintiff, pursuant to Rule 68 of the South Carolina Rules of Civil Procedure, hereby offers to take judgment in the Plaintiff's favor for a total of Three Million and No/100 (\$3,000,000.00) Dollars, included herein costs now accrued. Should this offer not be accepted within twenty (20) days, it is deemed withdrawn and Plaintiff shall proceed with preparation for trial. Furthermore, if this offer is not accepted and Plaintiff obtains a verdict of determination at least as favorable as this offer, Plaintiff shall recover from Defendant any administrative, filing, or other court costs from the date of this offer until the entry of the judgment, and (7.25%) percent interest computed on the amount of the verdict award from the date of the offer to the entry of judgment.

GOODING AND GOODING, P.A.

By: 

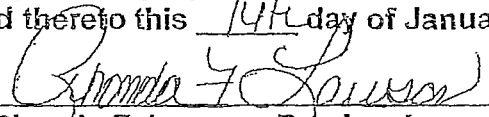
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

CERTIFICATE OF SERVICE BY MAIL

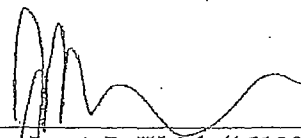
I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14th day of January, 2011.

By: 

Rhonda F. Lawson, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-573
COUNTY OF ORANGEBURG	)	
	)	
Junell W. Johnson as Personal	)	
Representative of the Estate of	)	
Woodrow C. Nelson,	)	
	)	ACCEPTANCE OF SCRPC 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	
_____	)	

The Defendant Michael Lee Clemons by and through his undersigned counsel in accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of \$3,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: 
 James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for the Defendant

February 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0573

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

PROOF OF SERVICE
for the
NOTICE OF APPEAL

Stephen P. Groves, Sr., 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
E-Mail: pdominick@nexsenpruet.com

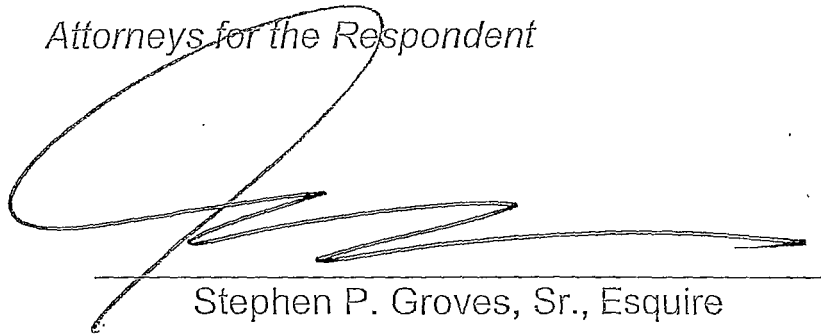
*Attorneys for the Appellant,
Michael Lee Clemons*

198

I, Stephen P. Groves, Esquire, hereby certify that on 7 March 2011, I served a copy of the Notice of Appeal submitted by the Appellant, Michael Lee Clemons, on counsel for the Respondent via United States Mail, postage pre-paid, and addressed as follows:

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A.
Post Office Box 1000
Allendale, South Carolina 29810
Telephone: 803.584.7676

Attorneys for the Respondent



Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

7 March 2011

NPCHAR1:638554.1-NC-(SPG) 022447-00005

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574

Eddie Williams, as Conservator for
Catina W. Nelson,

RECEIVED
MAR 08 2011
Respondent,
SC Court of Appeals

v.

Michael Lee Clemons,

Appellant.

NOTICE OF APPEAL

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

*Attorneys for the Appellant,
Michael Lee Clemons*

200

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS:

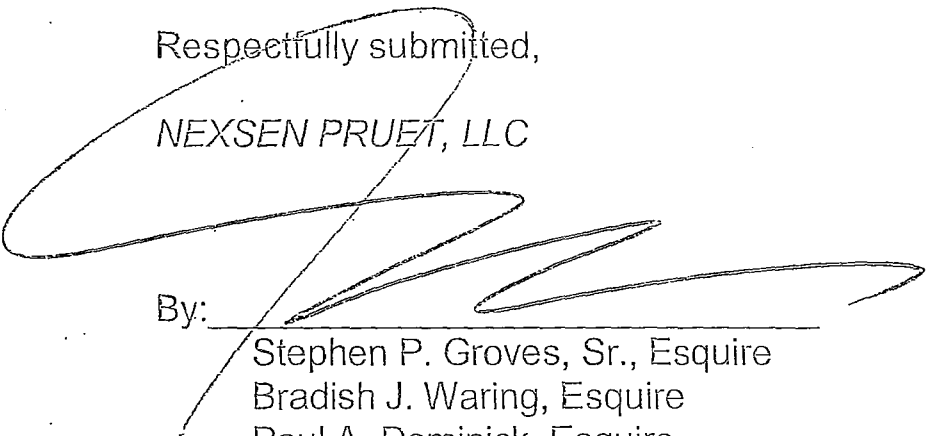
COMES NOW the Appellant, Michael Lee Clemons ("Mr. Clemons"), pursuant to Rule 203 of the South Carolina Appellate Court Rules, and respectfully hereby serves his Notice of Appeal showing he is appealing the below-listed orders and judgments in this matter:

- a. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondent's Complaint;
- b. Order of the Honorable Diane S. Goodstein, Circuit Judge, dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motion to Reconsider or Later or Amend; and
- c. Judgment dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$6,000,000.00.

Counsel for Mr. Clemons received filed and stamped copies of the Judgment no earlier than 7 February 2011. Copies of the Judgment and the Circuit Court orders appealed from are collectively attached hereto as Exhibit "A" and is incorporated herein by reference.

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

*Attorneys for the Appellant,
Michael Lee Clemons*

Charleston, South Carolina

7 March 2011

NPCHAR1:638567.1-NC-(SPG) 022447-00005

OTHER COUNSEL OF RECORD ARE:

H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
GOODING AND GOODING, P.A
Post Office Box 1000
Allendale, South Carolina 29810
Telephone: 803.584.7676

Attorneys for the Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

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

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-573

ORDER DENYING
MOTION TO DISMISS

2008 OCT 13 P 12:05
CLERK OF COURT
JUNELL W. JOHNSON
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
WOODROW C. NELSON

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

EDDIE WILLIAMS AS
CONSERVATOR FOR CATINA W.
NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

ORDER DENYING
MOTION TO DISMISS

These matters came before me on June 11, 2008, upon motions of the Defendant to dismiss each case based on an agreement to settle the Plaintiffs' claims reached between the Defendant's insurance carrier and Plaintiffs' counsel. Essentially, the Defendant asks this Court to enforce these agreements to settle and dismiss Plaintiffs'

ATTEST: TRUE COPY

[Signature]
CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

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complaints.¹ At the hearing both sides were represented by their respective counsel.

These claims arise out of an automobile collision which occurred in Orangeburg County on the morning of March 25, 2006. At that time, the Nelsons were hit head-on by Michael Lee Clemons. Woodrow Nelson died as a result of the wreck. His young wife, Catina Nelson, sustained a catastrophic brain injury. The Nelsons had two small children.

Defendant Clemons was insured by Viking Insurance. However, Viking Insurance did not pay its available liability coverage to the Plaintiffs' attorney or into the court. This motion essentially now seeks to force Plaintiffs to accept that coverage.

Additionally, the Nelsons had purchased underinsured coverage from State Farm Insurance Company. As a result of the wreck, State Farm offered and paid its underinsured coverage to Nelsons.

On September 13, 2006, a hearing was scheduled before the Orangeburg Probate Court to approve the settlement of Woodrow Nelson's death claims (wrongful death and survival) as well as to appoint a conservator for Catina Nelson. Plaintiffs' counsel argued and it appears from a review of the transcript of the probate hearing that it was initially setup to approve only the payment of State Farm's coverage because Viking had not paid

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its coverage.² Nonetheless, the transcript indicates that the hearing went forward to approve the settlement of the death claims of Woodrow Nelson with Viking's coverage to be included in that agreement and approval. The transcript does not contain any direct reference to an approval of the claims of Catina Nelson by the Probate Court nor does it specifically reflect the terms of any agreement relating to Catina Nelson's claim.

