

The Supreme Court of South Carolina

Elisa Narruhn, Respondent,

v.

Alea London Limited and Anderson Genral Insurance,
Defendants, Of whom, Alea London Limited is the,
Appellant.

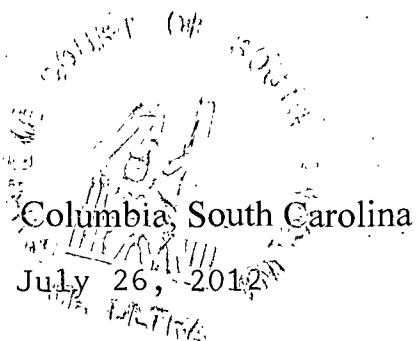
Appellate Case No. 2011-191646

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



J. J. Lyles

FOR THE COURT

J.

cc:

Mark V. Gende

Mark Steven Barrow

Gene McCain Connell, Jr.

William Roberts Calhoun, Jr.

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 11, 2012

Mark Steven Barrow, Esquire
Mark V. Gende, Esquire
William R. Calhoun, Jr., Esquire
Sweeney Wingate and
Barrow, P.A.
P. O. Box 12129
Columbia, SC 29211

Re: Narruhn, Elisa v. Alea London Limited
Case Tracking #: 2011191646

Dear Counsel:

The following Order has been endorsed on your "Motion to File Appellant's Final Reply Brief Out of Time" in the above entitled case on appeal.

"Granted.

John Cannon Few C.J.
For the Court

By s/ Tanya A. Gee
Clerk

January 11, 2012."

Please be advised the "Final Reply Brief of Appellant" has been received and is accepted as filed. All requested corrections have been completed. Therefore, all parties are advised that the Record on Appeal and all final briefs will be submitted for the Court's consideration.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Gene McCain Connell, Jr, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

DEC 20 2011

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

MOTION TO FILE APPELLANT'S FINAL REPLY BRIEF OUT OF TIME

Pursuant to Rule 240 S.C.A.C.R, Appellants move for an Order allowing the filing out of time of Appellant's Final Reply Brief.

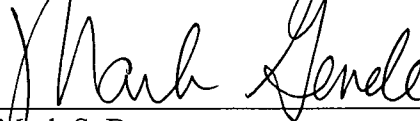
Due to an inadvertent oversight, the Appellant's Final Reply Brief was not served along with the Appellant's Final Brief, which was served timely and in correct quantities. Appellant moves this Court to accept its Final Reply Brief, which is served contemporaneously with this motion and in correct quantities and form.

Appellant notes there is no prejudice to the Respondent in granting this motion, because Respondent was served with the Initial Reply Brief in a timely manner during the briefing process.

Appellant apologizes for any inconvenience to the Court and has taken steps to insure the oversight that gave rise to this issue has been corrected.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

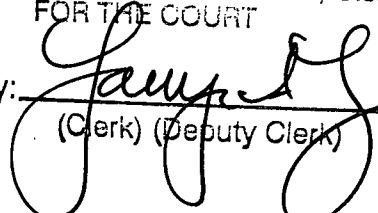


Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

**ATTORNEYS FOR APPELLANT
ALEA LONDON LIMITED**

Columbia, South Carolina
December 20, 2011

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: 
(Clerk) (Deputy Clerk)

FILED

cc 1/4/12

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

RECEIVED

DEC 20 2011

SC Court of Appeals

Elisa Narruhn Respondent

v.

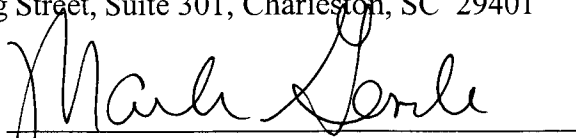
Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

PROOF OF SERVICE

I certify that I have served the Motion to File Final Reply Brief Out of Time of Appellant on Respondent Elisa Narruhn by depositing a copy of it in the United States Mail, postage prepaid, on December 20, 2011, addressed to her attorney of record, Gene M. Connell, Jr., Esquire, Kelaher, Connell & Connor, P.C., 1500 U.S. Highway 17 North, The Courtyard, Suite 209, Post Office Box 14547, Surfside Beach, SC 29587-4547 and on Defendant Anderson General Insurance by depositing a copy of it in the United States Mail, postage prepaid, on December 20, 2011, addressed to their attorney of record, Susan Taylor Wall, Esquire, Parker Poe Adams & Bernstein L.L.P., 200 Meeting Street, Suite 301, Charleston, SC 29401

December 20, 2011



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant Alea London Limited

S·W·B

SWEENY WINGATE & BARROW P.A.

December 20, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

RECEIVED

DEC 20 2011

SC Court of Appeals

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

Enclosed for filing are the original and seven (7) copies each of Motion to File Appellant's Final Reply Brief Out of Time in this case.

Please return to the courier who delivers these a filed, stamped copy of this letter and the attached Motion. Also enclosed, please find a check for \$25.00 for the filing fee. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire, and Susan T. Wall, Esquire

Respectfully,

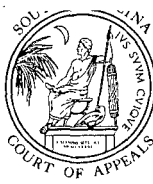
SWEENY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/smt

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

December 15, 2011

Mark Steven Barrow, Esquire
Mark V. Gende, Esquire
William R. Calhoun, Jr., Esquire
Sweeney Wingate and
Barrow, P.A.
P. O. Box 12129
Columbia, SC 29211

Re: Narruhn, Elisa v. Alea London Limited
Case Tracking #: 2011191646

Dear Counsel:

We have received the Record on Appeal, Appellant's Final Brief and Respondent's Final Brief in the above matter. Unfortunately, the record and Appellant's Final Brief are not in compliance with the South Carolina Appellate Court Rules and must be corrected before they can be accepted by this Court.

Also, we have not received the Appellant's Final Reply Brief. The deadline for filing this brief has now passed. If you would like to file this brief out of time, you must serve and file a motion in accordance with Rule 240, SCACR. You are encouraged to file the final reply brief with the motion within ten days of the date of this letter.

Within ten days, you are requested to provide:

1. Certificate of Counsel for the Record on Appeal that includes your original signature. The certification previously received was not signed by counsel.
2. Certificate of Counsel for the Appellant's Final Brief that includes your original signature. The certification previously received is not signed by counsel.
3. Labels to correct the cover of the Record on Appeal to add the firm name for Appellant's counsel.
4. Labels to correct the caption as it appears on the cover of the Record on Appeal. Please refer to the Court's letter of May 17, 2011 for the correct caption.

Please call our office at least 24 hours prior to your arrival so that the briefs can be made available without delay.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Gene McCain Connell, Jr., Esquire

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

December 2, 2011

RECEIVED
DEC 05 2011
SC Court of Appeals

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No. 2011191646
C/A No. 2010-CP-26-4112
Our File No. 2008-0383C

Dear Ms. Gee:

Enclosed please find the original (unbound) and fourteen copies of the following for filing in the above-captioned matter:

- Final Brief of Respondent, with Certificate of Counsel and Proof of Service.

I also enclose one (1) additional copy of the Final Brief and would ask that you please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve the Final Brief of Respondent on counsel of record.

With best regards, I am

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Mark S. Barrow, Esq.
Mark V. Gende, Esq.
William R. Calhoun, Jr., Esq.
Susan Taylor Wall, Esq.

S·W·B

SWEENEY WINGATE & BARROW P.A.

November 14, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

RECEIVED
NOV 14 2011
SC Court of Appeals

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

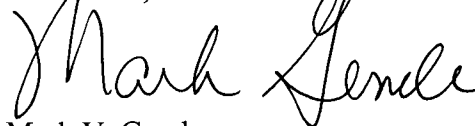
Enclosed for filing are the original and sixteen (16) bound copies each of Final Brief of Appellant and Record on Appeal in this case. Please file the original and return the two (2) remaining bound clocked copies to my courier. Also enclosed are two (2) original and two (2) copies of Proof of Service. Please file the original and return the two (2) clocked copies to my courier.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire, and Susan T. Wall, Esquire

Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/aem

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 13, 2011

Gene McCain Connell, Jr., Esquire
Kelaher Connell & Connor, PC
P.O. Drawer 14547
Surfside Beach, SC 29587

Re: Narruhn, Elisa v. Alea London Limited
2011191646

Dear Mr. Connell:

Enclosed is a copy of an Order of the Court denying your Motion in the above case.

Counsel for the Appellant must serve the Record on Appeal on the Respondent and file proof of service with this Court within thirty (30) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/ma

cc: Mark Steven Barrow, Esquire
Mark V. Gende, Esquire

The South Carolina Court of Appeals

Elisa Narruhn,

Respondent,

v.

Alea London Limited and Anderson
General Insurance,

Defendants,

Of whom, Alea London Limited is the, Appellant.

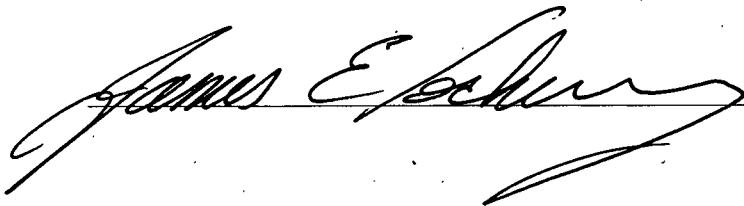
The Honorable Larry B. Hyman, Jr.
Horry County
Trial Court Case No. 2010-CP-26-04112

ORDER

Respondent has moved to dismiss Appellant's appeal, arguing Appellant seeks to appeal an interlocutory order and has no standing to contest the order. Appellant filed a return opposing the motion. After careful consideration, Respondent's motion to dismiss is denied. Nothing in this order prevents Respondent from arguing the issue of Appellant's standing in her brief.

IT IS SO ORDERED.

Columbia, South Carolina



cc: Mark Steven Barrow, Esquire
Mark V. Gende, Esquire
Gene McCain Connell, Jr, Esquire

FILED
10/13/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2011191646

RECEIVED
AUG 22 2011
SC Court of Appeals

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

INITIAL REPLY BRIEF OF APPELLANT

Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

ARGUMENT IN REPLY.....1

**I. RESPONDENT’S BRIEF MISCHARACTERIZES THE
NATURE OF APPELLANT’S APPEAL.1**

**II. RESPONDENT DOES NOT CONTEST OR ARGUE SEVERAL
POINTS IN APPELLANT’S BRIEF, SO THEY ARE UNOPPOSED
IN THIS APPEAL.2**

CONCLUSION.....6

Cases

Ball v. Ball, 312 S.C 12, 430 S.E.2d 533 (Ct. App. 1995).....5

In re Marriage of Brown, 544 P.2d 561 (Cal. 1976).....5

Johnson v. Service Management, Inc., 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995).....4

Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010)5, 6

McDaniel v. U.S. Fid & Guar. Co., 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996).....5

Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 746 (Ct. App, 2007)4, 5

Mr. T v. Mrs. T, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008).....3

Rick’s Amusement, Inc. v. State, 351 S.C. 352, 570 S.E.2d 155 (2001).....5

The Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 155 S.E.2d 591 (1967).....5

Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).....5

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000).....2

Statutes

S.C. CODE ANN. § 15-39-310 et seq.....3

S.C. CODE ANN. § 15-39-350.....3

Rules

Rule 60(B), SCRCP.....Passim

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO HEAR AND DECIDE A MOTION UNDER RULE 60(b), SCRCP, REGARDING AN ORDER BY A SPECIAL REFEREE WHO HAD FULLY COMPLETED THE TASK FOR WHICH HE HAD BEEN APPOINTED?

2. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT'S MOTION UNDER RULE 60(b) WAS UNTIMELY?

3. DID THE TRIAL COURT ERR IN IMPLICITLY HOLDING THAT THE SPECIAL REFEREE WHOSE CHARTER WAS TO CONDUCT SUPPLEMENTAL PROCEEDINGS HAD SUBJECT MATTER AND PERSONAL JURISDICTION TO ORDER THE ASSIGNMENT OF A PARTY'S INCHOATE RIGHTS AGAINST ITS NON-PARTY INSURER, WHEN THE INSURER IS PROVIDED NO NOTICE OF THE PROCEEDING OR THE OPPORTUNITY TO BE HEARD?

ARGUMENT IN REPLY

I. RESPONDENT'S BRIEF MISCHARACTERIZES THE NATURE OF APPELLANT'S APPEAL.

Appellant's Statement of Issues on Appeal is cited above to highlight what Appellant is, and is not, appealing. Respondent's brief repeatedly asserts that Appellant is seeking to "set aside a default judgment [or default]...." Respondent's Brief, pp. 1, 3, 4, 8. That is completely incorrect. Such argument is a strawman that Respondent can readily refute, but it is not the argument that Appellant makes. Respondent's Brief *de facto* asserts that Appellant is seeking reversal of the orders of April 17, 2006 and July 7, 2009, which, respectively, order the entry of default and judgment by default against RKC Entertainment. R. _____. Respondent Alea London's appeal is directed at two entirely different Orders. Appellant is appealing the Circuit Court's Order of May 2,

2011, which holds that it does not have jurisdiction to set aside, under Rule 60(B), SCRPC, and the Special Referee's Order of March 8, 2010. R. _____, _____. Appellant seeks to have the March 8, 2010 Order, which orders the assignment of Alea's insured's purported rights against Alea to Respondent, set aside based on the grounds articulated in Appellant's brief. There is no holding in either of the appealed Orders about default, which is a primary focus of Respondent's brief.

II. RESPONDENT DOES NOT CONTEST OR ARGUE SEVERAL POINTS IN APPELLANT'S BRIEF, SO THEY ARE UNOPPOSED IN THIS APPEAL.

While the failure of a Respondent to argue issues raised by an Appellant may not, under our law, represent Respondent's abandonment of that issue, such refusal to address the Appellant's issue leaves them uncontested. There are several such legal and factual issues here, raised and supported in Appellant's brief, but not addressed in Respondent's brief. Among them are the following:

A. The Fact that the Special Referee Had Completed His Assigned Task.

Appellant argued (brief, p. 7) that Special Referee Fata had completed the task assigned him by entering his final judgment on March 8, 2010. That statement is uncontested, bringing into applicability the statement that, "[o]nce the master has concluded his duties and entered all necessary orders, his jurisdiction ends and any post-trial motion, other than those covered by this court's May 22, 1986, order, are to be heard by the circuit court." Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000). Because a motion under Rule 60(b), SCRPC, is not one covered by the Supreme Court's Order of May 22, 1986, the Rule 60(b) motion here was properly submitted to the circuit court – which erred when it held that it did not have jurisdiction.

