STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

The Honorable Kristi F. Curtis
Circuit Court Judge

Appellate Case No. 2025-000403

Lauren Chambers Tracy, Respondent,

v.

Elijah Osama Mustafa, Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly rejected Appellant's Rule 60(b) motion which sought to challenge issues that could have been raised on direct appeal of the August 9, 2023 judgment?

2. Did the trial court properly deny Appellant's Motion for Entry of Satisfaction of Judgment where the Covenant Not to Execute expressly preserved Respondent's right to pursue and recover excess liability coverage?

STATEMENT OF THE CASE

This appeal arises from Appellant's attempt to challenge a $4.2 million judgment through successive post-judgment motions after failing to file a timely appeal. (Form 4 Order, Order of Judgment, both entered August 9, 2023, R. __). The judgment followed a motor vehicle accident on August 6, 2016, in which Respondent Lauren Chambers Tracy ("Tracy" or "Respondent") suffered a traumatic brain injury due to the negligence of Appellant Elijah Osama Mustafa ("Mustafa" or "Appellant"). (Complaint, R.__). Tracy was 36 years old at the time of the accident. (Order of Judgment, R.__). The lower court found that Tracy suffered "severe and permanent injuries" from the accident, requiring surgery, numerous medical procedures, and life-long care. (Order of Judgment, R. __).

Despite being represented by counsel and receiving electronic notice of this August 9, 2023 Judgment, Appellant never appealed within the thirty-day deadline. Instead, he now seeks relief through untimely Rule 60(b) motions and a Motion for Entry of Satisfaction based on a pre-suit Covenant Not to Execute that repeatedly and explicitly preserved Tracy's right to pursue excess liability coverage through seven separate provisions. The trial court properly denied these attempts to circumvent appellate deadlines and contradict the parties' clear contractual intent.

This appeal involves two related but distinct issues, (1) applicability of a pre-suit Covenant Not to Execute, and (2) judgment for damages in the lawsuit. To make the presentation clearer, Respondent will present the Facts separately for the two issues rather than in a single chronological sequence.

PART I: FACTS RELATING TO THE COVENANT NOT TO EXECUTE

The Covenant

Prior to filing suit, on January 31, 2018, Tracy entered into a Covenant Not to Execute with Appellant and his primary automobile liability carrier, Travelers Property & Casualty Insurance Company ("Travelers"). (Covenant Not to Execute, R.__). Under the Covenant's express terms, Travelers paid Tracy $175,000.00 of its $250,000.00 per person policy limits. (Covenant, p. 1, R.__). As customary with a Covenant Not to Execute, Tracy agreed not to execute a judgment obtained against Appellant personally in return for Travelers' payment. (Covenant, ¶ 2, R. __). The interpretation of that agreement is a subject in dispute in this appeal.

Tracy's expected course of action was set forth in the Covenant and agreed to by Travelers and Appellant. (Covenant, R. __). The pertinent paragraphs of the Covenant affirm Tracy's right to file suit against Appellant for the purpose of pursuing recovery from Appellant's excess liability carrier and Tracy's underinsured motorist carriers. (Covenant, ¶¶ 3, 5, 11-12, R. __). The Covenant *explicitly* and *repeatedly* preserves this right through each of the following provisions:

The Ninth paragraph **(Eighth "WHEREAS" Paragraph)** specifically states that the Covenant does not prejudice or release in any way Tracy's right to proceed against Appellant's excess liability carrier and her underinsured motorist carriers:

> WHEREAS, the Plaintiff desires to accept payment from Travelers, on behalf of its Insureds, in return for a Covenant Not to Execute ***but without prejudicing or releasing in any way the Plaintiff's right to proceed against the excess liability insurance coverage and/or the underinsured motorist coverage above-described***. (Emphasis added). (R.__).

Paragraph 3 makes the same point:

> That Travelers and the Insureds agree that the Plaintiff may proceed with their case against the Insureds to effect settlement or verdict against the Insureds

> solely for the purpose of collecting excess liability insurance coverage and/or underinsured motorist coverage. (underlining in original) (R.__)

As does Paragraph 5:

> The parties hereto further agree that this Covenant is not a Release or a Covenant Not to Sue and that it shall not be construed nor is it intended to relinquish or release the Plaintiff's right to pursue and maintain their action against the Insureds solely for the purpose of collecting excess liability insurance coverage and/or underinsured motorist coverage. ***Nothing contained herein releases any rights of the Plaintiff against any excess liability insurance coverage and/or underinsured motorist carrier.*** (Emphasis added) (underlining in original). (R.__).

And likewise Paragraph 11:

> ***Notwithstanding anything to the contrary*****,** the Plaintiff does not waive or release in any way any excess liability insurance coverage and/or underinsured motorist carrier because of the terms and conditions as stated herein. (Emphasis added). (R.__).

Finally, Paragraph 12 sets forth Tracy's obligations *after* collecting from Appellant's excess liability carrier and her underinsured motorist carriers:

> The Plaintiff agrees that when and if excess liability insurance coverage and/or underinsured motorist coverage is paid by the excess liability carrier and/or underinsured motorist carrier and/or the Plaintiff enters into an agreement with the excess liability insurance carrier and/or underinsured motorist carrier for the payment of excess liability coverage and/or underinsured motorist coverage that she will execute proper Releases relinquishing and releasing all of their rights to proceed against the Insureds and Travelers. (R.__).

In addition, another part of the Covenant, **Paragraph 6**, upon which Appellant seeks to rely to the exclusion of the rest of the Covenant, also addresses the satisfaction of a judgment:

> The Plaintiff agrees that if a judgment against the Insureds for damage arising out of the Plaintiff's claim has been entered, the Plaintiff agrees to promptly satisfy the judgment with respect to the amount of consideration being paid under this agreement, and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered on the face of the judgment. If a judgment against the Insureds is in excess of the amount paid under the agreement and is enrolled, the Plaintiff will promptly satisfy the judgment with

> respect to such excess and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered upon the face of the judgment. (Covenant ¶ 6, R. __).

Commencement of Action and Initial Proceedings

On May 11, 2018, Tracy filed a Summons and Complaint against Appellant, asserting a claim for negligence arising from the August 6, 2016 motor vehicle accident. (Summons and Complaint, R. __). On October 8, 2018, Appellant timely answered the Complaint (Answer, R. __).[1]

Once the lawsuit began, the Covenant Not to Execute had no direct involvement, except for one notable instance. That was in 2023, when United States Liability Insurance ("USLI") (Appellant's excess liability insurance carrier) moved to intervene in order to participate in the scheduled damages hearing – a motion it later withdrew. (Motion to Intervene, Letter Withdrawing Motion, R.__). In its motion to intervene, USLI explicitly acknowledged that the Covenant Not to Execute preserved Tracy's right to seek recovery "under the excess liability insurance policy issued by USLI." (R.__).