The dispute here arises concerning the payment of the liability proceeds by Viking for the Nelsons' claims. Counsel for Defendant Nelson argues that Viking did not pay, because it did not have all the information it needed. Plaintiffs' counsel argues that repeated demands for the payment were made on the insurance company during the six months following the September 13, 2006, hearing and for it to send the checks to the Plaintiffs' lawyer's office. Ultimately, the Plaintiffs contend that they withdrew their assent to the agreement because the money was not paid. Essentially, Plaintiffs do not contest that at one time they had agreed to and would have accepted the limited coverage; instead, they maintain that the agreement was that the money would be paid and that it was not.

Rule 43(k), SCRPC, is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation. Ashcroft v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (S.C. 1995). Before the Court can enforce an agreement, the existence and the terms of the agreement must be reduced to the form of a consent order

² For instance, on page 5 of the transcript, counsel for Defendant Clemons indicates that the petition that was being presented to the court was filed by State Farm and did not include Viking's coverage. Counsel then goes on to state that he doesn't know how Viking got "behind" the UIM. Further, counsel for Defendant Clemons indicated that he "would prepare" an amended petition that would include Viking's coverage.

or written stipulation signed by counsel and entered on the record, or made in open court and noted upon the record. Substantial compliance with the rule does not work and is insufficient. Id. at 495, 458 S.E.2d at 535, citing Lyons Enter., Inc. v. Custer, 168 Ariz. 439, 814 P.2d 780 (Ct. App. 1991) ("A stipulation that simply states that a settlement has been reached, but does not set forth the terms of the settlement does not serve the purpose of the rule."). See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (S.C. 1995) ("a settlement order is unenforceable where it fails to set forth the terms of the settlement as required by Rule 43(k), SCRPC.").

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Where the parties agree on the amount of the settlement, but not the terms of the settlement, it is not admitted so as to remove Rule 43(k)'s requirements. See, Galloway v. Regis Corp., 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1997). As we read the record, we find the trial court erred in concluding that Reed and Associated reached an agreement about the terms

of the settlement. 'Because the conditions upon which an agreed-upon sum of money will be paid are material terms of any settlement agreement, the absence of agreement on the terms of the settlement is fatal . . . To conclude otherwise would largely render meaningless the requirements that settlement agreements be in writing.' Id. at 546, 481 S.E.2d at 716.

Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the requirements of Rule 43(k) preclude enforcement of the settlement.

See also, Widewater Square Assoc. v. Edens, 319 S.C. 243, 460 S.E.2d 396 (S.C. 1995)(holding that "a settlement order is unenforceable where it fails to set forth the terms of the settlement and required by Rule 43(k).")(emphasis added); Farnsworth v. Davis Heating & Air, 367 S.C. 634, 627 S.E.2d 724(S.C. 2006)(holding until the terms of an agreement satisfy Rule 43(k), the agreement is non-binding and until a party is bound, she is entitled to withdraw her assent).

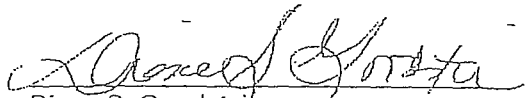
In these matters, the offers to settle were conditioned on the payment of Viking Insurance's coverage. For whatever reason, that payment did not occur as contemplated by the parties. Moreover, the transcript of the probate hearing fails to set forth when or how the money would be paid to the Plaintiffs.³ Therefore, there is no enforceable agreement and Plaintiffs were entitled to withdraw their assent. See e.g., Young v. Cooler, 347 S.C. 362, 555 S.E.2d 410(S.C. Ct. App. 2001)(holding that there is no meeting of the minds where the parties envisioned that further work was needed to finalize a settlement agreement and that even if there was an intent to be bound and an attempt to announce

³ In any event, there is nothing in the transcript of the probate hearing specifically about the settlement of Catina Nelson's claims. Moreover, the Court finds there is no enforceable agreement under Rule 43(k) with respect to her claim even if the insurance company's failure to pay was excused.

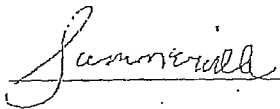
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Accordingly, Defendant's motions are hereby DENIED.

IT IS SO ORDERED, this 30 day of Sept, 2008.



Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit



South Carolina

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG
 JUNELL W. JOHNSON AS
 PERSONAL REPRESENTATIVE
 OF THE ESTATE OF
 WOODROW C. NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,
 Defendant.

IN THE COURT OF COMMON PLEAS
 CIA#: 07-CP-38-573

ORDER DENYING
 MOTION TO RECONSIDER
 OR ALTER OR AMEND

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG
 EDDIE WILLIAMS AS
 CONSERVATOR FOR CATINA W.
 NELSON,

Plaintiff,

vs

MICHAEL LEE CLEMONS,
 Defendant.

IN THE COURT OF COMMON PLEAS
 CIA#: 07-CP-38-574

ORDER DENYING
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 OR ALTER OR AMEND

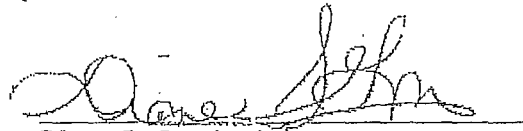
On September 30, 2008, this Court issued its order in these matters denying Defendant's motions to dismiss. The order was filed on October 13, 2008. Subsequently, Defendant filed an Amended Notice of Motion and Motion for Reconsideration or In The Alternative to Alter or Amend the Order Pursuant to Rule 59(e), SCRCP, which presently before me.

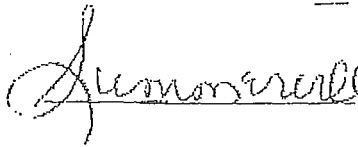
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HORGER000009

After reviewing my Order and everything presented to the Court, it does not appear that the motion to reconsider raises any issue that was not previously considered by and ruled upon by the Court. Moreover, there is no reason to alter or amend the order and none has been presented. Accordingly, Defendant's motions to reconsider or alter or amend are hereby DENIED.

IT IS SO ORDERED, this 31 day of Dec, 2008.


Diane S. Goodstein
Chief Administrative Judge
First Judicial Circuit

 Sumner
South Carolina

IN THE COURT OF COMMON PLEAS
C/A#: 07-CP-38-574

C/A#: 07-CP-38-574

OFFER OF JUDGMENT

OFFER OF JUDGMENT

OFFER OF JUDGMENT

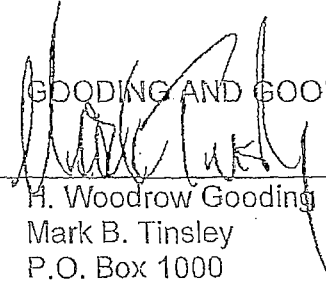
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GOODING AND GOODING, P.A.

By: 

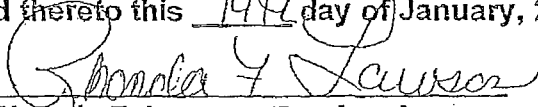
H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

ATTORNEYS FOR PLAINTIFF

Dated: January 14, 2011

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 14th day of January, 2011.

By: 

Rhonda F. Lawson, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2007-CP-38-574
COUNTY OF ORANGEBURG	)	
	)	
Eddie Williams as Conservator for	)	
Catina W. Nelson,	)	
	)	ACCEPTANCE OF SCRCP 68
Plaintiff,	)	OFFER OF JUDGMENT
	)	
vs.	)	
	)	
Michael Lee Clemons,	)	
	)	
Defendant.	)	

The Defendant Michael Lee Clemons by and through his undersigned counsel in accordance with Rule 68(a) of the South Carolina Rules of Civil Procedure hereby accepts the Offer of Judgment filed by the Plaintiff January 18, 2011 in the amount of \$6,000,000 and authorizes the clerk to enter judgment against him in that amount.