B. That Alea's Motion is an Independent Action in Equity Specifically Allowed by Rule 60(b)

As argued in Appellant's brief, pp. 8-10, Alea's motion represents an independent action in equity provided for in Rule 60(b), which states that the power of a court is not limited in that it can "entertain an independent action to relieve a party from a judgment, order or proceeding. . . . " In this case, it is also unchallenged that Alea's claim meets all five of the equitable elements, for such an independent action cited by this Court in Mr. T. v. Mrs. T, 378 S.C. 127, 135-36, 162 S.E.2d 413, 417-18 (Ct. App. 2008). As an independent action, it was in the purview, and could have been adjudicated by, the Circuit Court, which erroneously failed to exercise its jurisdiction.

C. That Alea's Motion was Timely

The Special Referee's Order was entered March 8, 2010. Alea London's Motion was filed on December 10, 2010, well within one year of the appealed order. There is, moreover, no time limitation for motions made under Rule 60(b)(4) and (5). Alea's motion was made under Rule 60(b)(1), (4) and (5).

D. That the Actions and Order of the Special Referee did not comply with the Statutes Governing Supplementary Proceedings.

The Respondent has not contested that the proceeding before Special Referee Fata did not comply with the applicable statutes. Though his appointment order, R. _____, limited Special Referee Fata's authority to the conduct of supplemental proceedings, he did not comply with the statutory provisions of S.C. Code Ann. § 15-39-310 *et. seq.* Those statutes limit his jurisdiction, which he exceeded by his failure to adhere to the statutes and case law construing them, especially S.C. Code Ann. § 15-39-350, as

construed by Johnson v. Service Management, Inc., 319 S.C. 165, 167-69, 459 S.E.2d 900, 902-03 (Ct. App. 1995). *aff'd* 324 S.C. 198, 478 S.E.2d 63 (1996).

E. That the Uncertain rights of Alea London's Insured against Alea London was not a Chose In Action

The Respondent fails to contest Appellant's position, and cited authority, that the inchoate rights of RKC Entertainment, LLC against Alea were not a chose in action. Such rights were completely undefined and indefinite and, therefore, did not meet the requirements of our law to be a chose in action, a form of property. RKC Entertainment, LLC, therefore, had nothing – no property – that could properly be assigned to Appellant in supplementary proceedings.

F. That the Special Referee did not have Personal Jurisdiction of Alea London to Deprive it of its Contractual Rights.

The Respondent does not challenge, or address in any way, Appellant's position that the Special Referee did not have personal jurisdiction of Alea London sufficient to deprive it of rights under its contract with RKC Entertainment. That contract specifically stated that RKC's "rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured." R. _____. The policy did not have an individual Named Insured and there was no pertinent death, so the exception to this statement is inapplicable. The upshot is that RKC Entertainment could not transfer its rights under the policy without Alea's written consent – and that consent was not given.

Even if it were proper for the Special Referee to step into the shoes of RKC¹, the Special Referee would have no greater rights than the contract holder. Moore v.

¹ Though the failure of the Special Referee to establish RKC's ownership should preclude that.

Weinberg, 373 S.C. 209, 220, 644 S.E.2d 746, 745 (Ct. App. 2007) (“An assignee stands in the shoes of its assignor,” citing Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999 (“[T]he assignee should have. . . the same rights and privileges as the assignor”)). RKC could not have assigned its rights to Respondent Narruhn; the Special Referee, therefore, could not assign RKC’s “rights” under the contract to Ms. Narruhn.

Because Alea was never brought within the jurisdiction of the Special Referee, or even notified of the proceedings at which its contractual rights were to be abrogated, the Special Referee did not have jurisdiction to deprive Alea of its property right in its contract. Ball v. Ball, 312 S.C. 31, 34, 430 S.E.2d 533, 535 (Ct. App. 1993) (“a ‘contractual right issue a form of property’ ” quoting In re Marriage of Brown., 544 P.2d 561, 565 (Cal. 1976)). The order of a court that is without personal jurisdiction is void under Rule 60(b)(4), SCRPC. Linda Mc Co. v. Shore, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) citing McDaniel v. U.S. Fid & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996).

Inasmuch as the Special Referee’s Order impaired the obligations of Alea’s insurance contract, it was in violation of Art I, § 4 of the South Carolina Constitution. Rick’s Amusement, Inc. v. State 351 S.C. 352, 360, 570 S.E.2d 155, 159 (2001) (“Both the United States and South Carolina Constitutions prohibit the State from passing laws which impair the obligations of contracts. See U.S. Const. Act I, § 10; S.C. Const. Act I, § 4”). See also The Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 155 S.E.2d 591 (1967) (Court could not impair obligation of insurance contract).

Impairing Alea's contractual rights at a hearing of which it had no notice and no opportunity to be heard – and in violation of the statutes governing supplementary proceedings – deprived Alea of the due process guarantees of the Fourteenth Amendment of the United States Constitution and Act I, § 3 of the South Carolina Constitution. Orders from “courts which failed to provide proper due process” are within Rule 60(b)(4)'s definition of “void.” Linda Mc Co. v. Shore, *supra.*, 390 S.C. at 552, 703 S.E.2d at 503.

CONCLUSION

Respondent's brief misapprehends the substance of Appellant's brief in asserting that Appellant is seeking to have a default or default judgment of RKC Entertainment set aside. Such an objective is entirely absent from Alea London's appeal. On the other hand, Respondent leaves entirely uncontested several key positions of Appellant, which lead to the following conclusions:

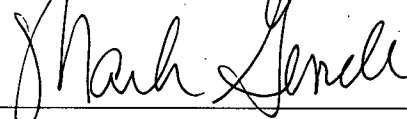
- The Special Referee's task was fulfilled, so the proper forum for adjudication of a Rule 60(b) motion was the circuit court.
- That Alea's Rule 60(b)(5) motion is a viable independent action in equity.
- That the Trial Court erred in holding that Alea's motion was untimely.
- That the Special Referee failed to abide by the statutory requirements for supplementary proceedings.
- That RKC Entertainment's inchoate right against Alea was not a chose in action, susceptible to an assignment by anybody.
- That the Special Referee did not have personal jurisdiction over Alea, that its Order impaired Alea's contractual rights, and that the proceedings violate Alea's right to due process under the United States and South Carolina Constitutions.

These uncontested facts lead to the conclusions that the Trial Court erred in holding that it did not have jurisdiction to adjudicate the Rule 60(b) motion and that the Order of the Special Referee is void for lack of due process and personal jurisdiction.

This Court should reverse the Trial Court's Order of May 11, 2011 and remand the case with instructions to vacate the Special Referee's Order of March 8, 2010.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

**ATTORNEYS FOR APPELLANT
ALEA LONDON LIMITED**

Columbia, South Carolina
August 22, 2011

S·W·B

SWEENEY WINGATE & BARROW P.A.

August 22, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RECEIVED
AUG 22 2011
SC Court of Appeals

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No.: 2011191646
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

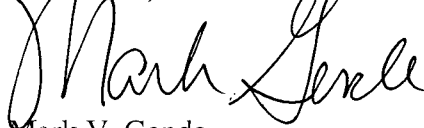
Enclosed for filing are the original and one copy of the Initial Reply Brief of Appellant in this case.

Please return to the courier who delivers these a filed, stamped copy of this letter and the attached Initial Reply Brief of Appellant. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.


Mark V. Gende

MVG/vlp

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2011191646

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant

RECEIVED

AUG 22 2011

SC Court of Appeals

Under the provisions of Rule 240(c), SCACR, the Appellant herewith provides its return to Respondent Narruhn's motion to dismiss this appeal. As addressed below, Respondent's motion should be denied. Respondent has misapprehended the import of Appellant's appeal. Contrary to Respondent's motion, Appellant has not appealed a denial of a motion to set aside an entry of default or default judgment entered against Appellant's insured, RKC Entertainment. It has appealed an Order of the Circuit Court wherein the Court held that he did not have jurisdiction to adjudicate a motion under Rule 60(b) regarding an order issued previously by a Special Referee who has completed his task. Under the holding of Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000), the Circuit Court is precisely the forum in which such a motion should be brought.

A second facet of Appellant's appeal regards the issue of whether the Order of the Special Referee should be vacated. The Special Referee was appointed to conduct supplementary proceedings. He did not follow any of the statutes regarding supplementary proceedings. Without having Appellant Alea London come in to testify about whether it had any property in which its insured, RKC Entertainment, had any ownership – as required by S.C. Code Ann. § 15-39-350 and Johnson v. Service Management, Inc., 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995) – the Special Referee assigned RKC Entertainment's ostensible rights against Alea to Respondent Narruhn. Because these "rights" were totally indefinite and speculative, they were not a chose in action or any other form of property and were not properly assignable, especially by the Special Referee who did not own, and had not arrested, these rights. The assignment of the rights without Alea's written consent was also in direct conflict with the provisions of

the insurance contract. RKC Entertainment, the owner if there were any such rights that existed, could not have made the assignment. The Special Referee, who could have no more "rights" in the contract than did their owner, nonetheless ordered, at the request of Respondent's counsel, their assignment.

Alea London was provided no notice of the hearing before the Special Referee at which the abrogation of its contractual rights was adjudicated. The Referee's order, entered March 8, 2010, brought that impairment of the insurance contract to fulfillment. Appellant has asserted a violation of its constitutional rights under the United States Constitution. Art. I, § 10 and the South Carolina Constitution, Art. I, § 3 in that the rights it had under the contract were clearly infringed by the actions of the Special Referee.

Based on the lack of notice and opportunity to be heard when the issues of its contract were being adjudicated, Appellant Alea has also appealed on the ground that it was denied the right to due process under the national and state constitutions.

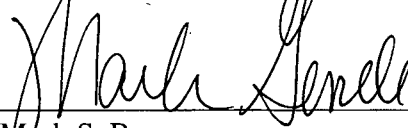
Respondent's motion to dismiss the appeal should be denied. The assertions in Respondent's motion have very little relation to the actual substance of this appeal. Appellant has filed a brief with the Court. A copy of the draft reply brief is attached at Exhibit 1. Perusal of the Appellant's briefs will reveal more fully that the grounds for dismissal of the appeal propounded by Respondent are a red herring. They present no legitimate basis for dismissing this appeal, which is a well-supported effort to correct errors of law and obtain equity and justice from this Court.

CONCLUSION

The Respondent's Motion to Dismiss Appeal should be denied. This appeal is fully worthy of consideration by the Court inasmuch as there were errors of law below which need to be corrected.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

**ATTORNEYS FOR APPELLANT
ALEA LONDON LIMITED**

Columbia, South Carolina
August 22, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2011191646

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

INITIAL REPLY BRIEF OF APPELLANT

Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant

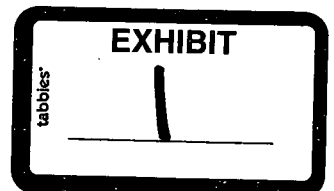


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

ARGUMENT IN REPLY.....1

**I. RESPONDENT’S BRIEF MISCHARACTERIZES THE
NATURE OF APPELLANT’S APPEAL.1**

**II. RESPONDENT DOES NOT CONTEST OR ARGUE SEVERAL
POINTS IN APPELLANT’S BRIEF, SO THEY ARE UNOPPOSED
IN THIS APPEAL.2**

CONCLUSION.....6

Cases

Ball v. Ball, 312 S.C 12, 430 S.E.2d 533 (Ct. App. 1995).....5

In re Marriage of Brown, 544 P.2d 561 (Cal. 1976).....5

Johnson v. Service Management, Inc., 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995).....4

Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010)5, 6

McDaniel v. U.S. Fid & Guar. Co., 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996).....5

Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 746 (Ct. App, 2007)4, 5

Mr. T v. Mrs. T, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008).....3

Rick’s Amusement, Inc. v. State, 351 S.C. 352, 570 S.E.2d 155 (2001).....5

The Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 155 S.E.2d 591 (1967).....5

Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).....5

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000).....2

Statutes

S.C. CODE ANN. § 15-39-310 et seq.....3

S.C. CODE ANN. § 15-39-350.....3

Rules

Rule 60(B), SCRCP.....Passim

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO HEAR AND DECIDE A MOTION UNDER RULE 60(b), SCRPC, REGARDING AN ORDER BY A SPECIAL REFEREE WHO HAD FULLY COMPLETED THE TASK FOR WHICH HE HAD BEEN APPOINTED?

2. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT'S MOTION UNDER RULE 60(b) WAS UNTIMELY?

3. DID THE TRIAL COURT ERR IN IMPLICITLY HOLDING THAT THE SPECIAL REFEREE WHOSE CHARTER WAS TO CONDUCT SUPPLEMENTAL PROCEEDINGS HAD SUBJECT MATTER AND PERSONAL JURISDICTION TO ORDER THE ASSIGNMENT OF A PARTY'S INCHOATE RIGHTS AGAINST ITS NON-PARTY INSURER, WHEN THE INSURER IS PROVIDED NO NOTICE OF THE PROCEEDING OR THE OPPORTUNITY TO BE HEARD?

ARGUMENT IN REPLY

I. RESPONDENT'S BRIEF MISCHARACTERIZES THE NATURE OF APPELLANT'S APPEAL.

Appellant's Statement of Issues on Appeal is cited above to highlight what Appellant is, and is not, appealing. Respondent's brief repeatedly asserts that Appellant is seeking to "set aside a default judgment [or default]...." Respondent's Brief, pp. 1, 3, 4, 8. That is completely incorrect. Such argument is a strawman that Respondent can readily refute, but it is not the argument that Appellant makes. Respondent's Brief *de facto* asserts that Appellant is seeking reversal of the orders of April 17, 2006 and July 7, 2009, which, respectively, order the entry of default and judgment by default against RKC Entertainment. R. _____. Respondent Alea London's appeal is directed at two entirely different Orders. Appellant is appealing the Circuit Court's Order of May 2,

2011, which holds that it does not have jurisdiction to set aside, under Rule 60(B), SCRCF, and the Special Referee's Order of March 8, 2010. R. _____, _____. Appellant seeks to have the March 8, 2010 Order, which orders the assignment of Alea's insured's purported rights against Alea to Respondent, set aside based on the grounds articulated in Appellant's brief. There is no holding in either of the appealed Orders about default, which is a primary focus of Respondent's brief.