The full paragraph read as follows:

> Plaintiff asserted a claim against the Defendant for a motor vehicle accident on August 6, 2016, and in exchange for a payment of $175,000 by Travelers to Plaintiff, a Covenant Not to Execute ("Covenant") was given by Plaintiff to the Defendant on February 31, 2018. The Covenant protected the Defendant from liability for any future judgment but preserved Plaintiff's ability to seek recovery from the Plaintiff's own underinsured motorist (UIM) carrier or under the excess policy issued by USLI. (R.__) (emphasis added).

[1] Subsequently, two underinsured motorist ("UIM") carriers, State Farm and USAA, appeared in the action pursuant to S.C. Code Ann. § 38-77-160, and provided counsel for Appellant. (Consent Order, January 23, 2019, R.__). These carriers were dismissed from the action following their settlement with Tracy. (Consent Order, February 11, 2022, R. __).

Appellant's Motion for Entry of Satisfaction (pursuant to the Covenant)

Following proceedings described below, the lower court entered judgment for Tracy on August 9, 2023. (R.__). However, the judgment was not paid. Instead, new counsel appeared on behalf of Appellant. Specifically, on November 9, 2023—more than three months after entry of judgment—Appellant's new counsel filed a Notice of Appearance and a "Motion for Entry of Satisfaction of Judgment Based on the January 31, 2018 Covenant Not to Execute." (Notice of Appearance NEF and Motion for Entry of Satisfaction, November 9, 2023, R. __).

On January 27, 2025, the trial court held a hearing on the Motion for Entry of Satisfaction. (Hearing Transcript, January 27, 2025, R. __).

On February 3, 2025, the trial court denied the motion and stated:

> The Plaintiff entered into a Covenant Not to Execute with Travelers Insurance which references no fewer than seven times the fact that the Covenant is meant to preserve Plaintiff's right to recover excess liability and/or UIM coverage. (See paragraphs 4,5,9 and numbered paragraphs 3,5, 11 and 12). (Form 4 Order Denying Motion for Entry of Satisfaction, R. __).

The court added that "[s]atisfaction in violation of the clear terms and intent of the Covenant would result in an unfair windfall to Defendant that neither Travelers, Plaintiff, or Defendant intended when entering into the Covenant Not to Execute." (Id.)

A motion to reconsider was denied on February 21, 2025. (Order, R.__). This appeal followed.

Part II: Facts Relating to the Judgment for Damages and the Rule 60(b) Motions

Appellant's Repeated Failure to Appear for His Deposition

Once the lawsuit began, Tracy noticed Appellant's deposition six times between December 2019 and January 2022. (MIO to Motion to Vacate, Exhs. C to G, including letters, Notices of Depositions, and Affidavits of Service, R.__). Despite being personally served with

deposition notices on multiple occasions, and repeatedly warned in writing that Tracy would "move for relief" if he failed to appear, Appellant failed to appear for his deposition every time. (Id.).

The Order Striking Appellant's Answer

On March 11, 2022, after more than two years of Appellant's refusal to participate in discovery, Tracy filed a Motion to Strike Defendant's Answer pursuant to Rule 37, SCRCP. (Motion to Strike Defendant's Answer, R. __). A hearing on the Motion was scheduled for June 1, 2022, before the Honorable Benjamin H. Culbertson. (Notice of Hearing, filed May 16, 2022, R. __).

Appellant was personally served with the Notice of Hearing on Tracy's Motion to Strike on May 17, 2022. (Affidavit of Service, filed May 18, 2022, R. __). Appellant failed to appear at the June 1, 2022 hearing. (Hearing Transcript, June 1, 2022, R. __).

On June 1, 2022, Judge Culbertson entered a Form 4 Order granting Tracy's Motion to Strike Defendant's Answer due to Appellant's failure to participate in discovery. (Form 4 Order, June 1, 2022, R. __). Appellant was personally served with a copy of Judge Culbertson's Order on June 4, 2022. (Affidavit of Service, filed June 6, 2023, R. __).

Appellant's Motion to Vacate the Order Striking his Answer

On March 17, 2023—nine months after entry of the Order Striking Answer—attorneys for Appellant filed a Motion to Vacate the June 1, 2022 Order Striking Answer pursuant to Rule 60(b)(1), SCRCP. (Motion to Vacate, March 17, 2023, R. __). The motion alleged the Order was entered due to Appellant's "mistake, inadvertence, surprise, or excusable neglect." (Id.).

On June 2, 2023, the trial court heard argument from counsel on Appellant's Motion to Vacate, and verbally denied it, following which the Court later confirmed this denial in the Order

of Judgment for damages. (H'rg Transcript, June 2, 2023, 8:4-7; Order of Judgment, Aug. 9, 2023, R. __).

Damages Hearing

Having denied the Motion to Vacate, the Court then proceeded with the damages hearing. (H'rg Transcript, 8:9-10, R.__). Tracy presented extensive testimony and evidence documenting her injuries and course of treatment. (H'rg Transcript, pp. 9:5:-45:15, Amended Damages Hearing Notebook w/ Prayer for Relief and Cover Letter, R.__). Thereafter, the damages hearing continued for a second day on June 29, 2023. (H'rg Transcript, June 29, 2023, R. __). Throughout both hearing dates, Appellant was vigorously represented by Attorneys Jeffrey Ammons and S. Wallace Carnwath, III, who actively participated in the proceedings. (R.__).[2]

Entry of Judgment and Failure to Appeal.

Following the damages hearing, on August 9, 2023, the trial court entered both a Form 4 Order of Judgment and a formal written Order of Judgment in the amount of $4,198,672.14. (Form 4 Order and Order of Judgment, August 9, 2023, R___). The Form 4 Order expressly stated "This order ends the case." (Form 4 Order, August 9, 2023, R___). In its formal Order of Judgment, the court found that Tracy had suffered "severe and permanent injuries" requiring extensive past and future medical treatment. (Order of Judgment, August 9, 2023, R___). The damage award encompassed $479,718.85 in past medical expenses, $98,176.00 in lost wages, $1,330,777.29 in future medical expenses, and $2,290,000.00 in pain and suffering, loss of enjoyment of life, and mental anguish. (Order of Judgment, August 9, 2023, R___). The court

[2] It was during the period leading up to the damages hearing that USLI moved to intervene in order to participate in the damages hearing, USLI ultimately withdrew its motion. (Motion to Intervene, R.__; Letter withdrawing Motion to Intervene, R.__). USLI's motion to intervene contained the passage quoted above acknowledging that the Covenant Not to Execute preserved Tracy's right to pursue recovery from USLI. (Motion, ¶¶ 3 and 9, R.__).

expressly deemed this amount "just and reasonable" in light of Tracy's severe and permanent injuries. (Order of Judgment, August 9, 2023, R___).