By: _____

James P. Walsh (15180)
 Clarkson, Walsh, Terrell & Coulter, P.A.
 P.O. Box 6728
 Greenville, SC 29606
 (864) 232-4400
 (864) 235-4399 (fax)
 Attorneys for the Defendant

February 4, 2011

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2007-CP-38-0573
Case No. 2007-CP-38-0574

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

v.

Michael Lee Clemons, ... Appellant.

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

v.

Michael Lee Clemons, ... Appellant.

**RESPONDENTS' REPLY TO APPELLANT'S RETURN
TO RESPONDENTS' MOTION TO DISMISS APPEALS**

Pursuant to Rule 240(f), SCACR, Respondents Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson, and Eddie Williams, as Conservator for Catina W. Nelson, reply as follows to the Return filed on behalf of the putative appellant, Michael Lee Clemons. Respondents adhere to the arguments they made in the Motions to Dismiss but file this Reply to respond to assertions Mr. Clemons's insurer, Viking/Peak (hereafter "Viking"), made in the Return.

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I.

Viking references a “First Amended Motion to Intervene Via Rule 24, SCRCivP (sic)” which was filed on March 14, 2011, and which Viking attached to the Return. (Return, p. 3, n. 1). Although Viking certifies that the Amended Motions to Intervene were served upon the Respondents four days earlier (March 10, 2011), Respondents’ counsel does not have any record of having received the Amended Motions to Intervene. Had they been in Respondents’ file they would have been appended to the Motion to Dismiss. The first time Respondents’ counsel saw these Amended Motions to Intervene were as exhibits attached to the Return. However, the Amended Motions to Intervene pursuant to Rule 24, SCRCvP, do not change the posture of the appeal in this case – that is, as an appeal from two voluntarily accepted confessions of judgment.

II.

Viking contends that Mr. Walsh (Mr. Clemons’s true attorney) has now become a part of the team of lawyers representing Mr. Clemons in this appeal as evidenced by his “signatory hereto.” (Return, p. 3, n. 1). Viking contends it retained not only the Nexsen Pruet lawyers, but Mr. Walsh as well to represent Viking’s interests. (Return, p. 3, n. 1). The fact that information for Mr. Walsh (Mr. Clemons’ true attorney) now appears on the signature line for the Return is of no moment – Viking’s counsel served Mr. Walsh separately as counsel for Mr. Clemons with both Amended Motions to Intervene. (Return, Appendix A). Also, in light of the fact that Mr. Walsh was hired as “independent” counsel *for Mr. Clemons*, it is incredulous to assert that Mr. Walsh would place himself into the obvious conflict of interest that arises if he now joins the team attempting to reverse Mr. Clemons’s stated intent to confess the judgments and to then put

Mr. Clemons back into a position of facing the potential of larger verdicts than the judgments he freely and voluntarily confessed. After all, Viking attempted to intervene (even in its amended motions to intervene) because it contended it was so situated that *its* interests were not being adequately protected by the parties and lawyers then in the case.

III.

Viking points out that Respondents “have failed to directly challenge, raise issue with, and/or question the appealability” of the earlier orders. (Return, p. 14). Viking contends this “lack of challenge should be deemed a concession as to the appealability of those two earlier orders.” (Return, p. 14). Of course, appealability is an issue this Court *must* address, even *sua sponte*, so that it would be improper for this Court to accept Viking’s invitation to deem any lack of a previous direct challenge as “a concession as to the appealability of those two earlier orders.” *See, e.g., Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004) (affirming court of appeals decision to raise appealability *ex mero motu* and dismiss appeal); *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010) (addressing the issue of appealability *ex mero motu*); *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 330 S.E.2d 548 (Ct. App. 1985) (same).

IV.

Viking also cites to *Raby Construction, L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) for the proposition that “even consent judgments are subject to attack under particular circumstances.” (Return, p. 13). An examination of *Raby Construction* demonstrates how that

case is meaningfully distinguishable from the attempted direct appeals in the matters *sub judice*.

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. The Supreme Court affirmed.

Viking relies upon language in a footnote in *Raby* to contend that it is entitled to directly appeal the confessions of judgment. This language, however, does not aid Viking's cause. In Footnote 3 of *Raby*, the Supreme 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 cases currently before this Court, the Court in *Raby* was dealing with an appeal following a collateral attack on both the confession of judgment and the foreclosure. It was not a direct appeal from the entry of the confession of judgment.

V.

Viking also gives a “see also” signal to *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005) without any parenthetical information about *Lanier*. (Return, p. 13, n. 23). An examination of *Lanier* reveals how *Lanier* is also meaningfully distinguishable from what Viking is attempting to do in this case.

In *Lanier*, Wife and Husband entered into a divorce settlement agreement which the family court incorporated into its final order of divorce. Wife later sought relief from the judgment pursuant to Rule 60(b)(2), SCRPC. The family court denied the motion, and Wife appealed the order denying her relief under Rule 60. She did not, however, appeal the original divorce decree that was entered by consent.

The Court of Appeals noted that a consent judgment may be attacked “via a Rule 60(b) motion.” In fact, the Court of Appeals stated:

As a preliminary matter, we address whether a consent judgment may be attacked via a Rule 60(b) motion. Husband argues that consent orders are “binding

and conclusive and cannot be attacked by the parties either on direct appeal or in a collateral proceeding.” See *Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App.1992). Although this is the general rule, consent judgments are subject to attack in particular circumstances, including for the reasons specified in Rule 60(b). See *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 18 n. 3, 594 S.E.2d 478, 482 n. 3 (2004) (“[E]ven consent judgments are subject to attack under particular circumstances.”). Indeed, the *Johnson* court ultimately granted relief under Rule 60(b)(5). *Id.*; *Johnson*, 310 S.C. at 47, 425 S.E.2d at 48. Additionally, consent orders could be vacated under the statutory predecessor to Rule 60. See *Lord Jeff Knitting Co., Inc. v. Mills*, 281 S.C. 374, 376, 315 S.E.2d 377, 378 (Ct. App.1984) (acknowledging availability of relief but refusing it on other grounds). Therefore, we find no error in the family court’s decision to consider Wife’s motion on the merits:

Lanier, 364 S.C. at 216, 612 S.E.2d at 459 (underline added). Hence, the Court of Appeals acknowledged that while the general rule does not permit attack on consent judgments by direct appeal or collateral proceeding, under some circumstances, a consent judgment may be attacked by a Rule 60 motion (*i.e.*, by collateral attack, not direct appeal).

Viking has not collaterally attacked anything. Instead, it has attempted to appeal the very confessions of judgment Mr. Clemons freely and voluntarily entered through his real counsel, Mr. Walsh. Unlike the parties in *Raby Construction*, *Johnson*, *Lanier* and even *Lord Jeff Knitting Co.* (cited by *Lanier*), Viking has instead tried to directly appeal two judgments that were entered by consent. There is no authority in South Carolina’s jurisprudence that would allow Viking to do this – not under S.C. Code Ann. § 14-3-330 or any other relevant authority.

VI.

Viking cites to Rule 72, SCRCF, in support of its contention that it may appeal the confessions of judgment and through that appeal raise issue with the earlier intermediate orders. (Return, p. 15, n. 27). Although both the Supreme Court and this Court have cited to Rule 72 as

part of a string citation of authority for appealability rules [e.g. *State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006); *Brunson v. American Koyo Bearings*, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005)], appealability in this state is governed by § 14-3-330 and not Rule 72. *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988).

VII.

While Viking spends a great deal of energy criticizing Respondents' counsel for allegedly missing one thing or the other in moving to dismiss these appeals, the key point Viking hopes this Court will overlook is this: The voluntary confessions of judgment are not appealable. Viking should have sought to collaterally attack the judgments under Rule 60 and then appeal if that attack had not been successful (as was done by the parties in *Raby*, *Johnson*, *Lanier*, and *Lord Jeff Knitting*), but it did not.

VIII.

Although Viking has clouded this Court's consideration of this Motion to Dismiss by separately appending a number of materials it intends to use to attack the earlier orders, the Court should focus solely on what is before it. The only thing currently before this Court is Respondents' Motion to Dismiss Viking's appeal of the confessions of judgment entered by Vikings' insured, Mr. Clemons, in the underlying actions.