II. RESPONDENT DOES NOT CONTEST OR ARGUE SEVERAL POINTS IN APPELLANT'S BRIEF, SO THEY ARE UNOPPOSED IN THIS APPEAL.

While the failure of a Respondent to argue issues raised by an Appellant may not, under our law, represent Respondent's abandonment of that issue, such refusal to address the Appellant's issue leaves them uncontested. There are several such legal and factual issues here, raised and supported in Appellant's brief, but not addressed in Respondent's brief. Among them are the following:

A. The Fact that the Special Referee Had Completed His Assigned Task.

Appellant argued (brief, p. 7) that Special Referee Fata had completed the task assigned him by entering his final judgment on March 8, 2010. That statement is uncontested, bringing into applicability the statement that, "[o]nce the master has concluded his duties and entered all necessary orders, his jurisdiction ends and any post-trial motion, other than those covered by this court's May 22, 1986, order, are to be heard by the circuit court." Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000). Because a motion under Rule 60(b), SCRCF, is not one covered by the Supreme Court's Order of May 22, 1986, the Rule 60(b) motion here was properly submitted to the circuit court – which erred when it held that it did not have jurisdiction.

B. That Alea's Motion is an Independent Action in Equity Specifically Allowed by Rule 60(b)

As argued in Appellant's brief, pp. 8-10, Alea's motion represents an independent action in equity provided for in Rule 60(b), which states that the power of a court is not limited in that it can "entertain an independent action to relieve a party from a judgment, order or proceeding. . . . " In this case, it is also unchallenged that Alea's claim meets all five of the equitable elements, for such an independent action cited by this Court in Mr. T. v. Mrs. T., 378 S.C. 127, 135-36, 162 S.E.2d 413, 417-18 (Ct. App. 2008). As an independent action, it was in the purview, and could have been adjudicated by, the Circuit Court, which erroneously failed to exercise its jurisdiction.

C. That Alea's Motion was Timely

The Special Referee's Order was entered March 8, 2010. Alea London's Motion was filed on December 10, 2010, well within one year of the appealed order. There is, moreover, no time limitation for motions made under Rule 60(b)(4) and (5). Alea's motion was made under Rule 60(b)(1), (4) and (5).

D. That the Actions and Order of the Special Referee did not comply with the Statutes Governing Supplementary Proceedings.

The Respondent has not contested that the proceeding before Special Referee Fata did not comply with the applicable statutes. Though his appointment order, R. _____, limited Special Referee Fata's authority to the conduct of supplemental proceedings, he did not comply with the statutory provisions of S.C. Code Ann. § 15-39-310 *et. seq.* Those statutes limit his jurisdiction, which he exceeded by his failure to adhere to the statutes and case law construing them, especially S.C. Code Ann. § 15-39-350, as

construed by Johnson v. Service Management, Inc., 319 S.C. 165, 167-69, 459 S.E.2d 900, 902-03 (Ct. App. 1995). aff'd 324 S.C. 198, 478 S.E.2d 63 (1996).

E. That the Uncertain rights of Alea London's Insured against Alea London was not a Chose In Action

The Respondent fails to contest Appellant's position, and cited authority, that the inchoate rights of RKC Entertainment, LLC against Alea were not a chose in action. Such rights were completely undefined and indefinite and, therefore, did not meet the requirements of our law to be a chose in action, a form of property. RKC Entertainment, LLC, therefore, had nothing – no property – that could properly be assigned to Appellant in supplementary proceedings.

F. That the Special Referee did not have Personal Jurisdiction of Alea London to Deprive it of its Contractual Rights.

The Respondent does not challenge, or address in any way, Appellant's position that the Special Referee did not have personal jurisdiction of Alea London sufficient to deprive it of rights under its contract with RKC Entertainment. That contract specifically stated that RKC's "rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured." R. _____. The policy did not have an individual Named Insured and there was no pertinent death, so the exception to this statement is inapplicable. The upshot is that RKC Entertainment could not transfer its rights under the policy without Alea's written consent – and that consent was not given.

Even if it were proper for the Special Referee to step into the shoes of RKC¹, the Special Referee would have no greater rights than the contract holder. Moore v.

¹ Though the failure of the Special Referee to establish RKC's ownership should preclude that.

Weinberg, 373 S.C. 209, 220, 644 S.E.2d 746, 745 (Ct. App. 2007) (“An assignee stands in the shoes of its assignor,” citing Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999 (“[T]he assignee should have. . . the same rights and privileges as the assignor”)). RKC could not have assigned its rights to Respondent Narruhn; the Special Referee, therefore, could not assign RKC’s “rights” under the contract to Ms. Narruhn.

Because Alea was never brought within the jurisdiction of the Special Referee, or even notified of the proceedings at which its contractual rights were to be abrogated, the Special Referee did not have jurisdiction to deprive Alea of its property right in its contract. Ball v. Ball, 312 S.C. 31, 34, 430 S.E.2d 533, 535 (Ct. App. 1993) (“a ‘contractual right issue a form of property’ ” quoting In re Marriage of Brown., 544 P.2d 561, 565 (Cal. 1976)). The order of a court that is without personal jurisdiction is void under Rule 60(b)(4), SCRPC. Linda Mc Co. v. Shore, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) citing McDaniel v. U.S. Fid & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996).

Inasmuch as the Special Referee’s Order impaired the obligations of Alea’s insurance contract, it was in violation of Art I, § 4 of the South Carolina Constitution. Rick’s Amusement, Inc. v. State 351 S.C. 352, 360, 570 S.E.2d 155, 159 (2001) (“Both the United States and South Carolina Constitutions prohibit the State from passing laws which impair the obligations of contracts. See U.S. Const. Act I, § 10; S.C. Const. Act I, § 4”). See also The Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 155 S.E.2d 591 (1967) (Court could not impair obligation of insurance contract).

Impairing Alea's contractual rights at a hearing of which it had no notice and no opportunity to be heard – and in violation of the statutes governing supplementary proceedings – deprived Alea of the due process guarantees of the Fourteenth Amendment of the United States Constitution and Act I, § 3 of the South Carolina Constitution. Orders from “courts which failed to provide proper due process” are within Rule 60(b)(4)'s definition of “void.” Linda Mc Co. v. Shore, *supra.*, 390 S.C. at 552, 703 S.E.2d at 503.

CONCLUSION

Respondent's brief misapprehends the substance of Appellant's brief in asserting that Appellant is seeking to have a default or default judgment of RKC Entertainment set aside. Such an objective is entirely absent from Alea London's appeal. On the other hand, Respondent leaves entirely uncontested several key positions of Appellant, which lead to the following conclusions:

- The Special Referee's task was fulfilled, so the proper forum for adjudication of a Rule 60(b) motion was the circuit court.
- That Alea's Rule 60(b)(5) motion is a viable independent action in equity.
- That the Trial Court erred in holding that Alea's motion was untimely.
- That the Special Referee failed to abide by the statutory requirements for supplementary proceedings.
- That RKC Entertainment's inchoate right against Alea was not a chose in action, susceptible to an assignment by anybody.
- That the Special Referee did not have personal jurisdiction over Alea, that its Order impaired Alea's contractual rights, and that the proceedings violate Alea's right to due process under the United States and South Carolina Constitutions.

These uncontested facts lead to the conclusions that the Trial Court erred in holding that it did not have jurisdiction to adjudicate the Rule 60(b) motion and that the Order of the Special Referee is void for lack of due process and personal jurisdiction.

This Court should reverse the Trial Court's Order of May 11, 2011 and remand the case with instructions to vacate the Special Referee's Order of March 8, 2010.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

**ATTORNEYS FOR APPELLANT
ALEA LONDON LIMITED**

Columbia, South Carolina
August 22, 2011

S·W·B

SWEENY WINGATE & BARROW P.A.

August 22, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RECEIVED
AUG 22 2011
SC Court of Appeals

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No.: 2011191646
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

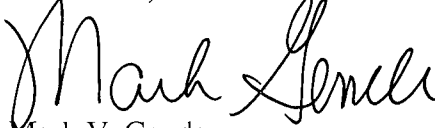
Enclosed for filing are the original and six copies each of Appellants Return to Respondent's Motion to Dismiss Appeal in this case.

Please return to the courier who delivers these a filed, stamped copy of this letter and the attached Appellants Return to Respondent's Motion to Dismiss Appeal. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire.

Respectfully,

SWEENY, WINGATE & BARROW, P.A.


Mark V. Gende

MVG/vlp

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 23, 2011

Mark Steven Barrow, Esquire
Mark V. Gende, Esquire
P. O. Box 12129
Columbia, SC 29211

Re: Narruhn, Elisa v. Alea London Limited
2011191646

Dear Counsel:

The following Order has been endorsed on your Motion to Request an Enlargement of Time in the above entitled case on appeal.

“Granted.

John Cannon Few C.J.
For the Court

By s/ Tanya A. Gee
Clerk

August 23, 2011.”

Please be advised that the Return to the Motion to Dismiss must be served and filed no later than September 1, 2011. Please be further advised that the deadline for the Appellant’s Initial Reply Brief is stayed until the Motion to Dismiss has been ruled on.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

cc: Gene McCain Connell, Jr, Esquire

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

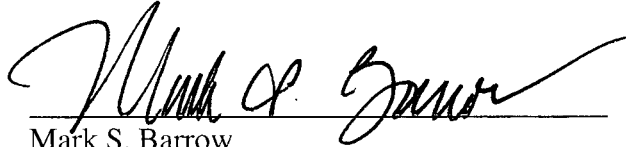
Of whom, Alea London Limited is Appellant

MOTION TO REQUEST AN ENLARGEMENT OF TIME

YOU WILL PLEASE TAKE NOTICE that the undersigned moves the Court for an Order granting Appellant Alea London Limited an extension of time to respond to Eliza Narruhn's Motion to Dismiss Appeal and to submit Appellant's Reply Brief. The basis of this motion is that the Attorney for Alea London Limited, Mark V. Gende, had scheduled plans to be out of the country on a mission trip with his daughter, August 14 through August 20, 2011. We request that the time to respond to the motion and to submit a reply brief, if any, begin on Monday, August 22, 2011.

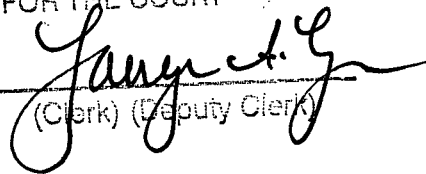
Signature page immediately follows.

August 16, 2011



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803) 256-2233
Attorneys for Appellant Alea London Limited

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: 
(Clerk) (Deputy Clerk)

 **FILED**

S·W·B

SWEENEY WINGATE & BARROW P.A.

August 16, 2011

Reply to: Main Office

Mark S. Barrow
(803) 256-2233 x 105
msb@swblaw.com

VIA HAND DELIVERY

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RECEIVED

AUG 16 2011

SC Court of Appeals

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No.: 2011191646
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

Enclosed for filing are the original and seven copies each of Motion to Request an Enlargement of Time in this case.

Please return to the courier who delivers these a filed, stamped copy of this letter and the attached Motion to Request an Enlargement of Time. Also enclosed, please find a check for \$25.00 for the filing fee. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow

MSB/vlp

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

RECEIVED
AUG 15 2011
SC COURT OF APPEALS

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

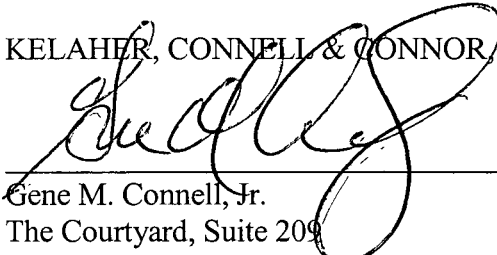
Of whom Alea London Limited is the Appellant

NOTICE OF MOTION AND MOTION
TO DISMISS APPEAL

YOU WILL PLEASE TAKE NOTICE that the undersigned moves the Court for an Order dismissing the Appeal of Defendant Alea London Limited. The basis of this motion is that Alea London Limited seeks to appeal an interlocutory Order which does not apply to it and, thus, it has no standing to contest the Order. The appealed Order here involves RKC Entertainment, LLC and not Alea London Limited and was in a separate action to which Alea London Limited was not a party. The Respondent's Memorandum of Law is attached as authority to dismiss this appeal. See *Ex parte Government Employees Insurance Co*, 373, S.C. 132, 644 S.E.2d 699 (2001) (insurance carrier had no standing to intervene in case involving insured because its interest was tangential and peripheral).

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Respondent

August 12, 2011
Surfside Beach, South Carolina

RECEIVED
AUG 15 2011
SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED
AUG 15 2011
SC Court of Appeals

CASE NO. 2010-CP-26-4112

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of whom Alea London Limited is the Appellant

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS APPEAL

STATEMENT OF THE CASE

Narruhn has sued Alea London Limited for bad faith and for refusal to defend RKC Entertainment, LLC. She was shot in The Red Room on April 5, 2005 by Ardon Cato and she filed suit against RKC Entertainment, LLC d/b/a The Red Room and Cato on August 4, 2005 in the Horry County Court of Common Pleas (Civil Action No. 2005-CP-26-4134). (R. _____). Because The Red Room and RKC Entertainment, LLC did not file an Answer, Plaintiff moved for a default judgment. The Circuit Court awarded a Six Million Dollar judgment against RKC Entertainment, LLC and Cato. Thereafter, Narruhn commenced supplemental proceedings to determine the assets of RKC Entertainment, LLC. The matter was referred to a Special Referee pursuant to an Order of the circuit court at which time the Special Referee assigned to Narruhn any rights in any insurance policy that RKC

Entertainment might have against its insurer, Alea London Limited. On May 11, 2010, Narruhn filed this case against Alea London Limited and Anderson General Insurance, the producing agency, alleging bad faith, failure to defend, negligence and unfair trade practices. RKC Entertainment, LLC was not named as a Defendant in this litigation and Alea, although not in default, moved to set aside the default for its insured, RKC Entertainment, LLC, under SCRCF 60(b)(1).

The circuit court issued its order denying Alea the right to move to set aside a default under SCRCF 60 because it was not a party to the original judgment against RKC Entertainment. Because Alea does not have standing to bring this appeal, this court should grant Plaintiff's motion to dismiss and return this litigation to the circuit court.