Electronic notices of the Form 4 Order of Judgment and the formal Order of Judgment were sent to both Appellant's counsel and USLI's counsel. (NEFs, August 9, 2023, R.__). **Neither Appellant nor USLI sought reconsideration under Rule 59(e) or filed an appeal.**

Appellant's Second Rule 60(b) Motion

On May 31, 2024—more than nine months after entry of the August 9, 2023 Judgment—Appellant, represented by new counsel, filed a Motion for Relief from Judgment pursuant to Rule 60(b), in other words, a second Rule 60(b) Motion. (Motion for Relief from Judgment, May 31, 2024, R. __). One part of this second Rule 60(b) motion sought to challenge the same June 1, 2022 Order Striking Answer that had been the subject of Appellant's first Rule 60(b) motion, which was denied on June 2, 2023. (Id.). The other parts of this motion sought to challenge the August 9, 2023 Judgment, which had not been timely appealed by Appellant, who was represented by other counsel at the time of its entry, or appealed by USLI which received immediate notice of the Order upon its entry. (Id., R.__; August 8, 2023 NEFs, R.__). [3]

These other issues raised in the second Rule 60(b) motion included the absence of a formal entry of default – an issue that Appellant seeks to raise in this appeal. This meritless issue likewise died when Appellant did not appeal the Judgment of August 9, 2023.

[3] A timely appeal by Appellant of the August 9 Final Judgment was of course the proper means to gain review of both the June 1, 2022 Order Striking Answer, and the June 2, 2023 denial of his first Rule 60(b) motion for relief from the Order Striking Answer. USLI also received electronic notification of the Judgment on the date it was entered but failed to take any action. (August 9, 2023 NEFs, R.__). As noted above, Appellant was represented by counsel at the damages hearing. Both USLI and Appellant received electronic notice of entry of the judgment. (NEFs, R.__).

The Trial Court's Post-Judgment Rulings

Regarding the second Rule 60(b) Motion, the court found that Appellant "failed to meet his burden of showing grounds under Rules 60(a) or 60(b), SCRCP." (Form 4 Order Denying Motion for Relief, R. __). The court emphasized the timeline of Appellant's serial delays: "Defendant's Answer was struck on June 1, 2022. Defendant's motion to vacate was not filed until Mar. 17, 2023. [The first Rule 60(b) motion was] denied on Aug. 9, 2023, and the instant motion was not filed until May 31, 2024." (Id.).

Appellant's motion to reconsider denial of his Rule 60(b) motion was denied February 21, 2025. (Order Denying Motion for Reconsideration, February 21, 2025, R. __). In denying reconsideration of the Rule 60(b) ruling, the court noted that "[Defendant] continued to ignore deposition notices for a period of years before Plaintiff moved to strike his Answer." (Id.).

This appeal followed.

STANDARD OF REVIEW

Rule 60(b), SCRCP Orders

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., LLP v. Orr*, 358 S.C. 10, 16, 594 S.E.2d 478 (2004). The appellate "standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Id.* "An abuse of discretion arises when the judge issuing the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support." *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 78, 832 S.E.2d 760, 768 (Ct. App. 2019). "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003).

Construction of Contracts

"It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: "[O]ne may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins*. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975), see also, *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008).

Further, in an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571 (2009).

A BRIEF SUMMARY OF THE ARGUMENT

Mustafa's appeal of the lower court's rejection of his Rule 60(b) motion should be rejected because the issues he raised could have and should have been raised by appealing the August 9, 2023 Judgment. He didn't. That failure is fatal to his current challenges.

The August 9, 2023 Judgment incorporated the denial of Appellant's first Rule 60(b) motion and awarded Tracy $4,198,672.14 in damages. Appellant—represented by counsel—received electronic notice but never appealed. The thirty-day deadline expired. The judgment became final. Now Appellant attempts to resurrect these dead issues through his successive Rule 60(b) motion that challenged orders he could have appealed but didn't. This Court has repeatedly

held that Rule 60(b) cannot substitute for a timely appeal. Appellant cannot do indirectly what he failed to do directly.

Even if these challenges were properly before this Court, they fail on the merits. The lower court did not abuse its discretion in denying these motions. Appellant's second Rule 60(b) motion violates three independent procedural bars: it's an impermissible successive motion, it was filed two years after the challenged order (beyond the one-year deadline), and it seeks to relitigate issues already decided. Substantively, ignoring six deposition notices over two years is willful defiance, not excusable neglect.

The Motion for Entry of Satisfaction likewise fails. The Covenant Not to Execute preserved Tracy's right to pursue excess coverage in seven explicit provisions, including a "notwithstanding anything to the contrary" clause. USLI admitted this in its own court filing. Appellant cannot cherry-pick one paragraph while ignoring seven others that directly contradict his position. Satisfaction would create a $3.9 million windfall no party intended.

The trial court's orders should be affirmed.

ARGUMENT

I. The trial court properly denied Appellant's second Rule 60(b) Motion because Rule 60(b) is not a substitute for a timely appeal and a party may not file successive Rule 60(b) motions in lieu of appealing an adverse ruling.

As a threshold matter, Appellant has not appealed the August 9, 2023 Judgment against him. Despite being represented by experienced counsel (Attorneys Ammons and Carnwath) Appellant did not file an appeal within thirty days of receiving electronic notice of the Form 4 Order and Order of Judgement. (Orders, R.__; NEFs, R.__). USLI likewise received immediate electronic notice of both orders on August 9, 2023., (Id., R.__). As Mustafa's insurance carrier

and with actual notice of the final Judgment, USLI plainly could have ensured (along with his then-counsel) that Mustafa file a timely appeal.

Appellant cannot claim confusion about the finality of the judgment. The Form 4 Order explicitly stated "This order ends the case" and was accompanied by a detailed formal Order of Judgment awarding $4,198,672.14—both filed simultaneously on August 9, 2023. (Orders, R.__). Any suggestion that the judgment was somehow unclear or incomplete is belied by the record. (Orders, R.__).

A. Appellant's Failure to Appeal the 2023 Judgment Deprives this Court of Appellate Jurisdiction.

Following Appellant's failure to timely appeal, the August 9, 2023 Judgment became final and is no longer subject to appellate review. As noted above, electronic notices of the Form 4 Order of Judgment and the formal Order of Judgment were sent to both Appellant's counsel and USLI's counsel contemporaneous with filing. (NEFs, August 9, 2023, R.__). Pursuant to Rule 203(b)(1), SCACR, Appellant had thirty days from notice of entry of the judgment (i.e. September 8, 2023) to serve his Notice of Appeal. "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR.