CONCLUSION

For the reasons stated in the Motion to Dismiss and in this Reply to the Return filed by Viking, this Court should find that the appeals in this case are improper and should dismiss the appeals with prejudice.

Respectfully submitted,



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Counsel for Respondents.

May 31, 2011

The South Carolina Court of Appeals

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2007-CP-38-00573

ORDER

Respondent moves to dismiss the appeal, arguing Appellant is attempting to appeal from two confessions of judgment into which he voluntarily entered and which, therefore, are not immediately appealable. Appellant maintains the confessions of judgment are final orders and therefore two prior orders from 2008 and 2009, which denied a motion to dismiss and enforce settlement agreements and a motion to reconsider, were interlocutory and not immediately appealable, are now also properly before this court. For the reasons set forth below, we dismiss the appeal.

First, a party may not appeal from the confessions of judgment he voluntarily executed. "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, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (quoting Jones & Parker v.

Webb, 8 S.C. 202 (1876)). However, a consent order may be challenged under certain circumstances. See id. at 46-47, 425 S.E.2d at 48 (recognizing rescission "by mutual consent in a subsequent court action" and a court's vacation of one consent order pursuant to Rule 60(b)(5), SCRCPP, after vacation of a prior consent order upon which the order at issue was based); Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 483 (2004) (acknowledging consent order may be set aside pursuant to Rule 60(b)(3), SCRCPP, for extrinsic fraud and affirming trial court's denial of relief for intrinsic fraud). Our supreme court has held a confession of judgment may be vacated or modified if void or insufficient in form. See Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (explaining a finding of voidness pursuant to Rule 60(b)(4), SCRCPP, requires either a failure of due process or a lack of subject matter or personal jurisdiction).

Appellant's argument does not fit any of the recognized exceptions. Although he seems to argue his situation compares to the consent orders described in Johnson, no order in this case has been vacated, and the record does not indicate his confessions of judgment were predicated upon the trial court's refusal to dismiss the case against him or enforce the prior settlement agreement. Consequently, appeal from the confessions of judgment is improper.

Next, the 2008 and 2009 orders Appellant challenges are unappealable as well. Appellant misapprehends the law. Section 14-3-330 of the South Carolina Code (1976 & Supp. 2010) permits appellate review of "any intermediate order or decree necessarily affecting the [final] judgment not before appealed from." He claims the trial court's denials of his motions to dismiss and enforce a settlement agreement and to reconsider "necessarily affected" his decision to consent to judgment. The trial court's denials of Appellant's attempts to end the case without a trial did not render it necessary for him to consent to judgment.

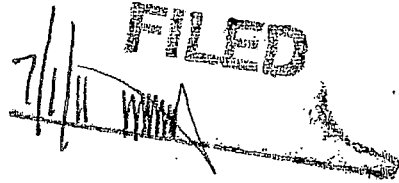
None of the orders Appellant has identified is appealable. Accordingly, we dismiss this appeal.

AND IT IS SO ORDERED.

Joseph M. Curston A.J.

Columbia, South Carolina

cc: James P. Walsh, Esquire
Stephen P. Groves, Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
John S. Nichols, Esquire



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The South Carolina Court of Appeals

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2007-CP-38-00574

ORDER

Respondent moves to dismiss the appeal, arguing Appellant is attempting to appeal from two confessions of judgment into which he voluntarily entered and which, therefore, are not immediately appealable. Appellant maintains the confessions of judgment are final orders and therefore two prior orders from 2008 and 2009, which denied a motion to dismiss and enforce settlement agreements and a motion to reconsider, were interlocutory and not immediately appealable, are now also properly before this court. For the reasons set forth below, we dismiss the appeal.

First, a party may not appeal from the confessions of judgment he voluntarily executed. "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, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (quoting Jones & Parker v. Webb, 8 S.C. 202 (1876)). However, a consent order may be challenged under certain

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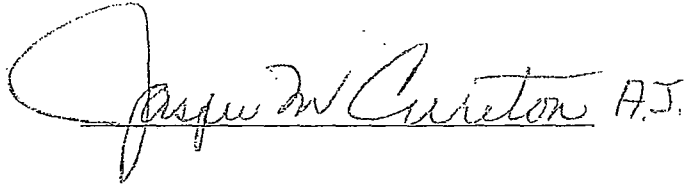
circumstances. See id. at 46-47, 425 S.E.2d at 48 (recognizing rescission "by mutual consent in a subsequent court action" and a court's vacation of one consent order pursuant to Rule 60(b)(5), SCRPC, after vacation of a prior consent order upon which the order at issue was based); Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 483 (2004) (acknowledging consent order may be set aside pursuant to Rule 60(b)(3), SCRPC, for extrinsic fraud and affirming trial court's denial of relief for intrinsic fraud). Our supreme court has held a confession of judgment may be vacated or modified if void or insufficient in form. See Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (explaining a finding of voidness pursuant to Rule 60(b)(4), SCRPC, requires either a failure of due process or a lack of subject matter or personal jurisdiction).

Appellant's argument does not fit any of the recognized exceptions. Although he seems to argue his situation compares to the consent orders described in Johnson, no order in this case has been vacated, and the record does not indicate his confessions of judgment were predicated upon the trial court's refusal to dismiss the case against him or enforce the prior settlement agreement. Consequently, appeal from the confessions of judgment is improper.

Next, the 2008 and 2009 orders Appellant challenges are unappealable as well. Appellant misapprehends the law. Section 14-3-330 of the South Carolina Code (1976 & Supp. 2010) permits appellate review of "any intermediate order or decree necessarily affecting the [final] judgment not before appealed from." He claims the trial court's denials of his motions to dismiss and enforce a settlement agreement and to reconsider "necessarily affected" his decision to consent to judgment. The trial court's denials of Appellant's attempts to end the case without a trial did not render it necessary for him to consent to judgment.

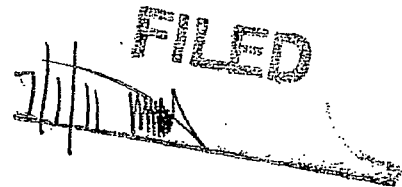
None of the orders Appellant has identified is appealable. Accordingly, we dismiss this appeal.

AND IT IS SO ORDERED.

James W. Curleton A.J.

Columbia, South Carolina

cc: James P. Walsh, Esquire
Stephen P. Groves, Sr., Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
John S. Nichols, Esquire



STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

RECEIVED

JUL 15 2011

SC Court of Appeals

Appeal from the Court of Common Pleas
For Orangeburg County
Honorable Diane S. Goodstein, Circuit Judge
Civil Action No.: 2007-CP-38-0574
Civil Action No.: 2007-CP-38-0573

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

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*Attorneys for the Appellant,
Michael Lee Clemons*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES NOW the Appellant, Michael Lee Clemons, pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, and respectfully submits his joint ***Petition for Rehearing with Suggestion for Rehearing En Banc*** in these two appeals. Mr. Clemons respectfully requests this Court of Appeals to grant rehearing and to reverse its prior two orders¹ granting the Motion to Dismiss Appeals filed by the Respondents, Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson, and Eddie Williams, as Conservator for Catina W. Nelson. This Court of Appeals should permit these appeals to proceed onward in the normal course.