ARGUMENT

I. Alea London Limited has no standing and thus cannot appeal the denial to set aside the default by the circuit court.

Alea London Limited in its initial brief argues it should be allowed to appeal an order of liability against RKC Entertainment, LLC. While Alea London Limited is, or was, the insurer for RKC Entertainment, LLC, it has no right or authority under established South Carolina to ask the court to allow it to set aside a default judgment issued against another party. The circuit court in denying the motion to set aside the default correctly noted:

In this case, Alea London Limited is not a party as the judgment is against RKC Entertainment, LLC, not Alea London Limited. Further, Alea London Limited cannot make this motion since it is more than a year after the Order of judgment was issued. (See Order of circuit court dated April 14, 2011).

Generally, a party must be a real party in interest to the litigation to have standing. See *Sloan v. Friends of the Hundley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). ("A real party in interest is a party with a real, material or substantial interest in the outcome of the litigation."). In this case, Alea London Limited seeks to do an end run around the

litigation which has already occurred in this case. It is clear that a judgment has been entered against RKC Entertainment, LLC and that RKC Entertainment, LLC has not moved to set aside the default judgment which was issued. Alea London seeks to take up the mantle of RKC Entertainment, LLC without RKC Entertainment, LLC being party to the proceedings. This court has never allowed an insurer to move for a default of an insured without the insured moving for relief from default. There are vastly different issues between suing an insured for personal injuries and suing the insurer for failure to defend. If Alea London Limited is allowed to set aside the default, then insurers will no longer have to defend the insured and request that a default be set aside. They will simply be able to go to court and argue that the default may be set aside for their insured without concern for the underlying facts. Here, Alea London Limited and RKC Entertainment, LLC are separate and distinct entities. Narruhn has a judgment against RKC Entertainment, LLC by default. (R. ____). Further, Narruhn has an order of the circuit court referring supplemental proceedings to a Special Referee. (R. ____). At that proceeding, Narruhn was assigned the right to sue RKC Entertainment, LLC's insurer. (R. ____). Now Alea London Limited seeks seventeen (17) months later to overturn a lawful order of the circuit court regarding an assignment of any claim that RKC Entertainment, LLC may have against its insurer for failure to defend. Alea London Limited is not RKC Entertainment, LLC and cannot and does not have standing to proceed with this appeal. The order of the circuit court regarding RKC Entertainment, LLC is final and binding and RKC Entertainment, LLC has never sought to set aside that order which is almost 17 months old. For this reason, the appeal should be dismissed.

Alea London Limited is not a real party in interest to the previous litigation between the Plaintiff and RKC Entertainment, LLC. That litigation is ended and Alea London

Limited has no authority to ask the court to allow it to appeal an order when it was not a party to in that previous litigation. See *Newman v. Richland Co. Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997) (disappointed legislator is not permitted to attack decision of her own body, either through declaratory judgment or through direct appeal); see also *Powell ex relation Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (S.C.App. 2008). (Bank is not an aggrieved party under Rule 201 of South Carolina Appellate Court Rules. Bank is party only to underlying damage claims. There is no overlapping evidence in these two separate cases brought by separate parties.) See also *Ex parte Government Employees Insurance Co*, 373, S.C. 132, 644 S.E.2d 699 (2001) (Court addressed the sufficiency of a party's potential liability in relation to standing and joinder. In *GEICO*, the court found that GEICO was not a necessary party and did not have standing to intervene. The Supreme Court affirmed referring to GEICO's interest as merely tangential and peripheral (644.S.E.2d at 701). The court further noted, "GEICO's interest is in the financial implications of the court's decision which is peripheral to the subject matter before the court.") (644 S.E.2d 702). The same can be said for the position of Alea London Limited in this litigation.

Finally, the Order which Alea London Limited has appealed is against RKC Entertainment, LLC and not Alea London Limited. South Carolina Appellate Court Rule 201 provides "Only a party aggrieved by an order, judgment or sentence may appeal." A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. *Sisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970); *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970) (the word "aggrieved" refers to a substantial grievance, a denial of some personal property right or the imposition on a party of a burden or obligation.)

In this case, Narruhn only has a judgment against RKC Entertainment, LLC not Alea London Limited. This judgment may or may not be the responsibility of Alea London Limited. Only through this litigation will Plaintiff be able to argue that Alea London Limited refused to defend its insured, RKC Entertainment, LLC. That issue has not been decided nor was it decided in RKC Entertainment, LLC when Plaintiff obtained a Six Million Dollar judgment. (R. ____). Alea London Limited's defenses to the judgment have not been foreclosed and Alea London Limited can and continues to assert all defenses in this case.

The United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 Sc.D. 2130, 119 L.2d 351 (1992) has had the opportunity to consider standing in lawsuits. In that case, the court noted as follows: (1) the plaintiff must suffer an injury in fact that is concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 Sc.D. 2130, 119 L.2d 351 (1992).

In this case, Alea London Limited can show no injury in fact because the judgment is entered against RKC Entertainment, LLC. Further, the injury is not fairly traceable to the judgment against RKC Entertainment, LLC and Alea London Limited has brought its own action in federal court seeking to deny coverage. For these reasons, this court should dismiss this appeal under SCACR 201 because Alea London Limited is not an "aggrieved party" nor was it a party to the order which it now appeals. Here, Alea London Limited is not an aggrieved party because it has suffered no injury. Alea London Limited still has all of the defenses under the policy it may raise in this litigation. There is no denial of personal

or property rights and Alea London Limited is free to litigate its insurance policy and any exclusions with the Plaintiff.

It also should be noted that the order appealed from has not determined some substantial matter to involved the merits pursuant to S.C. Code Ann. § 14-3-330(1). It is established law that any order must determine some substantial matter forming the whole or part of some cause of action or defense. *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809 (1995). In this case, the order which Alea appeals from does not in any manner fix its liability or impede its defense. Thus, this court should not review an order that does not prevent a judgment from being rendered in the action and from which the appellant can seek review in any appeal from the final judgment. An order which does not put a final end to the case nor establish any principal which will finally affect the merits of the case nor deprive the party of any benefit which he may have in a final hearing is an interlocutory order from which no appeal ought to be allowed. *Marshall v. Winner*, 250 S.C. 308, 157 S.E.2d 595, 596-97 (1967) (indicating an order denying a motion is not appealable before a final judgment in any respect when it does not deprive the movant of a substantial right). At the conclusion of this action, Alea London may appeal the trial court's order in this case as part of any appeal of an order on the merits. Thus, Alea London's appeal must be dismissed without prejudice. See also *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (S.C. App. 2001).

Finally, the appellate courts in this state have addressed the appealability of interlocutory decisions of the trial courts. See *Lewis v. State*, 368 S.C. 630, 631, 630 S.E. 2d 464 (2006) (any judgment or decree leaving some further act to be done by the court before the rights of the parties are determined is interlocutory but if it so completely fixes the rights of the parties that the court has nothing further to do in the action then it is final. *Jefferson*

by *Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (finding an interlocutory order is appealable under S.C. Code Ann. § 14-3-330(1) only if it involves the merits, i.e., it finally determines some substantial matter forming the whole or part of some cause of action or defense).

II. Alea London Limited has no right under SCRCP 60(B) to move to set aside the Order of Judgment.

Alea moves to set aside the default, but fails to mention that the judgment is against RKC Entertainment, LLC. Only an “aggrieved party” may move to set aside an Order under SCRCP 60. Thus, in order to even have considered the motion, RKC Entertainment, LLC would have to be the moving party. Accordingly, without RKC Entertainment, the trial court had no jurisdiction to consider the motion. (SCRCP 60(B) speaks to a “party” and Alea cannot claim it is such to the judgment it seeks to overturn.)

III. If any relief is afforded, the motion must be before the Special Referee.

Respondent respectfully suggests that Alea cannot move to set aside the Order of Judgment against RKC Entertainment, LLC. However, if the court holds otherwise, then Appellant argues, in the alternative, this motion to set aside the Order of Judgment must be before the Special Referee. The reason for this is simple. The case against RKC Entertainment was referred with finality. Once a case is referred with finality, the circuit court has no authority in the matter. See *Wachovia Bank v. Player*, 535 S.E.2d 128 (2000); accord *Normandy v. SCDOT*, 688 S.E.2d 136 (2009).

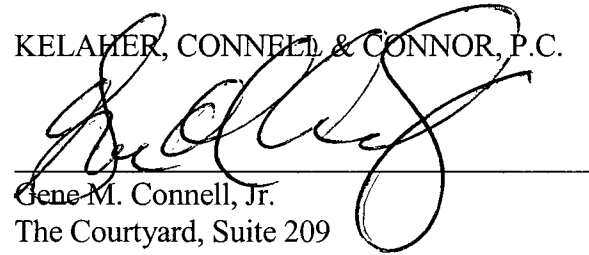
CONCLUSION

In this case, nothing final has been determined against Alea London Limited. Alea London Limited still has all of its defenses and it only seeks to appeal an order of default and supplemental proceedings concerning its insured, The Red Room. Because this order does not affect Alea London Limited’s defense or a substantial right, this court should

dismiss the appeal as improvident. See also *Thynes v. Lloyd*, 294 S.Ct. 152, 363 S.E.2d 122 (1987). (denying motion to set aside entry of default not appealable). Here, there is no final order against Alea London Limited and because there is no final order, they may not appeal an order refusing to set aside a default against a third party .

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Respondent

August 12, 2011
Surfside Beach, South Carolina.

RECEIVED
AUG 15 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

RECEIVED
AUG 15 2011
SC Court of Appeals

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of Whom Alea London Limited is the Appellant

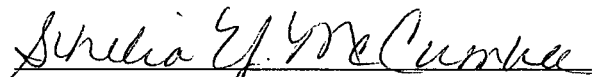
PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Notice of Motion and Motion to Dismiss Appeal and Memorandum of Law** on the Appellant and on Defendant Anderson General Insurance, through attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid to:

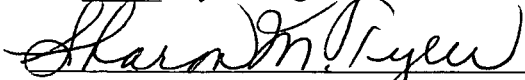
Mark S. Barrow, Esquire
Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street Suite 301
Charleston, SC 29401

DATE OF MAILING: August 12, 2011


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of August, 2011.


Notary Public for South Carolina
My Commission Expires: 2-25-19

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

August 12, 2011

RECEIVED
AUG 15 2011

AREA CODE 843
238-5648
FAX: 238-5050

SC Court of Appeals

Tanya Gee, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No. 2011191646
C/A No. 2010-CP-26-4112
Our File No. 2008-0383C

Dear Ms. Gee:

Enclosed please find an original and seven (7) copies of our Notice of Motion and Motion to Dismiss Appeal, Memorandum of Law and Proof of Service in the above-captioned matter. I also enclose a check for \$25.00 for the filing fee. Please return a filed copy to me in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated documents on counsel of record.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Mark S. Barrow, Esq.
Mark V. Gende, Esq.
Susan Taylor Wall, Esq.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

RECEIVED
AUG 15 2011
SC Court of Appeals

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of Whom Alea London Limited is the Appellant

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

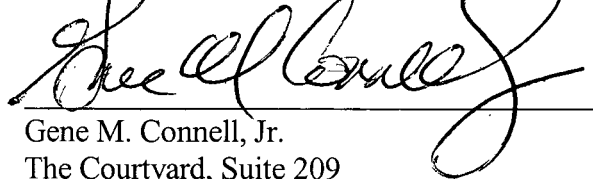
Respondents propose the following to be included in the Record on Appeal:

1. Order of Judgment as to RKC Entertainment, Inc. dated June 25, 2009, filed July 9, 2009 (Case No. 2005-CP-26-4134)
2. Supreme Court's Order of May 22, 1986
3. Order of Reference for Supplemental Proceedings dated October 13, 2009 filed January 27, 2010 (Case No. 2005-CP-26- 4134) .
4. Order of Special Referee dated March 3, 2010 filed March 8, 2010 (Case No. 2005-CP-26- 4134)
5. Order of April 14, 2011 filed May 2,2011 (case no. 4112)
6. Order for Judgment and for Hearing to Ascertain Damages April 13, 2006 filed April 17, 2006 (case no. 4134)
7. Order of Judgment April 13, 2006 filed April 17, 2006 (case no. 4134)
8. Complaint 2005 - case no. 4134
9. Amended Complaint 2005 - case no. 4134
10. Complaint 2008 - case no. 2609
11. Complaint 2010 - case no. 4112
12. Amended Complaint 2010 - case no. 4112

13. Defendant Alea London Limited's Answer to Plaintiffs Complaint 2010 - case no. 4112
14. Transcript of Record for March 1, 2011 hearing - case no. 4112
15. Affidavit of Service on Richard Cronce 2005 - case no. 4134
16. Affidavit of Default as to Defendant RKC - case no. 4134
17. Stipulation of Dismissal with Prejudice 2008 - case no. 2609
18. Letter from Mr. Garron's Carrier asking Alea to assume defense - October 6, 2008 re: case no. 2609
19. Alea letter declining to participate in 2008 case - October 8, 2008 re: case no. 2609
20. Certified Copy of insurance policy number ALT 047106 issued to The Red Room
21. Defendant's Motion for Relief from Judgment or Order filed December 10, 2010 - case no. 4112
22. Memorandum in Support of Motion to Set Aside Order Under Rule 60(b)(1)(4), and (5) filed March 2, 2011 - case no. 4112
23. Defendant Alea London Limited's Memorandum Regarding the Circuit Court's Jurisdiction to Set Aside Order of Special Referee filed March 14, 2011 - case no. 4112
24. Plaintiffs Answers to Defendant Alea's Request to Admit - case no. 4112
25. Defendant Alea London Limited's Motion to Determine The Sufficiency of Plaintiffs Answers to Defendant Alea's Requests to Admit - case no. 4112

I certify that this designation contains no matter which is irrelevant to this appeal

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Respondent

August 12, 2011
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of Whom Alea London Limited is the Appellant

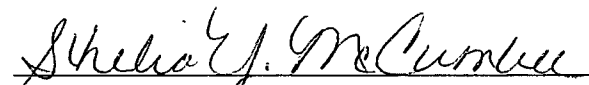
PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Designation of Matter to be Included in the Record on Appeal** on the Appellant and on Defendant Anderson General Insurance, through attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid to:

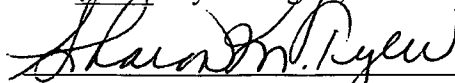
Mark S. Barrow, Esquire
Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street Suite 301
Charleston, SC 29401

DATE OF MAILING: August 12, 2011


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of August, 2011.