Appellant did not seek reconsideration under Rule 59(e) or file an appeal within thirty days from notice of entry of the Judgment. As the South Carolina Supreme Court has repeatedly held, "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). "An

unappealed ruling is the law of the case and requires affirmance." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010). Because Appellant failed to timely appeal the August 9, 2023 judgment, that judgment is now final and beyond this Court's appellate jurisdiction. This alone warrants affirmance of the lower court's judgment.

B. Rule 60(b) Cannot Substitute for a Timely Appeal.

South Carolina law is unequivocal that Rule 60(b) cannot serve as a substitute for an appeal. As the South Carolina Supreme Court stated in *Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000), "This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served. […] [I]f this Court were to allow a party to file a Rule 60 motion when a party fails to timely serve a Notice of Appeal, this Court would be exceeding its jurisdictional limits by allowing a party to extend or expand the time in which a Notice of Appeal may be served." *Sadisco v. Greenville Bd. of Zoning*, 340 S.C. 57, 59, 530 S.E.2d 383 (2000) (internal citations omitted). "A party may not invoke [Rule 60, SCRCP] where it could have pursued the issue on appeal." *Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 121, 122, 553 S.E.2d 451, 453 (2001).

Here, Appellant, purports to appeal the denial of two Rule 60(b) Motions. The first Rule 60(b) Motion was filed March 17, 2023—more than nine months after entry of the Order Striking Answer—and sought to vacate that Order based on alleged "mistake, inadvertence, surprise, or excusable neglect." (Motion to Vacate, March 17, 2023, R.**).** The trial court heard and verbally denied that motion on June 2, 2023. (H'rg Transcript, June 2, 2023, 8:4-7, R.__**).** The written order denying the motion was then incorporated into the August 9, 2023 Order of

Judgment, which noted the denial of the motion, awarded damages to Plaintiff, and ended the case. (Order of Judgment and Form 4 Order of Judgment, August 9, 2023, R.__**).**

The time to appeal that denial began to run on August 9, 2023, when both Appellant's counsel and USLI's counsel received electronic notice of entry of the Judgment. (NEFs, August 9, 2023, R**.**__). Because Appellant failed to appeal this denial or the Judgment within thirty days, he cannot do so now.[4]

The second Rule 60(b) Motion, filed on filed May 31, 2024—nine months after entry of the August 9, 2023 Judgment—sought relief from both the Judgment and the June 1, 2022 Order Striking Answer. (Motion for Relief from Judgment, May 31, 2024, R.__). Because Appellant failed to timely appeal the August 9, 2023 Judgment or the June 1, 2022 Order Striking Answer when those opportunities existed, he cannot now use Rule 60(b) as a substitute. As this Court made clear in *Sadisco*, allowing Rule 60(b) to substitute for a missed appeal deadline "would be exceeding [the Court's] jurisdictional limits." 340 S.C. at 59, 530 S.E.2d at 384. That is precisely what Appellant asks this Court to do—extend a jurisdictional deadline that expired over a year ago. This Court lacks the authority to grant such relief.

[4] Additionally, Appellant may have been required to immediately appeal the Order Striking Answer rather than waiting until after final judgment. Under South Carolina law, "An order affects a substantial right and is immediately appealable when it... (c) strikes out an answer or any part thereof or any pleading in any action.: S.C. Code Ann. § 14-3-330(2). As this Court held in *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) with regards to orders affecting substantial rights under section 14-3-330(2), said orders "must be immediately appealed or any later objection in a subsequent appeal will be waived." Because Judge Culbertson's Order struck Appellant's Answer in its entirety, it may have required immediate appeal under § 14-3-330(2)(c), and Appellant's failure to appeal within thirty days may have waived any challenge to that Order. Regardless, Appellant did not even appeal the Order Striking Answer within thirty days of entry of the final judgment in this case.

C. Successive Rule 60(b) Motions Are Not Permitted.

Even if Appellant could overcome the prohibition against using Rule 60(b) as an appellate substitute, his second motion fails because it violates the bar against successive Rule 60(b) motions. Rule 60, SCRCP, is drawn from the Federal Rules, making federal precedent instructive. (See Rule 60, SCRCP, Notes). As Moore's Federal Practice explains, "Because Rule 60(b) rulings are final and appealable, a party who is aggrieved by an adverse ruling on a Rule 60(b) motion must appeal it or waive any complaints about the ruling. A party may not simply file a second Rule 60(b) motion on the same grounds in lieu of an appeal." Moore's Federal Practice 3d, ¶60.69.

The Fifth Circuit applied this principle in *Latham v. Wells Fargo Bank*, 987 F.2d 1199 (5th Cir. 1993), rejecting an attempt to piggyback a 1992 motion onto a similar 1990 motion. Here, Appellant's second Rule 60(b) motion attempts to piggyback on his previously denied Rule 60(b) motion. Both motions challenge the same underlying order—Judge Culbertson's June 1, 2022 Order Striking Answer. The first motion alleged the order resulted from Appellant's "mistake, inadvertence, surprise, or excusable neglect." (Motion to Vacate, March 17, 2023, R. __). The second motion raises the same grounds, merely repackaged with additional arguments about the judgment itself. (Motion for Relief, May 31, 2024, R. __).

Appellant cannot cure his failure to appeal the denial of his first Rule 60(b) motion by filing a second one. Appellant's remedy was to appeal that first denial, not to wait nine months and try again. Successive motions cannot cure the failure to appeal.

D. The Lower Court Did Not Abuse Its Discretion in Finding that Appellant Has Not Met the Burden of Showing Grounds for Relief Under Rule 60, SCRCP.

Even if Appellant's Rule 60 challenges were properly preserved for appellate review—which they are not—the lower court correctly found Appellant "failed to meet his burden of

showing grounds under Rules 60(a) or 60(b), SCRCP." (Form 4 Order Denying Motion for Relief, R.__).

1. Appellant Does Not Meet the Requirements for Relief Under Rule 60(a), SCRCP.

Rule 60(a), SCRCP, permits correction of "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." This narrow rule corrects clerical errors—not substantive disputes about the judgment itself.