Rehearing is appropriate, because the orders of this Court of Appeals overlooked the import of material facts of record. The record clearly demonstrated Mr. Clemons submitted the two signed *Acceptance[s] of SCRPC 68 Offer[s] of Judgment* (Appx.74-75) to the Respondents **solely** "predicated upon the [T]rial [C]ourt's refusal to dismiss the case[s] against him or [the Trial Court's to] enforce the prior settlement agreement." (*Johnson Order*, p.2, para. 2; *Williams Order*, p.2, para. 2). Since, at the time, Mr. Clemons did not have a choice, his decision to appeal those *Acceptances*, as well as, the Trial Court's refusal to enforce the prior settlements in both case is proper. Rehearing is

¹ See Order dated and filed 1 July 2011, in Junell W. Johnson, as Personal Representative of the Estate of Woodrow C. Nelson v. Michael Lee Clemons (the "Johnson Order"). A copy of the Johnson Order is attached hereto as Exhibit "A" and incorporated herein by reference. See Order dated and filed 1 July 2011, in Eddie Williams, as Conservator for Catina W. Nelson v. Michael Lee Clemons (the "Nelson Order"). A copy of the Nelson Order is attached hereto as Exhibit "B" and incorporated herein by reference.

appropriate, because this Court of Appeals misapprehended the range of intermediate orders which may become appealable once a final judgment is entered.²

I. STATEMENT OF THE CASE

The Respondents filed their respective actions against Mr. Clemons on 10 May 2007.³ (Appx.1-2, 5-6).⁴ Ms. Johnson asserted a wrongful death claim (Appx.2-4, paras. 1-5), while Mr. Williams asserted an automobile negligence/personal injury claim. (Appx.6-8, paras. 1-6).⁵ On 6 June 2007, Mr. Clemons moved to dismiss and/or enforce the settlements which had been reached, as both actions then were barred due to the parties' previously agreed-upon settlement. (Appx.9-10; Appx.11-11A). Mr. Clemons' lawyer at the time, Michael P. Horger, Esquire⁶ contemporaneously filed an affidavit supporting the motions. (Appx.14-17). In response, Paul W. Owen, Jr., Esquire,⁷ legal counsel

² See Rule 221(a), SCACR.

³ There are two cases and two separate appeals involved herein. As this Court of Appeals is aware, both cases, and both appeals, are grounded in the same set of facts and circumstances, and are discussed jointly herein.

⁴ All of the documents which Mr. Clemons references herein were contained in an Appendix to his previously filed Return to Motion to Dismiss Appeals.

⁵ Mr. Clemons was served with copies of the Summonses and Complaints in both cases on 23 May 2007, by the Orangeburg Sheriff's Office. (Appx.12-13; Appx.29, para. 4). Mr. Clemons was incarcerated at the time in the Orangeburg-Calhoun Detention Center. (Appx.29, para. 4).

⁶ Attorney Horger of Michael P. Horger, P.A. originally represented Mr. Clemons. Later, James P. Walsh, Esquire of Clarkson, Walsh, Terrell & Coulter, P.A. was substituted as Mr. Clemons' legal counsel.

⁷ Attorney Owen represented Ms. Johnson in her capacity as the Personal Representative of the Estate of Woodrow C. Nelson and Mr. Williams in his capacity as the Conservator for Catina W. Nelson. (Appx.14, para. 2; Appx.28, para. 1).

for Ms. Johnson and Mr. Williams (Appx.14, para. 2), submitted an affidavit in opposition to Mr. Clemons' motions to dismiss, as did Attorney Owen's associated counsel, Shane M. Burroughs, Esquire (Appx.28-34)⁸ and an employee in Attorney Burroughs' office, Rachael M. Estok. (Appx.35).⁹

The Circuit Court considered Mr. Clemons' motions on 11 June 2008, and took the matters under advisement. (Appx.36). Thereafter, the Circuit Court issued its written order on 30 September 2008, denying both motions. (Appx.36-41). Mr. Clemons moved for reconsideration or to alter/amend both judgments (Appx.42-43) and later filed an amended reconsideration motion. (Appx.44-45). The Circuit Court denied reconsideration. (Appx.46-47).

Mr. Clemons filed his answers to both complaints on 8 April 2009. (Appx.48-57).¹⁰ The Respondents moved to strike the answers and to have default judgments entered against Mr. Clemons. (App.58-65). Mr. Clemons opposed the motions and preemptively moved to set aside any entry of default. (Appx.66-67). On 4 December 2009, the Circuit Court set aside any default against Mr. Clemons in either case. (Appx.68). The Respondents moved for reconsideration on 15 December 2009. (Appx.68-69).

⁸ Attorney Burroughs of Lanier & Burroughs, LLC also represented Ms. Johnson and Mr. Williams. (Appx.28, para. 1).

⁹ Ms. Estok was a legal assistant in Attorney Burroughs' office. (Appx.35, para. 1).

¹⁰ At this point in time, Mr. Clemons was being represented by Attorney Walsh. (Appx.52, 57).

On 14 January 2011, Mr. Williams sent Mr. Clemons an Offer of Judgment for Six Million Dollars (\$6,000,000.00) (Appx.72-73; 134-135) and Ms. Johnson sent him an Offer of Judgment for Three Million Dollars (\$3,000,000.00). (Appx.70-71, 117-118). Mr. Clemons accepted both offers on 4 February 2011 (Appx.74-75, 119, 136), and the acceptances were filed with the Circuit Court on 7 February 2011. (Appx.74-75, 119, 136).

These appeals followed. (Appx.105-136). The Respondents have filed their Motions to Dismiss seeking to have this Court dismiss the appeals. Mr. Clemons then filed his joint Return to Motions to Dismiss together with an Appendix. The Respondents then filed their reply. This Court of Appeals issued its orders on 1 July 2011, granting the Respondents' motions.

Mr. Clemons now seeks a rehearing with a suggestion for rehearing en banc, because the original appellate orders overlooked the import of material record facts, and misapprehended the range of appealable intermediate orders, once a final order or judgment has been entered.

II. STATEMENT OF THE FACTS

A. The Accident

These actions arise out of a tragic three-vehicle accident which occurred on 25 March 2006, in the City of Orangeburg, South Carolina. (Appx.2-3, para. 3; Appx.6, para. 3; Appx.18, para. 1; Appx.78, lines 14-18). Mr. Clemons was operating his vehicle and heading east on Chestnut Street in Orangeburg while, at the same time, Woodrow C. Nelson was heading west also on Chestnut Street. (Appx.2-3, para. 3; Appx.6, para. 3). Mr. Nelson's wife, Catina W.

Nelson, was riding in her husband's vehicle. (Appx.6, para. 3; Appx.78, lines 14-18). Unfortunately, Mr. Clemons was driving while under the influence of alcohol and crossed the center line of Chestnut Street, hitting Mr. Nelson's vehicle head on. (Appx.2-3, para. 3; Appx.6, para. 3; Appx.18, paras. 1-2; Appx.78, lines 14-18).¹¹ As a result of the collision, Mr. Nelson was killed and Ms. Nelson suffered significant debilitating injuries.¹² (Appx.2-3, paras. 3-4; Appx.6-7, paras. 4; Appx.18-19, para. 3; Appx.78, lines 18-20).¹³

At the time of the accident, Mr. Clemons was insured by Viking Insurance Company through an automobile liability insurance policy in the amount of \$15,000.00 per person per accident and \$30,000.00 for two or more persons per accident. (Appx.19, para. 6). Mr. Nelson had underinsured motorists' coverage ("UIM") with State Farm Mutual Automobile Insurance Company in the sum of \$150,000.00. (Appx.19, paras. 5, 7).

B. The Settlement

Not too long after the accident, Viking Insurance, on behalf of Mr. Clemons, and counsel for the two plaintiffs reached a settlement "whereby the insurance coverage [for Mr. Clemons] would be exhausted by the payment of the applicable [\$30,000.00] limits with \$5,000.00 allocated to the claim of [Mr.]

¹¹ On 17 April 2007, Mr. Clemons ultimately "plead guilty to felony DUI and was sentenced to 11 years in prison . . ." (Appx.21, para. 26).

¹² Ms. Nelson has been determined to be *non compos mentis*. (Appx.78, lines 14-20).