Notary Public for South Carolina
My Commission Expires: 2-25-19

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of Whom Alea London Limited is the Appellant


PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Initial Brief of Respondent** on the Appellant, and on Defendant Anderson General Insurance, through attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid to:

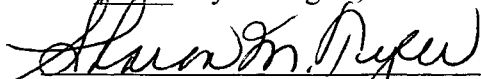
Mark S. Barrow, Esquire
Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street Suite 301
Charleston, SC 29401

DATE OF MAILING: August 12, 2011


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of August, 2011.


Notary Public for South Carolina
My Commission Expires: 2-25-19

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843

238-5648

FAX: 238-5050

August 12, 2011

Tanya Gee, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Case Tracking No. 2011191646
C/A No. 2010-CP-26-4112
Our File No. 2008-0383C

Dear Ms. Gee:

Enclosed please find the following for filing in the above-captioned matter;

- (1) Original and one copy of Respondent's Initial Brief, with Proof of Service;
- (2) Original and one copy of Respondent's Designation of Matter, with Proof of Service;
- (3) Self-addressed, stamped envelope for return of a filed copy of each to this office.

By copy of this letter, we hereby serve copies of the Respondent's Initial Brief and Designation of Matter on counsel of record.

With best regards, I am

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Mark S. Barrow, Esq.
Mark V. Gende, Esq.
Susan Taylor Wall, Esq.

RECEIVED
AUG 15 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2010-CP-26-4112

Elisa Narruhn Respondent

vs.

Alea London Limited and Anderson General Insurance Defendants

Of Whom Alea London Limited is the Appellant

INITIAL BRIEF OF RESPONDENT

Gene M. Connell, Jr.
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Respondent

RECEIVED
AUG 15 2011
SC Court of Appeals

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case.....2

Arguments3

 I. Alea London Limited has no standing and thus cannot appeal the denial
 to set aside the default by the circuit court.....3

 II. Alea London Limited has no right under SCRCP 60(B) to move to set aside
 the Order of Judgment. 8

 III. If any relief is afforded, the motion must be before the Special Referee 8

Conclusion..... 8

TABLE OF AUTHORITIES

Cases

Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298,
551 S.E.2d 588 (S.C. App. 2001) 7

Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970) 5

Ex parte Government Employees Insurance Co., 373, S.C. 132,
644 S.E.2d 699 (2001) 5

Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317,
368 S.E.2d 456 (1988) 7

Lewis v. State, 368 S.C. 630, 631, 630 S.E. 2d 464 (2006) 7

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 Sc.D. 2130, 119 L.2d 351 (1992) 6

Marshall v. Winner, 250 S.C. 308, 157 S.E.2d 595, 596-97 (1967) 7

Newman v. Richland Co. Historic Preservation Commission, 325 S.C. 79,
480 S.E.2d 72 (1997) 4

Normandy v. SCDOT, 688 S.E.2d 136 (2009) 8

Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809 (1995) 7

Powell ex relation Kelly v. Bank of America, 379 S.C. 437,
665 S.E.2d 237 (S.C.App. 2008) 4

Sisson v. McWhorter, 255 S.C. 174, 177 S.E.2d 603 (1970) 5

Sloan v. Friends of the Hundley, Inc., 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006) 3

Thynes v. Lloyd, 294 S.Ct. 152, 363 S.E.2d 122 (1987) 8

Wachovia Bank v. Player, 535 S.E.2d 128 (2000) 8

Statutes

S.C. Code Ann. § 14-3-330(1) 6, 7

Rules

South Carolina Rule of Civil Procedure, Rule 60(B), SCRCP 1, 2, 8

South Carolina Appellate Court Rules, Rule 201, SCACR 4, 5, 6

STATEMENT OF ISSUES ON APPEAL

- I. Does Alea London Limited have standing to appeal the denial of a motion to set aside a default of another party?
- II. Can Alea London Limited move for relief from a judgment under SCRCP 60(B) when the judgment is not against Alea London Limited?
- III. If Alea London Limited can move for relief under SCRCP 60(B), then must it appear before the Special Referee?

STATEMENT OF THE CASE

Narruhn has sued Alea London Limited for bad faith and for refusal to defend RKC Entertainment, LLC. She was shot in The Red Room on April 5, 2005 by Ardon Cato and she filed suit against RKC Entertainment, LLC d/b/a The Red Room and Cato on August 4, 2005 in the Horry County Court of Common Pleas (Civil Action No. 2005-CP-26-4134). (R. _____). Because The Red Room and RKC Entertainment, LLC did not file an Answer, Plaintiff moved for a default judgment. The Circuit Court awarded a Six Million Dollar judgment against RKC Entertainment, LLC and Cato. Thereafter, Narruhn commenced supplemental proceedings to determine the assets of RKC Entertainment, LLC. The matter was referred to a Special Referee pursuant to an Order of the circuit court at which time the Special Referee assigned to Narruhn any rights in any insurance policy that RKC Entertainment might have against its insurer, Alea London Limited. On May 11, 2010, Narruhn filed this case against Alea London Limited and Anderson General Insurance, the producing agency, alleging bad faith, failure to defend, negligence and unfair trade practices. RKC Entertainment, LLC was not named as a Defendant in this litigation and Alea, although not in default, moved to set aside the default for its insured, RKC Entertainment, LLC, under SCRCF 60(b)(1).

The circuit court issued its order denying Alea the right to move to set aside a default under SCRCF 60 because it was not a party to the original judgment against RKC Entertainment. Because Alea does not have standing to bring this appeal, this court should grant Plaintiff's motion to dismiss and return this litigation to the circuit court.

ARGUMENT

I. Alea London Limited has no standing and thus cannot appeal the denial to set aside the default by the circuit court.

Alea London Limited in its initial brief argues it should be allowed to appeal an order of liability against RKC Entertainment, LLC. While Alea London Limited is, or was, the insurer for RKC Entertainment, LLC, it has no right or authority under established South Carolina to ask the court to allow it to set aside a default judgment issued against another party. The circuit court in denying the motion to set aside the default correctly noted:

In this case, Alea London Limited is not a party as the judgment is against RKC Entertainment, LLC, not Alea London Limited. Further, Alea London Limited cannot make this motion since it is more than a year after the Order of judgment was issued. (See Order of circuit court dated April 14, 2011; R. _____).

Generally, a party must be a real party in interest to the litigation to have standing. See *Sloan v. Friends of the Hundley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). (“A real party in interest is a party with a real, material or substantial interest in the outcome of the litigation.”). In this case, Alea London Limited seeks to do an end run around the litigation which has already occurred in this case. It is clear that a judgment has been entered against RKC Entertainment, LLC and that RKC Entertainment, LLC has not moved to set aside the default judgment which was issued. Alea London seeks to take up the mantle of RKC Entertainment, LLC without RKC Entertainment, LLC being party to the proceedings. This court has never allowed an insurer to move for a default of an insured without the insured moving for relief from default. There are vastly different issues between suing an insured for personal injuries and suing the insurer for failure to defend. If Alea London Limited is allowed to set aside the default, then insurers will no longer have to defend the insured and request that a default be set aside. They will simply be able to go to

court and argue that the default may be set aside for their insured without concern for the underlying facts. Here, Alea London Limited and RKC Entertainment, LLC are separate and distinct entities. Narruhn has a judgment against RKC Entertainment, LLC by default. (R. ____). Further, Narruhn has an order of the circuit court referring supplemental proceedings to a Special Referee. (R. ____). At that proceeding, Narruhn was assigned the right to sue RKC Entertainment, LLC's insurer. (R. ____). Now Alea London Limited seeks 17 months later to overturn a lawful order of the circuit court regarding an assignment of any claim that RKC Entertainment, LLC may have against its insurer for failure to defend. Alea London Limited is not RKC Entertainment, LLC and cannot and does not have standing to proceed with this appeal. The order of the circuit court regarding RKC Entertainment, LLC is final and binding and RKC Entertainment, LLC has never sought to set aside that order which is almost 17 months old. For this reason, the appeal should be dismissed.

Alea London Limited is not a real party in interest to the previous litigation between the Plaintiff and RKC Entertainment, LLC. That litigation is ended and Alea London Limited has no authority to ask the court to allow it to appeal an order when it was not a party to in that previous litigation. See *Newman v. Richland Co. Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997) (disappointed legislator is not permitted to attack decision of her own body, either through declaratory judgment or through direct appeal); see also *Powell ex relation Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (S.C.App. 2008). (Bank is not an aggrieved party under Rule 201 of South Carolina Appellate Court Rules. Bank is party only to underlying damage claims. There is no overlapping evidence in these two separate cases brought by separate parties.) See also *Ex*

parte Government Employees Insurance Co, 373, S.C. 132, 644 S.E.2d 699 (2001) (Court addressed the sufficiency of a party's potential liability in relation to standing and joinder. In *GEICO*, the court found that GEICO was not a necessary party and did not have standing to intervene. The Supreme Court affirmed referring to GEICO's interest as merely tangential and peripheral (644.S.E.2d at 701). The court further noted, "GEICO's interest is in the financial implications of the court's decision which is peripheral to the subject matter before the court.") (644 S.E.2d 702). The same can be said for the position of Alea London Limited in this litigation.

Finally, the Order which Alea London Limited has appealed is against RKC Entertainment, LLC and not Alea London Limited. South Carolina Appellate Court Rule 201 provides "Only a party aggrieved by an order, judgment or sentence may appeal." A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. *Sisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970); *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970) (the word "aggrieved" refers to a substantial grievance, a denial of some personal property right or the imposition on a party of a burden or obligation.)

In this case, Narruhn only has a judgment against RKC Entertainment, LLC not Alea London Limited. This judgment may or may not be the responsibility of Alea London Limited. Only through this litigation will Plaintiff be able to argue that Alea London Limited refused to defend its insured, RKC Entertainment, LLC. That issue has not been decided nor was it decided in RKC Entertainment, LLC when Plaintiff obtained a Six Million Dollar judgment. (R. ____). Alea London Limited's defenses to the judgment have

not been foreclosed and Alea London Limited can and continues to assert all defenses in this case.

The United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 Sc.D. 2130, 119 L.2d 351 (1992) has had the opportunity to consider standing in lawsuits. In that case, the court noted as follows: (1) the plaintiff must suffer an injury in fact that is concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 Sc.D. 2130, 119 L.2d 351 (1992).

In this case, Alea London Limited can show no injury in fact because the judgment is entered against RKC Entertainment, LLC. Further, the injury is not fairly traceable to the judgment against RKC Entertainment, LLC and Alea London Limited has brought its own action in federal court seeking to deny coverage. For these reasons, this court should dismiss this appeal under SCACR 201 because Alea London Limited is not an “aggrieved party” nor was it a party to the order which it now appeals. Here, Alea London Limited is not an aggrieved party because it has suffered no injury. Alea London Limited still has all of the defenses under the policy it may raise in this litigation. There is no denial of personal or property rights and Alea London Limited is free to litigate its insurance policy and any exclusions with the Plaintiff.

It also should be noted that the order appealed from has not determined some substantial matter to involved the merits pursuant to S.C. Code Ann. § 14-3-330(1). It is established law that any order must determine some substantial matter forming the whole or

part of some cause of action or defense. *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809 (1995). In this case, the order which Alea appeals from does not in any manner fix its liability or impede its defense. Thus, this court should not review an order that does not prevent a judgment from being rendered in the action and from which the appellant can seek review in any appeal from the final judgment. An order which does not put a final end to the case nor establish any principal which will finally affect the merits of the case nor deprive the party of any benefit which he may have in a final hearing is an interlocutory order from which no appeal ought to be allowed. *Marshall v. Winner*, 250 S.C. 308, 157 S.E.2d 595, 596-97 (1967) (indicating an order denying a motion is not appealable before a final judgment in any respect when it does not deprive the movant of a substantial right). At the conclusion of this action, Alea London may appeal the trial court's order in this case as part of any appeal of an order on the merits. Thus, Alea London's appeal must be dismissed without prejudice. See also *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (S.C. App. 2001).

Finally, the appellate courts in this state have addressed the appealability of interlocutory decisions of the trial courts. See *Lewis v. State*, 368 S.C. 630, 631, 630 S.E. 2d 464 (2006) (any judgment or decree leaving some further act to be done by the court before the rights of the parties are determined is interlocutory but if it so completely fixes the rights of the parties that the court has nothing further to do in the action then it is final. *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (finding an interlocutory order is appealable under S.C. Code Ann. § 14-3-330(1) only if it involves the merits, i.e., it finally determines some substantial matter forming the whole or part of some cause of action or defense).

II. Alea London Limited has no right under SCRCP 60(B) to move to set aside the Order of Judgment.

Alea moves to set aside the default, but fails to mention that the judgment is against RKC Entertainment, LLC. Only an “aggrieved party” may move to set aside an Order under SCRCP 60. Thus, in order to even have considered the motion, RKC Entertainment, LLC would have to be the moving party. Accordingly, without RKC Entertainment, the trial court had no jurisdiction to consider the motion. (SCRCP 60(B) speaks to a “party” and Alea cannot claim it is such to the judgment it seeks to overturn.)

III. If any relief is afforded, the motion must be before the Special Referee.

Respondent respectfully suggests that Alea cannot move to set aside the Order of Judgment against RKC Entertainment, LLC. However, if the court holds otherwise, then Appellant argues, in the alternative, this motion to set aside the Order of Judgment must be before the Special Referee. The reason for this is simple. The case against RKC Entertainment was referred with finality. Once a case is referred with finality, the circuit court has no authority in the matter. See *Wachovia Bank v. Player*, 535 S.E.2d 128 (2000); accord *Normandy v. SCDOT*, 688 S.E.2d 136 (2009).

CONCLUSION

In this case, nothing final has been determined against Alea London Limited. Alea London Limited still has all of its defenses and it only seeks to appeal an order of default and supplemental proceedings concerning its insured, The Red Room. Because this order does not affect Alea London Limited’s defense or a substantial right, this court should dismiss the appeal as improvident. See also *Thynes v. Lloyd*, 294 S.Ct. 152, 363 S.E.2d 122 (1987). (denying motion to set aside entry of default not appealable). Here, there is no final

order against Alea London Limited and because there is no final order, they may not appeal an order refusing to set aside a default against a third party .