South Carolina courts consistently distinguish between clerical errors (which can be corrected) and substantive disagreements (which cannot). In *Landry v. Landry*, 430 S.C. 153, 161, 843 S.E.2d 491, 495 (2020), the South Carolina Supreme Court explained that a mistake exists only where "'there is an inconsistency between the text of an order or judgment and the...court's intent when it entered the order or judgment,' which 'includes an unintended ambiguity that obfuscates the court's original intent.'" (Ellipses in original). Clerical errors are "blunders in execution," not instances where a party disagrees with what the court decided. *Id.*

In *Brown v. Brown*, 392 S.C. 615, 622, 709 S.E.2d 679, 683 (Ct. App. 2011), this Court rejected an attempt to use Rule 60(a) to "clarify" a divorce decree, holding, "The family court's correction of clerical errors may not extend to 'chang[ing] the scope of the judgment.'" Similarly, in *Dion v. Ravenel, Eiserhardt Associates*, 316 S.C. 226, 230, 449 S.E.2d 251, 254 (Ct. App. 1994), this Court reversed when a master tried to use Rule 60(a) to add property to a foreclosure description, explaining there was "no evidence of an 'oversight' or 'omission'" but rather "the issue of whether or not it was included was never contemplated."

Appellant's complaints about the judgment are belied by the record. The Order of Judgment meticulously itemizes each component of the $4,198,672.14 award, including $479,718.85 in past medical expenses, $98,176.00 in lost wages, $1,330,777.29 in future medical

expenses, and $2,290,000.00 in pain and suffering. (Order of Judgment at 2, R.__). The court explicitly deemed this amount "just and reasonable" based on testimony about Tracy's "severe and permanent injuries." (Order of Judgment at 3, R.__). Any suggestion that the judgment is unclear, incomplete, or contains clerical errors is contradicted by this detailed, itemized order that reflects precisely what the court intended after hearing the evidence.

Appellant's suggestion that some additional order was supposed to be issued finds no support in the record. The trial court filed both a Form 4 Order of Judgment and a formal Order of Judgment simultaneously on August 9, 2023. (R.__). The Form 4's notation about an "attached" or "following" formal order refers to the Order of Judgment filed the same day—not some phantom document that never materialized. (R.__). Both documents are complete. Both state the judgment amount. The Form 4 explicitly states "This order ends the case." (R.__). There is no missing document, no incomplete judgment, no clerical error to correct.

Even if Appellant believed another document should have been issued, that would not constitute a clerical error under Rule 60(a). A clerical error involves mistakes in existing documents—typos, transcription errors, mathematical miscalculations. The complete absence of a document Appellant thinks should exist is not a "clerical mistake" that can be corrected under Rule 60(a).

The trial court properly found "no clerical mistakes or ambiguities which would give rise to relief under Rule 60(a)." (Form 4 Order Denying Motion for Relief, R.__). Appellant identifies no typo, no mathematical error, no transcription mistake—only his not-so-veiled disagreement with the court's damages determination. That is a substantive dispute, not a clerical error.

Appellant's transparent request is for Tracy to simply forfeit her judgment. But Rule 60(a) does not permit a party to escape a judgment by claiming clerical error where none exists. The rule corrects typos, not regrets. This is not a typo to be corrected—it is a judgment to be satisfied.

As *Thompson v. Thompson* confirms, Rule 60(a) cannot be used to modify court-ordered awards except for the correction of clerical errors, emphasizing that "the court's correcting of clerical errors may not extend to 'changing the scope of the judgment.'" 428 S.C. 142, 149, 833 S.E.2d 274, 278 (Ct. App. 2019) (internal citations omitted).

That is exactly what Appellant seeks here—a do-over on the court's exercise of judgment regarding damages.

2. Appellant's Rule 60(b) Motion is Time-Barred.

Motions brought under Rule 60(b)(1), (2), or (3) must be filed within one year of the judgment or order. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 340, 745 S.E.2d 90, 91-92 (2013) ("Motions under Rule 60(b)(1), (2), or (3) must be made within a reasonable time, **but not later than one year of the order taken**") (Emphasis added). This one-year deadline is mandatory and jurisdictional - it cannot be extended or excused.

Judge Culbertson struck Appellant's answer on June 1, 2022. (Order Striking Answer, R.__). To challenge that order under Rule 60(b)(1) for "mistake, inadvertence, surprise, or excusable neglect," Appellant had until June 1, 2023—one year from entry of the order. Appellant's second Rule 60(b) motion, filed May 31, 2024, arrived nearly two years after the Order Striking Answer and nearly twelve months beyond the mandatory deadline.

Appellant cannot escape this jurisdictional bar by recharacterizing his motion. His second Rule 60(b) motion purports to challenge the unappealed August 9, 2023 Judgment, but this is

merely an attempt to circumvent the one-year deadline. While Appellant now appeals the trial court's denial of this second motion, the motion itself was untimely because it sought relief from the June 1, 2022 Order well beyond the one-year deadline. As Tracy correctly observed in her memorandum in opposition to the motion, this second Rule 60(b) motion is really about the striking of Appellant's Answer by Judge Culbertson. Framing the motion in this manner does not make it timely. (MIO to Rule 60 Motion, January 24, 2025, at 8, R.__). The substance of the motion—not its caption—controls. Appellant seeks the same relief he sought in his first Rule 60(b) motion: vacatur of the June 1, 2022 Order Striking Answer. He cannot reset the one-year clock by filing successive motions challenging the same order.

Even more troubling, Appellant already filed a Rule 60(b)(1) motion challenging the June 1, 2022 Order on March 17, 2023—within the one-year deadline. That motion was denied on June 2, 2023 and incorporated in the August 9, 2023 Order of Judgment. (Order of Judgment, R.__). Having failed to appeal that denial, Appellant cannot now file a second Rule 60(b)(1) motion seeking identical relief. The one-year deadline is not renewable through successive filings. Once the year expires—or once a timely Rule 60(b) motion is denied without appeal—that avenue for relief is permanently closed.

Our Appellate Courts have consistently enforced Rule 60(b)'s temporal requirements. In *Narruhn v. Alea London Ltd.*, for example, the South Carolina Supreme Court reiterated that while Rule 60(b)(4) and (5) motions need only be filed within a reasonable time, motions under subsections (1), (2), and (3) are subject to the strict one-year time limit. 404 S.C. 337, 340, 745 S.E.2d 90, 91-92 (2013).

Appellant's second Rule 60(b) motion, filed nearly two years after the Order Striking Answer, violates this mandatory deadline. The trial court correctly recognized this defect, noting

in its order: "Defendant's Answer was struck on June 1, 2022. Defendant's motion to vacate was not filed until Mar. 17, 2023. [The first Rule 60(b) motion was] denied on Aug. 9, 2023, and the instant motion was not filed until May 31, 2024." (Form 4 Order Denying Motion for Relief, Feb. 4, 2024, R.__). A motion filed two years after the challenged order cannot satisfy a one-year deadline. The trial court correctly denied this untimely motion.