¹³ The driver of a third vehicle involved in the accident, Wendell Hamilton, also sustained personal injuries from the collision. (Appx.14, para. 2). Mr. Hamilton also made a claim against Mr. Clemons for his damages. That claim was resolved outside of this present litigation

Hamilton and \$12,500.00 [each] being allocated to the claim[s] of Catina W. Nelson and . . . the Estate of Woodrow C. Nelson" (Appx.14-16, paras. 2, 5; Appx.19, paras. 8-10).¹⁴ Due to the circumstances, the parties agreed the settlement required approval of the Orangeburg County Probate Court. (Appx.14, para. 2; Appx.19, para. 9). Viking Insurance retained Attorney Horger to represent Mr. Clemons and "to see that the appropriate Petition, Order[,] and Release were obtained from the Estate of Woodrow C. Nelson and on behalf of Catina W. Nelson upon a conservator being appointed for her." (Appx.15, para. 3). Attorney Owen, plaintiffs' counsel, ultimately scheduled a hearing in the Probate Court before the Honorable Pandora Jones-Glover, Probate Judge, for 13 September 2006. (Appx.15, para. 4; Appx.19, para. 9). The purpose of the hearing was to have the Probate Court approve the death settlement between Mr. Nelson's Estate and Viking Insurance (on behalf of Mr. Clemons) and to have a conservator appointed for Ms. Nelson. (Appx.15, para. 4; Appx.19, paras. 9-10; Appx.78, line 14 – Appx.79, line 22).¹⁵

Attorney Owen placed the settlement on the Probate Court record and Attorney Horger confirmed the terms. (Appx.14-16, paras. 2, 5; Appx.19, paras. 9-10; Appx.78, line 18 – Appx.79, line 22; Appx.80, line 5 – Appx.81, line

¹⁴ State Farm agreed to pay the UIM coverage of \$150,000.00 to Mr. Nelson's Estate and to Ms. Nelson on a 50/50 basis - \$75,000.00 to each. (Appx.19, paras. 7, 10; Appx.79, lines 1-9). Viking Insurance settled with Mr. Hamilton for \$5,000.00. (Appx.19, para. 8).

¹⁵ Contemporaneously with approving the insurance allocation settlement, the Probate Court also appointed Mr. Williams as Ms. Nelson's conservator. (Appx.19, para. 11; Appx.97, line 15 – Appx.103, line 24).

5).¹⁶ Ms. Johnson, the Personal Representative, testified she believed the settlement as described was in the best interests of her client, Mr. Nelson's Estate (Appx.81, line 17 – Appx.83, line 14; Appx.95, lines 6-9) and constituted a final resolution of the obligations of Viking Insurance and State Farm (all on behalf of Mr. Clemons). (Appx.93, line 22 – Appx.95, line 5). Based upon the parties' agreement, the amount of available liability insurance coverage, and Ms. Johnson's agreement, the Probate Court "approve[d] the settlement [as] reasonable, and in light of all [of the] circumstances [as being] in the best interest of the [E]state [of Woodrow C. Nelson]." (Appx.95, lines 10-13) (Emphasis added).¹⁷

Given the possible claim for the significant expenses of Mr. Nelson's funeral, Attorney Owen advised the Probate Court he would hold any funds from the insurance settlement in trust until the claim period expired. That waiting period would allow Attorney Owen to learn whether the funeral home or Mr. Nelson's parents actually filed a claim against Mr. Nelson's Estate for the funeral expenses. (Appx.15-16, para. 5; Appx.91, lines 21-24). The Probate Court approved this arrangement. (Appx.94, line 20 – Appx.95, line 13). Attorney

¹⁶ Attorney Horger had contacted Attorney Owen on 17 August 2006, almost a month before the hearing and requested certain "information [in order to be able] to prepare the appropriate Petition, Order[,] and Release for the [Probate] [C]ourt[s] approval of the death settlement." (Appx.15-16, para. 5). Attorney Horger did not receive any information and/or documentation until the day of the scheduled Probate Court hearing. (Appx.15-16, para. 5).

¹⁷ During the Probate Court hearing, it was determined that claims could be made against Mr. Nelson's Estate up through 10 February 2007, and, therefore, all funds would have to be held in trust until the claims period ended. (Appx.86, line 23 – Appx.87, line 25; Appx.89, line 21 – Appx.93, line 14). The major potential outstanding claim was the approximately \$16,000.00 funeral bill for Mr. Nelson's funeral (Appx.86, line 23 – Appx.87, line 25; Appx.89, line 21 – Appx.93, line 14).

Horger agreed to prepare a comprehensive final order “encompassing the terms of the settlement as to all parties and [all of the liability] insurance carriers.” (Appx.19, para. 12; Appx.94, line 20 – Appx.95, line 15). Based upon the information he had as of the end of the Probate Court hearing, Attorney Horger, as had been agreed, “drafted [the appropriate] documents in regard to the settlements.” (Appx.15-16, para. 5).

C. Settlement Or Settlement Revocation

On or about 28 December 2006, Attorney Owen sent Attorney Horger a letter requesting payment of Viking Insurance’s \$25,000.00 and submission of the final order to the Probate Court. (Appx.16, para. 6; Appx.20, para. 21; Appx.23). Upon receipt of the letter, Attorney Horger contacted Attorney Owen to advise him that he “still had not received a certified copy of the appointment of a conservator for [Ms.] Nelson and that the claim period had not run for a decision to be made on the payment of the funeral bill.”¹⁸ (Appx.16, para. 6). Attorney Owen advised told Attorney Horger there was “ ‘no problem of time demand.’ ” (Appx.16, para. 6).¹⁹

Apparently, nothing happened until 27 February 2007, when Attorney Owen sent Attorney Horger another letter demanding payment of the \$25,000.00 by 10:00 a.m. the next day. (Appx.16, para. 7; Appx.21, para. 25; Appx.26).

¹⁸ Attorney Owen contests the assertion that Attorney Horger had not received a copy of the conservator appointment form. (Appx.20, paras. 16-17, 24-25).

¹⁹ At this point, Attorney Owen retained Attorney Burroughs to assist him in obtaining the settlement funds from Attorney Horger. (Appx.21, para. 23). Attorney Owen asserts he did not receive any response, telephonically or otherwise, from Attorney Horger to the 29 December 2006, letter. (Appx.21, para. 23).

Attorney Horger advised Attorney Owen that delivery of the funds on the prescribed time frame was physically impossible, but that he would have the check issued and sent as quickly as possible. (Appx.16, para. 7). The settlement checks were issued on 28 February 2007, and Attorney Horger received them the next day – 1 March 2007. (Appx.16, para. 8). Attorney Horger contacted Attorney Owen on 1 March 2007, “and offered to hand deliver the checks, but [Attorney Owen] stated that was not necessary.” (Appx.16, para. 8). Unfortunately, Attorney Horger was not able to reach a resolution of the settlement dispute with Attorney Owen after 1 March 2007. (Appx.16, para. 10). Attorney Owen, by letter dated 30 April 2007, rescinded the Estate’s settlement agreement with Viking Insurance. (Appx.21, para. 28; Appx.27; Appx.32). Attorney Burroughs thereafter filed these actions against Mr. Clemons. (Appx.21, para. 29; Appx.29, para. 4).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Appeals Are Proper Under S.C. Code Ann. § 14-3-330

This Court of Appeals incorrectly concluded that Mr. Clemons’ two Notices of Appeals herein represented the appeals of orders and/or judgments which cannot be appealed under South Carolina law. (*Johnson Order*, pp.1-3; *Williams Order*, pp.1-3). This elimination of appellate rights does not comport with the applicable law when viewed in the context of the facts and circumstances of these particular cases. Mr. Clemons’ appeals of the relevant decisions and final judgments in these cases were timely, not legally barred, and should be allowed to proceed in the normal course toward a decision on the merits.

1. Judgments/Orders Appealed

As shown in Mr. Clemons' two Notices of Appeal (Appx.105-136), he has appealed the following orders and judgments:

- a. Circuit Court Order dated 30 September 2008, and filed 13 October 2008, denying Mr. Clemons' Motion to Dismiss the Respondents' Complaints and to enforce the previously agreed-to settlements which had already been approved by the Probate Court;
- b. Circuit Court Order dated 31 December 2008, and filed 13 January 2009, denying Mr. Clemons' Motions to Reconsider or Alter or Amend the 13 October 2008, Circuit Court Order; and
- c. Judgment in favor of Ms. Nelson dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$6,000,000.00; and Judgment in favor of Mr. Nelson's Estate dated on or about 4 February 2011, and entered on the Judgment Rolls on or about 7 February 2011, in the amount of \$3,000,000.00.

(Appx.105-136).