Respectfully submitted,

KELAJER, CONNELL & CONNOR, P.C.

A handwritten signature in black ink, appearing to read "Gene M. Connell, Jr.", written over a horizontal line.

Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Respondent

August 12, 2011
Surfside Beach, South Carolina



SWEENEY WINGATE & BARROW P.A.

August 15, 2011

Reply to: Main Office

Mark S. Barrow
(803) 256-2233 x 105
msb@swblaw.com

VIA HAND DELIVERY

RECEIVED

AUG 15 2011

SC Court of Appeals

The Honorable Tanya Gee
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

Enclosed for filing with this letter are two copies of the invoice for the transcript of the hearing on March 1, 2011 which was included in the Initial Brief of Appellant. This invoice is dated June 24, 2011 and we believe our office received the hearing transcript on this date.

Please return to the courier who delivers these a filed, stamped copy of this letter and the attached invoice. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow

MSB/cds

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail

MAIN OFFICE: T • 803-256-2233 F • 803-256-9177 1515 LADY ST. (29201) • POST OFFICE BOX 12129 • COLUMBIA, SC 29211
PEE DEE OFFICE: T • 843-383-2146 F • 843-383-6150 323 WEST HOME AVE. • POST OFFICE BOX 88 • HARTSVILLE, SC 29551

4150-7551

DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT
P. O. BOX 2194
MURRELLS INLET, SOUTH CAROLINA 29576-2194

June 24, 2011

=====
=====

TO: MARK V. GENDE, ESQ.
SWEENEY, WINGATE & BARROW, P.A.
POST OFFICE BOX 12129
COLUMBIA, SOUTH CAROLINA 29211

RE: ELISA NARRUHN V. ALEA LONDON LIMITED and ANDERSON GENERAL
INSURANCE

TRANSCRIPT OF RECORD
CASE NUMBER: (10-CP-26-04112)
DATE: March 1, 2011

31 PAGES @ \$3.25
U. S. POSTAGE
TOTAL

\$100.75
2.28
103.03

RECEIVED

AUG 15 2011

SC Court of Appeals

RECEIVED

JUL 20 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa Narruhn Respondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

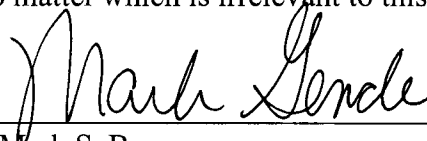
Appellant proposes the following be included in the Record on Appeal:

1. Supreme Court's Order of May 22, 1986
2. Order of Reference for Supplemental Proceedings October 13, 2009 filed January 27, 2010 (case no. 4134)
3. Order of March 3, 2010 filed March 8, 2010 (case no. 4134)
4. Order of April 14, 2011 filed May 2, 2011 (case no. 4112)
5. Order for Judgment and For Hearing to Ascertain Damages April 13, 2006 filed April 17, 2006 (case no. 4134)
6. Order of Judgment April 13, 2006 filed April 17, 2006 (case no. 4134)
7. Complaint 2005 - case no. 4134
8. Amended Complaint 2005 - case no. 4134
9. Complaint 2008 - case no. 2609
10. Complaint 2010 - case no. 4112
11. Amended Complaint 2010 - case no. 4112
12. Defendant Alea London Limited's Answer to Plaintiff's Complaint 2010 - case no. 4112
13. Transcript of Record for March 1, 2011 hearing - case no. 4112
14. Affidavit of Service on Richard Cronce 2005 - case no. 4134

15. Affidavit of Default as to Defendant RKC – case no. 4134
16. Stipulation of Dismissal with Prejudice 2008 – case no. 2609
17. Letter from Mr. Garron’s Carrier asking Alea to assume defense – October 6, 2008 re: case no. 2609
18. Alea letter declining to participate in 2008 case – October 8, 2008 re: case no. 2609
19. Certified Copy of insurance policy number ALT 047106 issued to The Red Room
20. Defendant’s Motion for Relief from Judgment or Order filed December 10, 2010 - case no. 4112
21. Memorandum in Support of Motion to Set Aside Order Under Rule 60(b)(1)(4), and (5) filed March 2, 2011 - case no. 4112
22. Defendant Alea London Limited’s Memorandum Regarding the Circuit Court’s Jurisdiction to Set Aside Order of Special Referee filed March 14, 2011 - case no. 4112
23. Plaintiff’s Answers to Defendant Alea’s Request to Admit - case no. 4112
24. Defendant Alea London Limited’s Motion to Determine The Sufficiency of Plaintiff’s Answers to Defendant Alea’s Requests to Admit - case no. 4112

I certify that this designation contains no matter which is irrelevant to this appeal.

July 20, 2011



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803) 256-2233
Attorneys for Appellant Alea London Limited

RECEIVED

JUL 20 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa Narruhn Respondent

v.

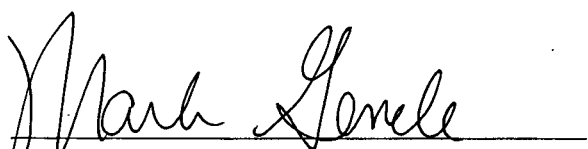
Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondent Elisa Narruhn by depositing a copy of it in the United States Mail, postage prepaid, on July 20, 2011, addressed to her attorney of record, Gene M. Connell, Jr., Esquire, Kelaher, Connell & Connor, P.C., 1500 U.S. Highway 17 North, The Courtyard, Suite 209, Post Office Box 14547, Surfside Beach, SC 29587-4547 and on Defendant Anderson General Insurance by depositing a copy of it in the United States Mail, postage prepaid, on July 20, 2011, addressed to their attorney of record, Susan Taylor Wall, Esquire, Parker Poe Adams & Bernstein L.L.P., 200 Meeting Street, Suite 301, Charleston, SC 29401

July 20, 2011



Mark S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant Alea London Limited

S·W·B

SWEENEY WINGATE & BARROW P.A.

RECEIVED

JUL 20 2011

SC Court of Appeals

July 20, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

The Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street,
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

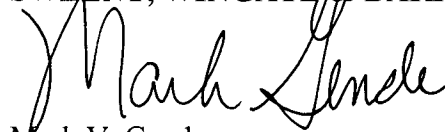
Enclosed for filing are the original and two copies each of Initial Brief of Appellant, Designation of Matter to be included in the Record on Appeal, and Proof of Service in this case.

Please return with the courier who delivers these two filed, stamped copies of the Initial Brief of Appellate, Designation of Matter to be included in the Record on Appeal, and Proof of Service. Should you have any questions or concerns, please do not hesitate to contact me.

By copy of this letter, I am serving the same on Respondent's counsel, Gene M. Connell, Jr., Esquire.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/csh

cc: Gene M. Connell, Jr., Esquire (w/enclosures) via U.S. Mail
Susan Taylor Wall, Esquire (w/enclosures) via U.S. Mail

RECEIVED

JUL 20 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-4112

Elisa NarruhnRespondent

v.

Alea London Limited and Anderson
General Insurance Defendant

Of whom, Alea London Limited is Appellant

INITIAL BRIEF OF APPELLANT

Mar S. Barrow
Mark V. Gende
William R. Calhoun, Jr.
SWEENY WINGATE AND BARROW, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

ARGUMENT 4

 I. The Jurisdiction of the Court of Appeals Includes Correction of Errors of Law.4

 II. The Trial Court Erred in Holding That it Did Not Have Jurisdiction to Rule on a Motion Under Rule 60(b), SCRCP, Pertaining to an Order From a Special Referee Who Had Completed His Assignment.5

 iii. The Trial Court Erred in Implicitly Holding that the Special Referee Had Jurisdiction to Issue His Order of May 2, 2010, Affecting The Rights Of Alea London When The Rules of Supplementary Proceedings Were Not Followed and Due Process Was Not Accorded Alea London.11

CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases

Ag-Chem Equipment Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984) 13

Ashenfelder v. City of Georgetown, 389 S.C. 568, 572, 698 S.E.2d 856, 858 (Ct. App. 2010) 4

Ball v. Ball, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993)..... 20

Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 111 S.C. 299, 97 S.E. 833 (1919)..... 16

Ex parte Cannon, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009)..... 20

Hill v. Dotts, 345 S.C. 304, 307, 547 S.E.2d 894, 896 (Ct. App. 2001)..... 6

In re: November 4, 2008 Bluffton Town Council Election, 385 S.C. 11

Johnson v. Service Management, Inc., 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995)... 13

Lynn v. Internation Broth. Of Firemen and Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955)..... 16

Mr. T. v. Mrs. T., 378 S.C. 127, 135-36, 162 S.E. 2d 413, 417-18 (Ct. App. 2008)..... 9

Palmetto Bank & Trust Co. v. McCown-Clark Co., 143 S.C. 98, 141 S.E. 155, 156 (1928) 18

Rhodes v. Casey, 26 S.C. 491 16

Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008) 7

South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353, 357, 638 S.E.2d 103, 105 (Ct. App. 2006). 22

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000) 6

Wannamaker v. Bryant, 165 S.C. 107, 162 S.E. 779, 780 (1932)..... 18

Statutes

S.C. CODE ANN. § 15-39-310 13, 17

S.C.CODE ANN.§ 14-3-330 4

S.C. Code Ann. § 15-39-350..... 13, 15

S.C. CODE ANN. §15-39-370 15

S.C. CODE ANN. §15-39-380 15

S.C. CODE ANN. §15-39-400 15

S.C. Code Ann. § 15-39-490..... 13

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO HEAR AND DECIDE A MOTION UNDER RULE 60(b), SCRPC, REGARDING AN ORDER BY A SPECIAL REFEREE WHO HAD FULLY COMPLETED THE TASK FOR WHICH HE HAD BEEN APPOINTED?

2. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT'S MOTION UNDER RULE 60(b) WAS UNTIMELY?

3. DID THE TRIAL COURT ERR IN IMPLICITLY HOLDING THAT THE SPECIAL REFEREE WHOSE CHARTER WAS TO CONDUCT SUPPLEMENTAL PROCEEDINGS HAD SUBJECT MATTER AND PERSONAL JURISDICTION TO ORDER THE ASSIGNMENT OF A PARTY'S INCHOATE RIGHTS AGAINST ITS NON-PARTY INSURER, WHEN THE INSURER IS PROVIDED NO NOTICE OF PROCEEDING OR THE OPPORTUNITY TO BE HEARD?

STATEMENT OF THE CASE

This is a case in which a Plaintiff, who had been shot in an establishment called The Red Room, seeks to collect a default judgment against RKC Entertainment, LLC d/b/a The Red Room by collecting on the liability insurance policy issued to that entity. Plaintiff has not obtained an assignment of RKC's rights against the insurance company, Alea London Limited ("Alea"), from RKC. Instead, a Special Referee, by Order of March 8, 2010, granted Plaintiff's Counsel's request to assign RKC's purported rights against its insurance company to Plaintiff. Alea had no notice of the hearing or any opportunity to be heard on the matter. Alea moved in the Circuit Court to have relief under Rule 60, SCRPC, from that Order of March 8, 2010, R. ____, but that motion was denied by the Court by Order of May 2, 2011, on the ground that the court did not have jurisdiction to grant a Rule 60 motion regarding an order issued by the special referee. R. ____.

Plaintiff Narruhn was shot in The Red Room on or about April 9, 2005, by a man named Arden Percival Cato, II. She initiated a civil action, C.A. No. 05-CP-26-4134, against RKC Entertainment, LLC d/b/a The Red Room and Mr. Cato on August 4, 2005 in the Court of Common Pleas for Horry County. A copy of her original Complaint is at R. _____. The Complaint states that "Plaintiff was assaulted by Defendant Cato, who had been ejected from the nightclub...." ¶6. All of the injuries alleged were the direct result of the assault by Mr. Cato.

Prior to the assault on Ms. Narruhn, Alea, pursuant to an application from Richard Cronce, the operator of, and registered agent for, The Red Room, issued liability policy number ALT047106 to The Red Room and RKC. R. _____. The policy was intended to cover the period 12/09/2004 to 12/09/2005.

RKC, owner of The Red Room, financed the purchase of the insurance policy through Charleston Premium Finance Company. Due to non-payment of premiums, Alea cancelled RKC's policy effective March 29, 2005, subsequent to the required 10-day written notice, which was sent by Charleston Premium on March 14, 2005. Thus, when Ms. Narruhn was shot on or about April 9, 2005, Alea London had no liability insurance in force for The Red Room. Alea's policy also includes an unambiguous exclusion for injuries caused by assault or battery.

After obtaining a Six Million Dollar (\$6,000,000.00) default judgment against RKC and Cato in C.A. No. 05-CP-26-4134, an action of which Alea had no notice from RKC, Plaintiff commenced supplemental proceedings to determine the assets of RKC. Rather than itself determining the Plaintiff's rights against RKC Entertainment, the special referee simply assigned to Plaintiff any rights that RKC might have against Alea,

as reflected in the Order from which Alea sought relief in the Trial Court. R. _____. Alea had no notice of the hearing associated with the supplemental proceedings and, therefore, had no opportunity to be represented or otherwise be heard during those supplemental proceedings. No inquiry was made by the special referee as to whether RKC had a viable claim for benefits under the liability policy.

On May 11, 2010, Narruhn filed the instant suit against Alea and Anderson General Insurance, the producing agency, alleging bad faith, failure to defend, negligence, and unfair trade practices. It was only *after* service of the summons and complaint in this action, in the first week of September, 2010, through the Insurance Department, that Appellant learned of the underlying lawsuit; of the default judgment of \$6 Million against RKC; of the referral to the special referee for supplemental proceedings; of the hearing of February 9, 2010 before the special referee; and of the Order of March 8, 2010. All of these events and actions were a total surprise to Alea and formed the basis for Alea's motion under Rule 60(b)(1) which provides relief for, *inter alia*, "surprise." There could be no more surprise than that experienced by Alea in this matter.

Appellant has meritorious defenses to Ms. Narruhn's claims. Even if the Alea policy had been in force, which, as addressed above, was not the case, there are provisions that should preclude coverage for Ms. Narruhn's injuries. Among those provisions is the cited exclusion for injuries arising from assault and/or battery, R. _____, and a cooperation requirement with which the RKC Entertainment did not comply in any respect. R. _____. RKC failed to provide the complaint to Alea; failed to answer the complaint; failed to appear at the damages hearing; failed to inform Alea of the Order of

Reference; and failed to attend the hearing before the Special Referee. RKC, moreover, failed to notify Alea of any of those events. This represents a total failure to cooperate under the terms of the policy.