3. Appellant Does Not Meet the Requirements for Relief Under Rule 60(b)(1), SCRCP.

Rule 60(b)(1), SCRCP, permits relief for "mistake, inadvertence, surprise, or excusable neglect." Appellant's two-year pattern of willful discovery violations cannot constitute excusable neglect. The record establishes deliberate defiance, not excusable neglect:

- Appellant was served with six deposition notices over two years, including notices through personal service. He attended none. (MIO to Motion to Vacate, Exhs. C to G, R.__).
- Appellant was repeatedly warned in writing that Plaintiff would seek relief for his non-compliance. He ignored these warnings. (Id.).
- Appellant was personally served with notice of the hearing on the motion to strike his answer. He chose not to appear. (Notice, filed May 16, 2022, Affidavit of Service, filed May 18, 2022, R.__**;** Hearing Transcript, June 1, 2022, R.__).
- Appellant was personally served with the Order Striking Answer in June 2022. In response, he took no action for nine months. (Affidavit of Service, June 6, 2022; Motion to Vacate, R.__**).**
- Appellant, who was represented by counsel throughout the damages hearing and when the Order of Judgment was entered, did not seek timely reconsideration of the judgment or appeal it.

Given this record of deliberate non-compliance, the lower court did not abuse its discretion in finding that Appellant's conduct constituted willful defiance rather than excusable neglect. As this Court held in *Goodson v. American Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988), "A party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Appellant cannot claim excusable confusion, unfamiliarity or surprise—he was warned of the consequences of non-compliance, personally served with the Order Striking Answer, and represented by experienced lawyers at the damages hearing who chose not to appeal.

4. Appellant Does Not Meet the Requirements for Relief Under Rule 60(b)(4), SCRCP Because the Judgment is Not Void—No Separate Entry of Default Was Required After the Answer Was Struck.

Appellant seeks refuge in a procedural technicality that doesn't exist. Having ignored discovery for years, he now claims the judgment is "void" because the trial court did not issue a separate piece of paper labeled "Entry of Default" after striking his answer. This misguided argument rests on a fundamental confusion between entry of default and default judgment—two distinct concepts Appellant conflates throughout his brief.

South Carolina courts regularly encounter this confusion. In *5star Life Ins. Co. v. Peek Performance, Inc.*, this Court noted cases where "the parties and the trial court confused the terms 'entry of default' and 'entry of default judgment.'" 434 S.C. 334, 343, 863 S.E.2d 468, 473 (Ct. App. 2021) (citing *Beckham v. Durant*, 300 S.C. 329, 331 & n.2, 387 S.E.2d 701, 702-03 & n.2 (Ct. App. 1989)). The Court clarified: "[A] court is unable to enter judgment until damages are determined. The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default." *Id.* (quoting *Ricks v. Weinrauch*, 293 S.C.

372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987)). "Until damages are entered, there is no default judgment." *Id.* (emphasis added).

An entry of default—whether by failing to answer or having an answer struck—is merely a procedural designation that establishes liability. It has no weight as a judgment until damages are determined. When the trial court struck Appellant's answer, it placed him in the same position as any defaulting defendant: liable but awaiting damages determination. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) ("By defaulting, a defendant forfeits his 'right to answer or otherwise plead to the complaint.' In essence, the defaulting defendant has conceded liability."). The striking of an answer, like an entry of default, establishes liability with only damages remaining to be determined. [5] No separate entry of default was required after the answer was struck, but even if there should have been a separate entry of default, as well as striking the answer, failure to do so did not rise to the level of affecting fundamental rights as required to raise points after failing to appeal.

Appellant was not deprived of any due process rights. The record establishes:

- He was repeatedly warned that Plaintiff would seek relief if he failed to attend depositions. (MIO to Motion to Vacate, Exhs. C to G, R.__).
- He was personally served with deposition notices. He chose not to attend. (Id.).
- He was personally served with notice of the hearing on the motion to strike his answer. He chose not to attend. (Affidavit of Service, R.__**;** Hearing Transcript, June 1, 2022, R.__).

[5] As acknowledged in USLI's own Motion to Intervene, "With liability effectively admitted by the Defendant, the hearing on damages is set to proceed on Friday, January 27, 2023." (Motion to Intervene, R.__).

- He was personally served with the Order Striking Answer, then took no action for nine months. (Affidavit of Service, R.__).
- He was provided notice of and vigorously represented by counsel at the damages hearing. (Hearing Transcript, June 2 & 29, 2023, R.__).
- Only after damages were awarded did a default judgment exist. (Order of Judgment, August 9, 2023, R.__).

The language in Appellant's brief—"no default was ever entered" (AIB at 15)—betrays his categorical misunderstanding of these concepts. There was no due process violation. Rather, there was a willful pattern of ignoring the judicial process.

Moreover, Appellant, represented by counsel at the damages hearing, did not move to have the matter heard before a jury, and when judgment was entered, could have challenged the judgment on appeal. He never filed a motion for reconsideration. He never filed a timely appeal. Instead, his lawyers waited nine months to file a successive Rule 60(b) motion.

Ignoring and/or disregarding opportunities to participate in litigation is not the functional equivalent of having your due process rights denied. Appellant cannot close his eyes, plug his ears, then claim to be a victim. Appellant made his choices. He lives with the consequences of those choices.

II. The lower court properly denied Appellant's Motion for Entry of Satisfaction of Judgment where the Covenant Not to Execute expressly preserved Tracy's right to pursue excess liability and underinsured motorist coverage, and satisfaction would result in an unfair windfall to Appellant.

The lower court correctly denied Appellant's Motion for Entry of Satisfaction, recognizing that the Covenant Not to Execute *explicitly* and *repeatedly* preserved Tracy's right to pursue and recover excess liability coverage. (Form 4 Order, Feb. 3, 2025, R.__). The Covenant addresses this preservation no fewer than seven times, making the parties' intent unmistakable.

As the lower court recognized, to order satisfaction now would violate the plain language of the agreement and create an unfair windfall that none of the parties intended. (Id., R.__).

A. The Covenant Preserves Tracy's Right to Pursue Excess Coverage.

South Carolina law requires contracts, especially those relating to insurance, to be construed as a whole, not by taking single words or sentences out of context. Language must be read in its ordinary plain meaning. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). "Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." Id.[6]

The Supreme Court's application of this principle in *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 574 (2009), is instructive. There, a party attempted to create ambiguity by focusing on one provision of a land sale contract while ignoring other provisions. The Court rejected this approach:

> Reading all of the provisions as a whole, we find that the contract assumes that all owners would sell their interests in the property... Appellant impermissibly focuses on one provision in order to create an ambiguity and ignores the rest of the language in the contract indicating that the contract required unity of all owners before closing would take place. *Id*.