Admittedly, the judgments herein resulted from Mr. Clemons accepting an Offer of Judgment from Ms. Nelson for \$6,000,000.00 and an Offer of Judgment from Mr. Nelson's Estate for \$3,000,000.00. (Appx.70-75, 117-119, 134-136).²⁰ There is no dispute that these are final judgments.²¹ This Court of Appeals, in

²⁰ Other than pursuant to an amicable settlement, our courts have acknowledged that cases are disposed of by judgments for one party or another through either "a jury verdict, [an] order of judgment, or [a] confession of judgment" Wade v. Berkeley County, 348 S.C. 224, 227, 559 S.E.2d 586, 587 (2002), (quoting Wade v. Berkeley County (Wade III), 339 S.C. 513, 518-519, 529 S.E.2d 743, 746 (Ct.App. 2000) (*en banc*)).

²¹ See State v. Wilson, 387 S.C. 597, 599, 693 E.E.2d 923, 924 (2010) (citing Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C.

Johnson v. Johnson,²² stated that “[o]rdinarily, 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.”²³ Nevertheless, this Court of Appeals also readily acknowledged that “a consent order is an agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement [which may be set aside or modified under the appropriate circumstances].”²⁴ In that case, the parties had consented to vacate one order, but not a related order. Similarly, our Supreme Court, in Raby Construction, LLP v. Orr,²⁵ specifically interpreting the Johnson v. Johnson holding, stated **even consent judgments are subject to attack under particular circumstances.**²⁶

Here, the consent judgments are appealable because, among other reasons, the two prior orders which set the stage for the Respondents’ two Offers of Judgment and which ultimately resulted in Mr. Clemons providing the two *Acceptances*, were legally flawed.

Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; and Rule 201(a), SCACR)) (“An appeal ordinarily may be pursued only after a party has obtained a final judgment.”).

²² Johnson v. Johnson, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (citing Jones & Parker v. Webb, 8 S.C. 202 (1876) (1876 WL 5996, filed 31 October 1876)).

²³ Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (citing Jones & Parker v. Webb, 8 S.C. 202 (1876)).

²⁴ Johnson v. Johnson, 310 S.C. 44, 48, 425 S.E.2d 46, 47 (citing Jones & Parker v. Webb, 8 S.C. 202).

²⁵ Raby Construction, LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004).

²⁶ Raby Construction, LLP v. Orr, 358 S.C. 10, 18 n.3, 594 S.E.2d 478, 482 n.3 (Second emphasis added). See also Lanier v. Lanier, 364 S.C. 211, 216, 612 S.E.2d 456, 459 (Ct. App. 2005).

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This Court of Appeals' joint decisions to dismiss the appeals primarily addressed the appealability of Mr. Clemons' acceptances of the Offers of Judgment (*i.e.*; his decision to enter into the consent judgments for a total of \$9 million). (*Johnson Order*, pp.1-2; *Williams Order*, pp.1-2). Even though this Court of Appeals summarily considered the appealability of Mr. Clemons' acceptances of the Offers of Judgment (*Johnson Order*, p.2, para. 2; *Williams Order*, p.2, para. 2), the law provides that the final judgments (*i.e.*; Mr. Clemons' acceptance of the Offers of Judgment) which concluded these two cases rendered the two earlier Trial Court orders (*i.e.*; denying enforcement of the settlements,²⁷ denying reconsideration/alter or amend judgment) appealable.²⁸ This is particularly true in light of the fact the Orangeburg County Probate Court had already approved the two settlements in these cases (Appx.95, lines 10-13) and pursuant to S.C. Code Ann. § 14-3-330(1), a party is not required to actually challenge "the final judgment itself in order to contest an intermediate judgment."²⁹

²⁷ Mr. Clemons' motions specifically asked the Trial Court to enforce the settlements previously reached by Viking Insurance with Ms. Nelson and Mr. Nelson's Estate, respectively.

²⁸ In Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), our Supreme Court concluded a party who appealed from an interlocutory order was not required to make any arguments supporting reversal of the final judgment "in order to [be able to] contest an intermediate judgment or order under S.C. Code Ann. § 14-3-330(1)." Link v. School District of Pickens County, 302 S.C. 1, 7, 393 S.E.2d 176, 179. See also Lancaster v. Fielder, 305 S. C. 418, 422, 409 S.E.2d 375, 377 (1991).

²⁹ Lancaster v. Fielder, 305 S. C. 418, 421, 409 S.E.2d 375, 377. Furthermore, the Supreme Court stated "if there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under [S.C. Code Ann. §] 14-3-330(1) [an appellate] [c]ourt can review any intermediate order or decree necessarily affecting the judgment not before appealed from." Lancaster v. Fielder, 305 S. C. 418, 421, 409 S.E.2d 375, 377.

South Carolina law provides, in pertinent part, as follows:

[South Carolina's appellate courts] shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order[,] or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from . . . **30**

Even though our appellate courts will sometimes entertain the appeal of an interlocutory order, it is clear that "South Carolina adheres to the final judgment rule[, and therefore], with certain exceptions, an appeal lies only from a final judgment."**31** Given this proposition, the two earlier orders (Appx.36-41, 46-47, 109-116, 126-133) could not have been appealed as of right until these cases were ended in a final judgment. As noted in S.C. Code Ann. § 14-3-330(1), since there was no prior appeal of any interlocutory orders in these cases, this Court

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

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

may now properly entertain an “appeal from such final judgment [in order to] review any intermediate order or decree necessarily affecting the judgment not before appealed from . . .”³²

That is precisely the situation Mr. Clemons faced when initiating the two appeals in these cases. (Appx.105-136). Under South Carolina law, Mr. Clemons could not appeal either (a) the Circuit Court’s 13 October 2008 Order denying his motions to dismiss/enforce the settlement between Viking Insurance and the Respondents (Appx.36-41, 109-114, 126-131) or (b) the Circuit Court’s 13 January 2009 Order denying his motion for reconsideration/alter or amend judgment. (Appx.46-47, 115-116, 131-133). Both of those previous Circuit Court orders (Appx.46-47, 115-116, 131-133) were interlocutory and unappealable when issued.³³

On the other hand, once there were final judgments in these cases, as evidenced by Mr. Clemons’ acceptances of the respective Offers of Judgment (Appx.74-75, 119, 136), then the two prior orders (Appx.46-47, 115-116, 131-

³² See S.C. Code Ann. § 14-3-330(1). See generally Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (The appealability of intermediate orders attaches when the rights of the parties have finally been determined by some action of the court.); Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) (When “there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under [S.C. Code Ann. §] 14-3-330(1), [our appellate] [c]ourt[s] can review any intermediate order or decree necessarily affecting the judgment not before appealed from.”).

³³ See generally S.C. Code Ann. § 14-3-330. See Capell v. Moses, 36 S.C. 559, 15 S.E. 711 (1892). An order denying summary judgment is not immediately appealable. Thornton v. South Carolina Electric and Gas Company, 391 S.C. 297, 308, 705 S.E.2d 475, 481 (Ct. App. 2011). An order denying a motion to dismiss is not immediately appealable. Moyd v. Johnson, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986). See also generally Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93-94, 529 S.E.2d 11, 13 (2000) (Listing of unappealable motions under Rule 12(b), SCRCivP).

133) were ripe for appeal as they constituted "intermediate order[s] or decree[s] [which] necessarily affect[ed] the judgment not before appealed from . . ."34

It cannot be reasonably disputed that the Trial Court's failure to enforce the settlements "necessarily affect[ed] the judgments not before appealed from".35 Had the Trial Court enforced the settlements as it should have, the judgments which have been appealed would never have existed in the first instance. The two prior orders (Appx.46-47, 115-116, 131-133) clearly and unequivocally affected Mr. Clemons' decision to ultimately accept the Offers of Judgment.36 In this vein, if Mr. Clemons' argument that the original settlement between Viking Insurance and Ms. Nelson and Mr. Nelson's Estate should have been enforced by the Trial Court in 2008 is endorsed on appeal, then these two cases should

34 See S.C. Code Ann. § 14-3-330(1). Mr. Clemons was faced with the proverbial "Hobson's choice" of finding the most expedient way in which to appeal the Trial Court's decision not to enforce the agreed-upon settlements. He could either proceed to and through a lengthy civil trial or, alternatively, "agree" to the Offers of Judgment. Clearly, the latter was the fastest way to have the enforceability of the settlement addressed. Consequently, as noted in Link v. School District of Pickens County, South Carolina law, pursuant to:

[S.C. Code Ann. § 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders 'necessarily affecting the judgment not before appealed from.'