Alea moved to have the Special Referee's Order of March 8, 2010, set aside under Rule 60, SCRPC. Specifically, Alea London moved to have the Order set aside because of surprise, Rule 60(b)(1); because the judgment is void, Rule 60(b)(4); and because it is no longer equitable for application in this current lawsuit, Rule 60(b)(5). A copy of the memorandum provided to the court is at R. _____. The trial court tentatively ruled at the hearing of March 1, 2011, that it did not have jurisdiction to address Appellant's motion, but allowed the parties to provide further briefing on the issue of its jurisdiction. Transcript, p. 28, 11.3-5; R. _____. Appellant's brief to the Trial Court on the issue of its jurisdiction is at R. _____. The appealed Order followed on May 2, 2011. R. _____.

ARGUMENT

I. THE JURISDICTION OF THE COURT OF APPEALS INCLUDES CORRECTION OF ERRORS OF LAW.

This Court has recently addressed its jurisdiction to correct errors of law. Ashenfelder v. City of Georgetown, 389 S.C. 568, 572, 698 S.E.2d 856, 858 (Ct. App. 2010) ("The Court of Appeals also exercises its appellate jurisdiction under [S.C.CODE ANN. § 14-3-330],” which provides “appellate jurisdiction for correction of errors of law.”

Appellant herewith requests this Court to correct the errors of law in the Circuit Court's order of May 2, 2011, R._____.

II. THE TRIAL COURT ERRED IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO RULE ON A MOTION UNDER RULE 60(b), SCRPC, PERTAINING TO AN ORDER FROM A SPECIAL REFEREE WHO HAD COMPLETED HIS ASSIGNMENT.

The Trial Court's order concludes as follows:

Based on the above authority, the court declines jurisdiction of this case because this matter is vested with the Special Referee who was assigned to it pursuant to Order of this Court. Further, Defendant Alea London Limited has no basis to challenge the Order because Alea London Limited was not a party and thus may not file a SCRPC Rule 60 motion.

R.____. Elsewhere in the order, the Court states that, "Alea London cannot make this motion since it is more than a year after the Order of Judgment was issued." R.____.

As addressed below, as a matter of both law and equity, the Trial Court's Order should be reversed. It places Alea London in a Catch-22 in which it is subjected to a lawsuit based on an order from a Special Referee, who is no longer serving in that capacity, with instructions that any motion regarding that order must be to that Special Referee, and, moreover, that Alea may not file a Rule 60 motion because it was not a party. The Trial Court's Order errs in construing South Carolina law.

A. The Trial Court Erred in Holding that the Rule 60(b) Motion Could be Addressed Only to the Special Referee Who had Completed His Assignment.

1. South Carolina Law Provides that when a Special Referee completes the Task incorporated in the Order of Reference, his Jurisdiction ends and jurisdiction is reposed in the Circuit Court.

The Supreme Court has addressed specifically when a Master or Referee loses jurisdiction and where Rule 60(b) motions are to be filed and adjudicated thereafter.

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000)¹ *reh'g denied*. The Player Court held as follows:

The proper construction of the order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him. . . .

Once the master has concluded his duties and entered all necessary orders, his jurisdiction ends and any post-trial motions, other than those covered by this Court's May 22, 1986, order,^{FN2} are to be heard by the circuit court. The language in the order of reference authorizing the master to enter a final judgment is not a limitation on his jurisdiction, but rather is descriptive of the nature of his order.

^{FN2} Pursuant to this order, a post-trial motion filed under Rules 50, 52, 59 or 60(a), SCRPC, is to be delivered to the trial judge, who is then to dispose of it promptly.

341 S.C. at 427, 535 S.E.2d at 129 (emphasis added) (footnotes omitted). *See also, Hill v. Dotts*, 345 S.C. 304, 307, 547 S.E.2d 894, 896 (Ct. App. 2001) (special referee appointed to conduct a damages hearing, which he did, awarding damages for personal injury and property damage. *Defendant filed motion under Rule 60(b) for relief. Circuit court had jurisdiction and conducted hearing* (emphasis added)).

It should be noted that the Supreme Court's Order of May 22, 1986 **excludes** motions under Rule 60(b) from the list of actions that must be presented to the trial court. A copy of this Order is at R. ____.

2. The Cases which state that one Circuit Judge does not have the Authority to set aside the Order of another Circuit Judge are distinguishable and not dispositive of the case at hand.

The rule that one circuit court judge does not have authority to overturn an order of another circuit judge is founded on the prior Circuit Court Rules. This rule is not in

¹ The Trial Court's Order citing Player, R. ____, fails to address the fact that the Special Referee has completed his assignment to conduct supplementary proceedings. The Special Referee's final action was to enter the Order of March 8, 2010.

the current South Carolina Rules of Civil Procedure, but it is still correct under our law. Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008).

a. Inasmuch as the Special Referee's Assignment under the Order of Reference was completed, he was no longer "another Circuit Judge."

As addressed above, citing *Player*, when a Special Referee completes the task assigned him in the Order of Reference, he no longer has jurisdiction. That is exactly what happened here. The Order of Reference, R. ___, assigns Attorney Nate Fata to conduct supplementary proceedings; to hold a hearing to that effect on February 9, 2010; and to enter final judgment, which he did by entering his Order of March 8, 2010. He, therefore, completed everything he was charged with doing, so he no longer has jurisdiction. He is no longer a circuit judge. For a circuit judge of the Fifteenth Judicial Circuit to hear and grant a Rule 60(b) motion would thus **not** be overturning the Order of another Circuit Judge.

b. The Circuit Court's grant of the Rule 60(b) motion would not reverse Judge John's Order.

To the extent Plaintiff asserts that for this Court to hear and grant the 60(b) motion would be to overrule Judge John's Order of Reference, that assertion is incorrect. In Salmonsens, *supra.*, a subsequent circuit judge's ruling on class certification and opt-out provisions in the case did not violate the rule that one circuit judge does not have authority to overturn an order of another circuit judge. This was because the first judge did not rule on the same provisions, 377 S.C. at 454, 661 S.E.2d at 88. As this Court has stated:

The Binkleys argue that Judge Hall effectively reversed Judge Kittredge's prior order. We disagree.

Generally, one circuit court judge may not reverse or modify the order of another circuit court judge. In the present case, the issues before Judge Kittredge and Judge Hall were easily distinguishable. Judge Kittredge determined that Rabon Creek's easement was ambiguous, that the homeowners had no actual or constructive notice of it, and that the doctrine of equitable estoppel limited Rabon Creek's enforcement rights. Judge Hall addressed the question of when the Binkleys knew or should have known that they had a potential claim for legal malpractice against Haynsworth and determined that they had at least inquiry notice of their claim when Haynsworth advised them that the easement existed.

Binkley v. Burry, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002) (footnotes omitted).

Here, the issues before Judge John and the Court hearing the 60(b) motion are also easily distinguishable.

The issue before Judge John was whether Attorney Fata should conduct supplementary proceedings and when. The issues before the Circuit Court regarding the 60(b) motion were whether Alea – which was unrepresented at the hearing – was surprised; whether it was accorded the minimums of due process, notice and a hearing; and whether, given all the circumstances, it is equitable to enforce against Alea the Special Referee's – not Judge John's – Order granting Plaintiff an assignment against Alea when no evidence was presented to establish that RKC had ownership of any assets deriving from Alea's policy.

The Circuit Court's Order ruling on the Rule 60(b) motion would not overrule or reverse any aspect of Judge John's Order.

c. Alea's Motion is *de facto* an Independent Action in Equity Specifically Allowed by Rule 60(b).

Rule 60(b), in pertinent part, states that, “[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding. . . .” This Court has addressed such an action as follows:

Rule 60 explicitly indicates that it in no way limits the court’s power to entertain an independent action “*to relieve a party from a judgment. . . ‘or’ to set aside a judgment for fraud upon the court.*” (emphasis added). While the most common ground for an independent action is for fraud, the rule is not restricted to only that ground. The structure of this rule and its use of the word “or” indicate to this court two potential independent action attacks on a judgment, order or proceeding: 1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. See, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2868 (2d ed.1995).

The Eighth Circuit characterized the independent action as follows:

The indispensable elements of such a cause of action are 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law.

Nat’l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir. 1903). In essence, the rule merely reflects many of the considerations attendant to an equitable analysis. Further, since the independent action referenced in the rule is one in equity, the court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists. The court may also consider other policy doctrines such as *parens patriae*; we do not suggest this list is exclusive. However, what we do suggest is that equity only intervenes when the circumstances so require, but to do so, a court must be aware of all of the circumstances before it acts. Thus, the parties must be allowed to develop the record accordingly.

Mr. T. v. Mrs. T., 378 S.C. 127, 135-36, 162 S.E. 2d 413, 417-18 (Ct. App. 2008).

Being independent, such an action should not necessarily be presented to the same court. Alea’s claim meets all five of the elements stated by the Eighth Circuit, as follows:

- In equity and good conscience, the assignment against Alea – which was totally without notice – should not be enforced.
- Alea’s policy does not provide coverage. Even if it did, that coverage should be excluded by the exclusion for injuries caused by assault and battery and by the insured’s abject failure to meet its obligation of cooperation under the policy.
- The intentional failure to notify Alea – by the insured, the Plaintiff (despite counsel’s intention to impose liability on Alea) and the Special Referee – prevented Alea from obtaining the benefit of this defense.
- Alea is in no way at fault for not appearing at a hearing of which it had no knowledge or notice.
- Alea has no adequate remedy at law. By the time it received the Order granting an assignment, the time for appeal was over.

The Circuit Court should clearly have had jurisdiction over this independent act. The Circuit Court erred in not recognizing the seriously inequitable aspects of the hearing before the Special Referee and the Order that resulted from that hearing. There are so many irregularities in the procedure below that Alea’s motion should have been, and should be, considered to be an independent action in equity allowed by Rule 60(b). The matter had been brought to the Circuit Court’s attention, R. ____, prior to that Court’s entering its Order of May 7, 2011, which was the genesis of this appeal.

For the reasons cited, the rule that one circuit judge cannot overrule another circuit judge does not preclude this Court’s exercise of jurisdiction.

B. The Trial Court Erred in Holding that Alea London’s Rule 60 (b) Motion was Untimely.

Rule 60 (b), SCRCP, allows motions under that section based on surprise to be brought, “no more than one year after the...order...was entered...” There is no time limitation for motions made under Rule 60 (b)(4) and (5).

In the case at hand, the order from which relief was sought² was entered March 8, 2010. R.____. Alea London’s motion to set aside this order was filed with the Clerk of Court for Horry County on December 10, 2010. R.____. It should be noted that Alea London’s motion was made under Rule 60 (b)(1), (4) and (5). There is, thus, no basis in the record for the Trial Court’s holding that Alea London’s motion under Rule 60 (b)(1), (4) and (5) was untimely.

III. THE TRIAL COURT ERRED IN IMPLICITLY HOLDING THAT THE SPECIAL REFEREE HAD JURISDICTION TO ISSUE HIS ORDER OF MAY 2, 2010, AFFECTING THE RIGHTS OF ALEA LONDON WHEN THE RULES OF SUPPLEMENTARY PROCEEDINGS WERE NOT FOLLOWED AND DUE PROCESS WAS NOT ACCORDED ALEA LONDON.

The Trial Court held that “jurisdiction of this case...is vested with the Special Referee.” R.____. The issue of the Special Referee’s jurisdiction was, therefore, before the Trial Court, which ruled upon it. There are issues of both personal jurisdiction (implicating due process) and subject matter jurisdiction.

A. The Trial Court Erred in Not Recognizing that the Special Referee was without Subject Matter and Personal Jurisdiction to Issue the Order of March 8, 2010.

Subject matter jurisdiction can be raised at any time, even on appeal when it was not raised below. In re: November 4, 2008 Bluffton Town Council Election, 385 S.C.

² The Trial Court appears to assume that Appellant was seeking to set aside the Order of Reference, R.____, entered January 27, 2010. The 60(b) motion was timely even under that order of reference.

632, 639, 686 S.E.2d 683, 687 (2009) (“Just as subject matter jurisdiction cannot be waived or conferred by agreement of the parties to an action, it cannot be conferred at the direction of a county official [citation omitted]. Furthermore, subject matter jurisdiction may also be raised at any time, and it is properly contested in this appeal even if it was not raised below”); *see also*, Ex parte Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) (“Lack of subject matter can be raised at any time, even for the first time on appeal, by a party or by the court”).

In the case at hand, the Special Referee, appointed specifically and exclusively to conduct supplementary proceedings, exceeded his authority in ordering, *inter alia*, that:

IT IS ORDERED that any and all claim by RKC Entertainment LLC against Alea London Limited Insurers is assigned to the Plaintiff under Policy Number ALT047106.

IT IS FURTHER ORDERED that any and all right, title and claim which RKC Entertainment LLC may have against Alea London Limited Insurers for failure to pay the claim, to defend the claim, or to investigate the claim and for any other claim that RKC Entertainment LLC may have against Alea London Limited is hereby assigned to the Plaintiff Elisa Narruhn.

R. ____.

1. The Special Referee’s Authority was Limited to the Conduct of Supplemental Proceedings.

The Order of Reference, entered January 27, 2010, was specifically entitled “Order of Reference for Supplemental Proceedings.” R. _____. The body of that Order states that “the action is one which may be referred to ... a Special Referee for supplemental proceedings.” Rule 53, referenced in the Order of Reference states that, once appointed, a special referee has the same powers as a circuit court judge. Rule 53(c), SCRCF. In this case, a circuit court judge, or the Special Referee appointed,

would be required to operate within the authority granted by legislature regarding supplemental proceedings.