Here, Appellant similarly focuses on Paragraph 6 in isolation while ignoring seven explicit provisions preserving Tracy's rights to pursue excess coverage. Even if Paragraph 6

[6] *See also, State Farm Mutual Automobile Insurance Company v. Windham*, 438 S.C. 156, 882 S.E.2d 754 (2022); *Beverly v. Grand Strand Regional Medical Center, LLC*, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2022); *Portrait Homes – South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Company*, 442 S.C. 515, 900 S.E.2d 245 (Ct. App. 2023).

standing alone could be viewed as ambiguous, the Covenant as a whole is unambiguous when all provisions are read together.

Applying these well-established principles to the Covenant at issue demonstrates the parties' clear intent. Reading the Covenant as a whole reveals an unmistakable intent to preserve Tracy's rights to pursue and recover excess coverage. Parties do not repeat the same reservation of rights seven times by accident. The Covenant explicitly preserves Tracy's right to pursue excess liability coverage in each of the following provisions:

The **Eighth "WHEREAS" Paragraph** unequivocally states that the Covenant does not prejudice or release in any way Tracy's right to proceed against Appellant's excess liability carrier and her underinsured motorist carriers:

> WHEREAS, the Plaintiff desires to accept payment from Travelers, on behalf of its Insureds, in return for a Covenant Not to Execute ***but without prejudicing or releasing in any way the Plaintiff's right to proceed against the excess liability insurance coverage and/or the underinsured motorist coverage above-described***. (Emphasis added). (Covenant, R. __)

Paragraph 3 specifically preserves Tracy's right to pursue and collect from Appellant's excess liability carrier and her underinsured motorist carriers:

> That Travelers and the Insureds agree that the Plaintiff may proceed with their case against the Insureds to effect settlement or verdict against the Insureds <u>solely</u> for the purpose of collecting excess liability insurance coverage and/or underinsured motorist coverage. (underlining in original) (R. __).

Paragraph 5 expressly states that the parties agree that the Covenant is not a Release or a Covenant Not to Sue and that it shall not be construed in a manner which releases Tracy's rights to pursue and collect from Appellant's excess liability carrier and her underinsured motorist carriers:

> The parties hereto further agree that this Covenant is not a Release or a Covenant Not to Sue and that it shall not be construed nor is it intended to relinquish or release the Plaintiff's right to pursue and maintain their action against the Insureds

> solely for the purpose of collecting excess liability insurance coverage and/or underinsured motorist coverage. ***Nothing contained herein releases any rights of the Plaintiff against any excess liability insurance coverage and/or underinsured motorist coverage.*** (R. __). (Emphasis added) (underlining in original).

Paragraph 11 contains a catchall provision, which expressly reaffirms Tracy's right to pursue and recover from Appellant's excess liability coverage and her underinsured motorist coverage, specifically noting that this right exists even if anything in the Covenant could be interpreted to the contrary:

> ***Notwithstanding anything to the contrary***, the Plaintiff does not waive or release in any way any excess liability insurance coverage and/or underinsured motorist carrier because of the terms and conditions as stated herein. (R. __) (emphasis added).

Paragraph 12 addresses Tracy's obligations only *after* collecting from the excess carrier:

> The Plaintiff agrees that when and if excess liability insurance coverage and/or underinsured motorist coverage is paid by the excess liability insurance carrier and/or underinsured motorist carrier and/or the Plaintiff enters into an agreement with the excess liability insurance carrier and/or underinsured motorist carrier for the payment of excess liability coverage and/or underinsured motorist coverage that she will execute proper Releases relinquishing and releasing all of their rights to proceed against the Insureds and Travelers. (R.__).

Taken together, these provisions create an impenetrable wall of preservation. No reasonable interpretation could conclude that Tracy waived her rights to pursue and recover excess coverage when the Covenant repeatedly, explicitly, and emphatically preserves those exact rights. The use of absolute language— "without prejudicing or releasing **in any way**," "**Nothing** contained herein releases," and "**Notwithstanding anything to the contrary**"— demonstrates the parties' determination to preserve these rights regardless of any other provision. Despite Appellant's contention, the parties' repetitive and emphatic preservation of Tracy's rights cannot be ignored or explained away. When parties repeat the same reservation over and

over again and include a "notwithstanding anything to the contrary" provision, they leave no room for contrary interpretation.

Moreover, "The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230 (2008). When faced with competing interpretations, South Carolina law provides clear guidance: "Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." *Id.*, citing *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). Indeed, "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. at 155.

Appellant's tortured interpretation—that Paragraph 6 requires complete satisfaction despite the Covenant's repeated and emphatic preservation of Tracy's rights throughout the document—would lead to an absurd result where parties repeatedly preserved rights they intended to waive. The only reasonable interpretation of this provision, and the one that gives effect to all provisions, is that the Covenant preserved Tracy's right to pursue excess coverage exactly as stated throughout the document. By any measure of contract interpretation, the Covenant's plain language, consistent repetition, and absolute preservation language leave no room for Appellant's contradictory reading.

B. USLI's Own Motion to Intervene Admitted Tracy's Rights Were Preserved.

Notably, USLI's Motion to Intervene filed on January 26, 2023, affirms that the Covenant protected Appellant from liability for any future judgment but preserved Tracy's ability to seek recovery from the Appellant's excess policy issued by USLI, stating:

> Plaintiff asserted a claim against the Defendant for a motor vehicle accident on August 6, 2016, and in exchange for a payment of $175,000 by Travelers to Plaintiff, a Covenant Not to Execute ("Covenant") was given by Plaintiff to the Defendant on February 31, 2018. [sic] The Covenant protected the Defendant from liability for any future judgment but preserved Plaintiff's ability to seek recovery from the Plaintiff's own underinsured motorist (UIM) carrier or under the excess policy issued by USLI. (Emphasis Added). (R.__).

(Motion to Intervene ¶ 3, R.__) (emphasis added).

This is not casual correspondence or arguable interpretation; it is a formal representation to the Court acknowledging Tracy's right.

C. Paragraph 6 Refers Only to Travelers' Payment, Not the Entire Judgment.

Appellant misinterprets Paragraph 6 of the Covenant, one of two paragraphs in the Covenant which address satisfaction. When read logically, the two sentences of Paragraph 6 addresses the Travelers policy, with the first sentence addressing the consideration paid by Travelers ($175,000.000 of its $250,000.00 policy limit), and the second sentence referring to the remaining $75,000 that Travelers is not paying. Potential recovery from other insurers is dealt with in Paragraph 12, while Paragraph 6 addresses the payment by Travelers and the gap between this payment and Travelers per person limits:

> The Plaintiff agrees that if a judgment against the Insureds for damage arising out of the Plaintiff's claim has been entered, the Plaintiff agrees to promptly satisfy the judgment with respect to the amount of the consideration being paid under this agreement and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered on the face of the judgment. If a judgment against the Insureds is in excess of the amount paid under the agreement and is enrolled, the Plaintiff will promptly satisfy the judgment with respect to such excess and will file a certification of such satisfaction with the

> Clerk of Court in whose office the judgment is enrolled to be entered upon the face of the judgment. (Covenant ¶ 6, R. __).