Link v. School District of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (citing Blakely & Copeland v. Frazier, 11 S.C. 122 (1878)).

35 See S.C. Code Ann. § 14-3-330(1).

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

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have ended in 2008, and Mr. Clemons would never have been faced with the unenviable "Hobson's choice" of whether or not to accept the Respondents' multi-million dollar Offers of Judgment.

In sum, contrary to this Court of Appeals' twin decisions, Mr. Clemons properly noticed his appeal from the two intermediate Trial Court orders issued on 13 October 2008, and 13 January 2009, respectively. He also properly noticed his appeal from the two judgments entered against him by the Trial Court on or about 4 February 2011. Because this Court of Appeals overlooked the import of material facts of record and misapprehended the application of appellate procedural rules, rehearing en banc should be granted so this Court of Appeals will be able to vacate³⁷ its two 1 July 2011 orders and allow these appeals to proceed in the normal course to a decision on the merits regarding the enforceability of the agreed-upon settlements.

³⁷ See Rule 221(a), SCACR.

Respectfully submitted,

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14 July 2011

NPCHAR1:667971.1-MO-(SPG) 022447-00005

Exhibit "A"

The South Carolina Court of Appeals

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2007-CP-38-00573

ORDER

Respondent moves to dismiss the appeal, arguing Appellant is attempting to appeal from two confessions of judgment into which he voluntarily entered and which, therefore, are not immediately appealable. Appellant maintains the confessions of judgment are final orders and therefore two prior orders from 2008 and 2009, which denied a motion to dismiss and enforce settlement agreements and a motion to reconsider, were interlocutory and not immediately appealable, are now also properly before this court. For the reasons set forth below, we dismiss the appeal.

First, a party may not appeal from the confessions of judgment he voluntarily executed. "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, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (quoting Jones & Parker v.

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Webb, 8 S.C. 202 (1876)). However, a consent order may be challenged under certain circumstances. See id. at 46-47, 425 S.E.2d at 48 (recognizing rescission "by mutual consent in a subsequent court action" and a court's vacation of one consent order pursuant to Rule 60(b)(5), SCRCF, after vacation of a prior consent order upon which the order at issue was based); Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 483 (2004) (acknowledging consent order may be set aside pursuant to Rule 60(b)(3), SCRCF, for extrinsic fraud and affirming trial court's denial of relief for intrinsic fraud). Our supreme court has held a confession of judgment may be vacated or modified if void or insufficient in form. See Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (explaining a finding of voidness pursuant to Rule 60(b)(4), SCRCF, requires either a failure of due process or a lack of subject matter or personal jurisdiction).

Appellant's argument does not fit any of the recognized exceptions. Although he seems to argue his situation compares to the consent orders described in Johnson, no order in this case has been vacated, and the record does not indicate his confessions of judgment were predicated upon the trial court's refusal to dismiss the case against him or enforce the prior settlement agreement. Consequently, appeal from the confessions of judgment is improper.

Next, the 2008 and 2009 orders Appellant challenges are unappealable as well. Appellant misapprehends the law. Section 14-3-330 of the South Carolina Code (1976 & Supp. 2010) permits appellate review of "any intermediate order or decree necessarily affecting the [final] judgment not before appealed from." He claims the trial court's denials of his motions to dismiss and enforce a settlement agreement and to reconsider "necessarily affected" his decision to consent to judgment. The trial court's denials of Appellant's attempts to end the case without a trial did not render it necessary for him to consent to judgment.

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None of the orders Appellant has identified is appealable. Accordingly, we dismiss this appeal.

AND IT IS SO ORDERED.

Joseph W. Curritton A.J.

Columbia, South Carolina

cc: James P. Walsh, Esquire
Stephen P. Groves, Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
John S. Nichols, Esquire



EXHIBIT "B"

The South Carolina Court of Appeals

Eddie Williams, as Conservator for
Catina W. Nelson,

Respondent,

v.

Michael Lee Clemons,

Appellant.

The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2007-CP-38-00574

ORDER

Respondent moves to dismiss the appeal, arguing Appellant is attempting to appeal from two confessions of judgment into which he voluntarily entered and which, therefore, are not immediately appealable. Appellant maintains the confessions of judgment are final orders and therefore two prior orders from 2008 and 2009, which denied a motion to dismiss and enforce settlement agreements and a motion to reconsider, were interlocutory and not immediately appealable, are now also properly before this court. For the reasons set forth below, we dismiss the appeal.

First, a party may not appeal from the confessions of judgment he voluntarily executed. "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, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (quoting Jones & Parker v. Webb, 8 S.C. 202 (1876)). However, a consent order may be challenged under certain

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circumstances. See id. at 46-47, 425 S.E.2d at 48 (recognizing rescission "by mutual consent in a subsequent court action" and a court's vacation of one consent order pursuant to Rule 60(b)(5), SCRPC, after vacation of a prior consent order upon which the order at issue was based); Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 483 (2004) (acknowledging consent order may be set aside pursuant to Rule 60(b)(3), SCRPC, for extrinsic fraud and affirming trial court's denial of relief for intrinsic fraud). Our supreme court has held a confession of judgment may be vacated or modified if void or insufficient in form. See Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (explaining a finding of voidness pursuant to Rule 60(b)(4), SCRPC, requires either a failure of due process or a lack of subject matter or personal jurisdiction).

Appellant's argument does not fit any of the recognized exceptions. Although he seems to argue his situation compares to the consent orders described in Johnson, no order in this case has been vacated, and the record does not indicate his confessions of judgment were predicated upon the trial court's refusal to dismiss the case against him or enforce the prior settlement agreement. Consequently, appeal from the confessions of judgment is improper.

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None of the orders Appellant has identified is appealable. Accordingly, we dismiss this appeal.

AND IT IS SO ORDERED.

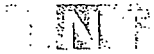
James M. Curston A.J.

Columbia, South Carolina

cc: James P. Walsh, Esquire
Stephen P. Groves, Sr., Esquire
Bradish J. Waring, Esquire
Paul A. Dominick, Esquire
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FILED
7/1/11

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Stacy Elizabeth Thompson
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Allison Paige Sullivan
Ashley Trout Thompson
Blake Alexander Hewitt

July 18, 2011

BY EUGENE POWELL, JR.

O. Eugene Powell, Jr.

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Junell W. Johnson v. Michael Lee Clemons
Case Tracking No. 2011178166
and
Eddie Williams v. Michael Lee Clemons
Case Tracking No. 2011187126

Dear Ms. Gee:

I am in receipt of the Petition for Rehearing With Suggestion for Rehearing *En Banc* filed by lawyers purporting to represent Michael Lee Clemons in these appeals. Regarding the petition for rehearing, the Respondents' Motions to Dismiss these appeals and the Respondents' Reply to the Return to the Motions to Dismiss the appeals adequately sets forth Respondents' position in response to the Petition for Rehearing.

With regard to the Suggestion for Rehearing *En Banc*, pursuant to the Supreme Court's amendment of Rule 219, SCACR, on April 28, 2011, Respondents are filing no response to that suggestion. However, Respondents are happy to provide the Court with a response if it should so order pursuant to 219(b), SCACR.

Thank you for your consideration. Please let me know if you need anything further.
With kind personal regards, I am

Yours truly,

John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

JSN/awh

Enclosures

cc: ✓ Steven P. Groves, Sr., Esquire

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The South Carolina Court of Appeals

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

Respondent,

v.

Michael Lee Clemons,

Appellant.

The Honorable Diane Schafer Goodstein
Orangeburg County
Trial Court Case No. 2007-CP-38-00573

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

H B W

John D. Hester
Deputy In Custodian

Columbia, South Carolina

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