Thus, the words "such excess" logically refer to the $75,000.00 that Plaintiff agreed to forgo in order to reach an agreement with Travelers and Appellant. This paragraph gives credit to Travelers and Appellant to the full extent of Travelers' $250,000.00 per person limits notwithstanding that only $175,000.00 is being paid. USLI's motion to intervene, quoted above, confirms USLI's appreciation of Paragraph 6.

By contrast, in each of the Covenant's seven paragraphs in which Tracy, Appellant and Travelers recognize the preservation of Tracy's right to collect from insurers for Appellant other than Travelers, the wording used is always "*excess liability insurance*." Every use of the phrase "*excess liability insurance*" includes Tracy's reservation of that remedy. By any fair reading, Appellant's interpretation of the Covenant is without merit.

D. Satisfaction Would Create an Unfair Windfall.

The trial court correctly found that satisfaction "would result in an unfair windfall to Defendant that neither Travelers, Tracy, or Appellant intended when entering into the Covenant Not to Execute." (Form 4 Order Denying Motion for Entry of Satisfaction, R.__).

If the Court were to order satisfaction of the entire $4.2 million judgment based on Travelers' $175,000 payment, it would give Appellant the benefit of complete release from a multi-million-dollar judgment for only $175,000. Most significantly, it would deprive Tracy of the very rights the Covenant explicitly and repeatedly preserved, violating both the cardinal rule that courts must "ascertain and give legal effect to the parties' intentions as determined by the contract language," *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012), and the rule that "[a] contract is read as a whole document so that one may not create an

ambiguity by pointing out a single sentence or clause," *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014).

The Covenant's structure makes clear that Tracy would receive: (1) $175,000 from Travelers; (2) potential recovery from excess liability coverage; and (3) only after collecting from excess coverage, would provide releases to all parties. This carefully negotiated agreement cannot be rewritten through selective reading of an isolated provision.

E. The Trial Court Applied the Correct Legal Standard and Should be Affirmed.

The trial court properly examined the Covenant as a whole and gave effect to its plain language. The court correctly noted that the Covenant "references no fewer than seven times the fact that the Covenant is meant to preserve Plaintiff's right to recover excess liability and/or UIM coverage." (Form 4 Order, R.__).

Appellant cannot cherry-pick and misconstrue Paragraph 6 while ignoring each of the provisions that explicitly preserve Tracy's rights. When construed as a whole—as South Carolina law requires—the Covenant preserves Tracy's right to pursue excess coverage, so satisfaction at this juncture without recovery would violate the agreement's plain terms and the parties' clear intent.

As the lower court pointedly asked, and counsel was forced to admit before attempting to justify their contrary position:

> The Court: [...] Ms. Stetson, isn't the whole purpose of the Covenant Not to Execute, as opposed to a release, so that we can have this exact situation where the injured party can pursue additional coverage without, you know, giving up their rights?
>
> MS. STETSON: Your Honor, the concept of the Covenant Not to Execute in general, I would agree with that. I think the purposes of pursuing additional coverage is stated in the agreement.
>
> (H'rg Transcript, January 25, 2025, 15:5-12, R.___).

The lower court correctly rejected the attempt to rewrite the Covenant through selective reading and misconstruction of its plain language, whether styled as a Motion for Entry of Satisfaction or as a request for relief under Rule 60(b)(5). Having correctly applied South Carolina law to the Covenant's terms, the trial court's denial should be affirmed.

F. Appellant's arguments on the Covenant are Meritless

Appellant makes only two arguments to support his request for reversal on the Covenant issue. First, he argues that the Covenant is unambiguous in requiring satisfaction of the judgment. This position is based entirely on Appellant's interpretation of Paragraph 6 of the Covenant. If Appellant simply asserted that Paragraph 6 is unambiguous, Tracy could understand that position – albeit disagreeing with it.

But Appellant argues that the *entire* Covenant is unambiguous in supporting satisfaction-without ever mentioning a single other Paragraph (except for passing mention of Paragraph 12). The notion that an Appellant would take such a position without even considering or mentioning the *seven* paragraphs that unqualifiedly preserve Tracy's right to recover is simply astounding.

Appellant's second argument is, if anything, even more bewildering. At page 12, Appellant says:

> Tracy had a right to 'proceed' against excess liability and/or UIM coverage and attempt to collect coverage. Tracy was in fact permitted to proceed, via the personal injury lawsuit she filed. And Mustafa never moved to dismiss or preclude the lawsuit on the basis of the 2018 agreement. Therefore, the covenant-not-to-execute could have and should have been fully enforced to protect the bargained-for right of both parties.

This is simply breathtaking. Apart from the fact that the Covenant specifically protected Tracy's right to "collect," not just "proceed," Paragraphs 3 and 5, Appellant's interpretation would render the judgment meaningless—a right to obtain a money judgment with no right to enforce it.

With all due respect, this argument is wholly without merit and defies both law and reason.

CONCLUSION

For the foregoing reasons, Tracy respectfully requests that this Honorable Court affirm the trial court's orders denying Appellant's Motion for Entry of Satisfaction of Judgment and the successive Rule 60(b) Motion. The lower court acted well within its discretion in denying Appellant's successive and untimely post-judgment motions.

This Court lacks jurisdiction to review the August 9, 2023 Judgment, which Appellant—represented by counsel—failed to timely appeal. Appellant cannot circumvent jurisdictional deadlines through successive Rule 60(b) motions filed nine months and twenty-one months after adverse rulings. Rule 60(b) is not a substitute for appeal, and permitting such collateral attacks would eviscerate this Court's jurisdictional requirements.

Even if this Court had jurisdiction, the trial court correctly denied relief. Appellant's two-year pattern of willful discovery violations, including ignoring deposition notices despite explicit warnings, constitutes deliberate defiance—not excusable neglect. The judgment contains no clerical errors requiring correction under Rule 60(a). The procedural technicality Appellant invents—that a separate "entry of default" was required after his answer was struck—finds no support in South Carolina law.

The trial court properly denied the Motion for Entry of Satisfaction. The Covenant Not to Execute expressly preserved Tracy's right to pursue excess liability coverage through seven explicit provisions, including a "notwithstanding anything to the contrary" clause. To order satisfaction now would violate the Covenant's plain language, create an unfair windfall, and deprive Tracy of rights all parties intended to preserve.

The trial court faithfully applied South Carolina law to the Covenant's contractual language and properly exercised its discretion in denying untimely, successive, and meritless post-judgment motions. Its orders should be affirmed in all respects.

Respectfully submitted,

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