2. The Statutes Governing Supplemental Proceedings Require Notice and Participation by the Debtor of a Judgment Debtor.

Supplemental Proceedings are equitable in nature. Ag-Chem Equipment Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984) (citation omitted). By statute, however, our legislature has laid out specific requirements for the conduct of supplemental proceedings. S.C. CODE ANN. §§ 15-39-310 *et seq.* The first step, as stated in §15-39-310, is, after an execution against property is returned unsatisfied in whole or in part, an examination of the debtor. The court, or Special Referee in this case, can, by order, require the presence and testimony of the debtor, *id.*, with a penalty of contempt for failure to obey such order. S.C. Code Ann. § 15-39-490. It appears that Plaintiff's counsel did not vigorously pursue this remedy, but was perfunctory at best. Certainly there was no reasonable attempt to require the attendance of RKC's principal. The Order of Reference, along with the notice of hearing was *mailed* to Richard Cronce on January 26, 2010, R. ____, 13 days after the Order was signed and **one** day before it was filed. R. ____. It is not unreasonable to believe that no serious attempt was made to obtain Mr. Cronce's attendance at either hearing.

This Court has previously addressed the second necessary step in supplemental proceedings, based on S.C. Code Ann. § 15-39-350. Johnson v. Service Management, Inc., 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995) *reh'g denied, cert. granted, aff'd* 324 S.C. 198, 478 S.E.2d 63 (1996). In Johnson, in which a plaintiff – as in this case – sought to obtain funds from a third party that were ostensibly owed to the judgment debtor, this Court held:

Here, A&J sought to satisfy its judgment by obtaining funds in an SMI bank account. The relationship between a general depositor and his bank is that of a creditor and debtor, and money deposited, unless put into a special account or specifically designated to be kept separate, becomes the property of the bank and goes into its general account. Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975). The funds on deposit thus are no longer the personal property of the depositor; instead, the depositor has a chose in action against the bank for recovery of the deposit. McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933); *see also* 30 Am. Jur.2d *Executions & Enforcement of Judgments* § 651(1994) (customary deposits in a bank create debts owed by the bank to the depositor and may be reached through supplementary proceedings). Therefore, the money in the Southern National account could not be reached through execution and levy, but only through supplementary proceedings. McManus, 171 S.C. at 88, 171 S.E. at 474.

After the issuing or return of an execution against the property of a judgment debtor, the judgment creditor may file an affidavit with the court stating that a third party has property of the judgment debtor or that a third party is indebted to the judgment debtor. S.C. Code Ann. §15-39-350. The court may then order the third party to appear and answer questions concerning the property or indebtedness, and may require notice of the proceedings be given to any additional party it deems necessary. *Id.* After conducting supplementary proceedings, the trial court may order non-exempt property of the judgment debtor in the hands of a third party or owed to the judgment debtor to be applied toward satisfaction of the judgment. S.C. Code Ann. § 15-39-410; Lynn, 228 S.C. at 362, 90 S.E.2d at 206 (chose in action belonging to judgment creditor may be reached through supplementary proceedings); McManus, 171 S.C. at 88, 171 S.E. at 474 (judgment creditor may reach bank account of judgment debtor through supplementary proceedings); Deer Island Lumber Co. v. Virginia-Carolina Chem. Co., 111 S.C. 299, 97 S.E.833(1919) (judgment creditor may reach funds in the hands of a third party through supplementary proceedings).

In this case, A&J's affidavit was prima facie evidence that Southern National was indebted to SMI in the amount of the deposit. **However, the funds on deposit could be reached only after supplementary proceedings were held to examine Southern National with regard to the account.** Because the trial court ordered the funds to be turned over to A&J without holding supplementary proceedings, the February 9th order is hereby reversed.

Johnson, 319 S.C. at 167-69, 459 S.E.2d at 902-03 (emphasis added).

The specific wording of § 15-39-350 upon which Johnson is based is as follows:

After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment and upon **an affidavit that any person or corporation has property of such judgment debtor** or is indebted to him in any amount exceeding ten dollars, the **judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place** and answer concerning such property or indebtedness. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper.

S.C. CODE ANN. § 15-39-350 (2005) (emphasis added).

In this case no affidavit was presented to the special referee³ and no one from Alea London was instructed or ordered to appear and answer questions about coverage. Representatives of Alea could have been required to testify, S.C. CODE ANN. §15-39-370,-380, and to provide testimony under oath. S.C. CODE ANN. §§15-39-400. The Special Referee failed to include Alea London in the process in any way.

In failing to have any evidence that RKC was entitled to coverage under the policy, or to make inquiry of Alea London, the Special Referee did not have authority – did not have subject matter jurisdiction – to issue the Order that he issued regarding Alea’s policy. He did not actually conduct supplementary proceedings as required by statute, but nonetheless ordered that a debtor’s inchoate, potential claim against a third party be assigned to a third party. As the Johnson Court held, “the funds on deposit [which were definite, not inchoate] could be reached only after supplementary proceedings were held *to examine Southern National* with regard to the account. Because the trial court ordered the funds to be turned over to A&J without holding supplementary proceedings, the February 9th order is hereby reversed.” 319 S.C. at 168-69, 459 S.E. 2d

³ An insurance policy—which is not proof of coverage—was presented to the Referee. R.____. The Special Referee made no inquiry whatsoever as to whether it provided coverage for Plaintiff’s injury.

at 902-03. Because Alea London was not examined, which is the essence of supplementary proceedings, the Special Referee's Order of March 8, 2010 should be vacated.

3. While a Chose-in-Action May be Reached through Supplementary Proceedings, Plaintiff's Claim against RKC's Liability Insurance Policy is not a Chose in Action.

The Special Referee's Order states that it had "reviewed the Plaintiff's counsel's request that any right the Defendant had against Alea London Limited Insurer be assigned as a 'chose in action to the Plaintiff.'" R.____. The Special Referee implicitly granted Plaintiff's counsel's request, though without saying so directly.

Under our law, supplementary proceedings may be used to reach choses in action.

Our Supreme Court has held as follows:

Proceedings supplementary to execution, in addition to providing for examination of the judgment debtor for the purpose of discovering property out of which the judgment against him may be satisfied, furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action. 21 Am.Jur., Executions, Sec. 689 p. 327; 33 C.J.S., Executions, § 349, p. 652. Cf. Union Bank & Trust Co. of Kokomo v. Vandervoort, 122 Ind.App. 258, 101 N.E.2d 724.

Lynn v. Internation Broth. Of Firemen and Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955). The immediately following paragraph in Lynn explains what the Court means by a chose in action: "Thus we have held that a judgment in favor of the judgment debtor may be so reached. Rhodes v. Casey, 26 S.C. 491. And likewise with funds in the hands of a third party alleged to belong to the judgment creditor *and proved prima facie to so belong.*" Lynn, 228, S.C. at 363, 90 S.E.2d at 206 *citing* Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 111 S.C. 299, 97 S.E. 833 (1919)(emphasis added). Our

law, therefore, requires definiteness for a chose in action to exist. That is not present in this case.

There appears to be no precedent in this state for allowing a trial court to order the assignment of an insured's alleged – but not established – rights against an insurance company to a judgment creditor. Our law requires that before a court conducting supplementary proceedings allows a judgment creditor to proceed against a third party to obtain funds ostensibly owned by the judgment debtor, the ownership of the funds must be established. That is, after all, the purpose of supplementary proceedings: to allow discovery of funds that may be applied to the debt in issue. S. C. CODE ANN. § 15-39-310. In this case, Alea London contends, based on the provisions of its policy, that it is entitled to ownership of the funds that Plaintiff seeks. The issue of ownership should have been determined before the assignment of The Red Room's rights was ordered by The Court.

South Carolina Courts have addressed the issue of disputed ownership as follows:

It appears manifestly intended by the foregoing sections that a third person claiming property rights which have been passed upon in the original action under which the execution is issued should not be deprived either of his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure. No provision appears that either expressly or by implication gives authority to the court to summarily dispose of the issue of ownership, or to order property claimed by another to be applied towards the satisfaction of an execution against the judgment debtor.

Nor can an appearance and return to such a rule, when made in obedience to the order of court, be given effect as consent to a mode of trial not authorized by the provisions of the statutes. On the other hand, it must be recognized that no limitation is imposed upon the discretion of the circuit judge in keeping the property within the control of the court, by forbidding its transfer or other disposition.

In our opinion, the decision of this court in the case of Deer Island Lumber Co. v. Virginia-Carolina Chemical Co. 111 S.C. 299, 97 S.E. 833, determines both questions raised in this appeal. In that case, Mr. Justice Gage, speaking for the court, in a matter similar to the case at bar, said:

“It is true the issue of ownership may not be finally determined, except the Deer Island Lumber Company shall be heard. But a judgment creditor may by the plain words of the statute arrest a fund in the hands of a third party, and alleged by such creditor to belong in truth to the judgment debtor, and **proven prima facie to so belong**, and hold the funds until the issue of ownership shall be decided. Sections 352 and 356, Code of Procedure [sections 614 and 618, Code of 1922]

Corollary to that postulate is another that, if the fund appears on proof to be probably the property of Wilkins, then it ought to be held intact until probable shall be ascertained to be the real. An examination of the whole record satisfies us that the circuit judge was right to conclude that the deposit ought to be arrested until by orderly proceedings the owner of it may be identified. Since that issue must be tried, we shall not suggest the probabilities of the case, but shall content ourselves merely with the statement of our conclusion.”

The insurance policy on its face stands in the name of the judgment debtor. In our opinion, this was a sufficient prima facie showing to warrant the circuit judge in holding the funds for proper action to decide who is entitled to have the funds, but it was not proper for the ownership to be decided at the hearing before the circuit judge. A hearing for that purpose, as provided by law, should have come later.

Palmetto Bank & Trust Co. v. McCown-Clark Co., 143 S.C. 98, 141 S.E. 155, 156 (1928)(emphasis added); *See also* Wannamaker v. Bryant, 165 S.C. 107, 162 S.E. 779, 780 (1932) (*quoting Palmetto Bank* to the effect that insured’s name on insurance policy was sufficient “to warrant the circuit judge in holding the funds... but it was not proper for the ownership to be decided before the circuit judge. A hearing for that purpose, as provided by law, should have come later”); Inter-Pac, Inc. v. Anderson, 36 B.R. 488, 490

(Bankr. D.S.C. 1982) (“The appellant failed to seek an order under § 15-39-410 hearing, hear and settle any issues of ownership by... third parties....”).

South Carolina law provides specifically for intervention by a third party when the issue of ownership of property “arrested” by the court is being decided. Deer Island Lumber Co., *supra*. Because Alea London had no notice of Plaintiff’s Motion for Assignment or the hearing on that Motion, it was denied a right – the right to intervene – that it should have under our law.

The Special Referee erred in holding that RKC had a chose in action against Alea London. Any possible claim that RKC might have against the insurer is far too contingent and indefinite to constitute a chose in action. There is no certainty whatsoever that the Red Room would have any claim against Alea London.⁴ Our law requires that for a claim to be a chose in action, it must be based on a definite obligation or contractual right. Our Supreme Court held as follows:

Where local union had obligation to pay parent union a specified percentage of the dues collected from the local’s members, and **amount was definitely determined** each month, the obligation was a chose in a action, the property of the parent union, and the circuit court had power to order amount of local union’s monthly payments under its obligation to the parent union to be applied to the payment of the judgment against parent union. Code 1952, §10-1731.

Lynn, *supra.*, 228 S.C. at 357, 90 S.E.2d at 204 (emphasis added). More recently,, this Court held as follows:

Because Sgt. Ball’s **vested right** to participate in a military retirement program, which could one day entitle him to receive retirement benefits as a form of deferred compensation, arises by virtue of his reenlistment contract, he could maintain an action at law to enforce this right should the

⁴ As pointed out *supra.*, p. 2, the policy was cancelled prior to the shooting and, even if there would have been coverage, it would have been excluded by the Assault and Battery exclusion.

military ever wrongfully attempt to deny it to him. Poe, 711 S. W. 2d at 855. This right of action is a chose in action, an interest which, as we noted, South Carolina courts include in the definition of the term "property." See Brown, 126 Cal. Rptr. At 637, 544 P.2d at 565 (a "contractual right is not an expectancy but a chose in action, a form of property").

Ball v. Ball, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993)(emphasis added).

Because the process employed failed to follow South Carolina law regarding supplemental procedures in that the ownership of the putative insurance funds was not determined and Alea London was not added as a necessary party, the Special Referee lacked subject matter jurisdiction to issue the Order of March 8, 2010. The Order should, therefore, be declared to be void under Rule 60 (b)(4), SCRCPP, and vacated.

4. The Special Referee did not have Personal Jurisdiction over Alea London, which was necessary to deprive the Insurer of its Contractual Rights.

This Court has addressed when personal jurisdiction attaches, as follows:

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct.App.2007).

Ex parte Cannon, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009).

In C.A. 2005-CP-26-4134, the case in which the Special Referee's Order was entered, Alea London was never served with a summons and complaint and never made a voluntary appearance. Alea London, in fact, had no knowledge of the prior suit until, at the earliest, the summons and complaint were served on the Red Room's Landlord in C.A. No. 2008-CP-26-2609. Alea London was, moreover, not served with a summons and complaint in that case and did not make a voluntary appearance therein. The Court

of Common Pleas of Harry County did not acquire personal jurisdiction of Alea London until the summons and complaint in C.A. No. 2010-CP-26-4112 were served on it through the Department of Insurance on September 1, 2010.

At the time the Special Referee issued his Order of March 8, 2010, therefore, the court did not have personal jurisdiction over Alea London.

Despite his lack of personal jurisdiction over Alea London, the Special Referee issued the Order of March 8 which deprived the Insurer of rights it had under its contract with RKC. The Common Policy Conditions, Form GU 267 (11-85), in the policy provide, in pertinent part, as follows:

F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the cause of death of an individual Named Insured.

R. ____.

The cited provision gave Alea London the contractual right to approve or disapprove any transfer of RKC's rights and duties under the policy. The Special Referee's Order abrogated this contractual provision, assigning RKC's rights under the policy to Plaintiff Elisa Narruhn.

The Special Referee's Order, therefore, violates Article I, Section 4 of the South Carolina Constitution, in that it impairs "the obligation of contracts." It similarly violates Article I, Section 10 of the United States Constitution. Moreover, as this Court has held, "[t]he judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort...." South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353, 357, 638 S.E.2d 103, 105 (Ct. App. 2006).

RKC could not, under the contract, have assigned its rights to Plaintiff Narruhn without Alea London's permission. The Special Referee assigned, on behalf of RKC, a right that RKC did not have – and in the process impaired and abrogated a contractual right held by Alea London. The Order of March 8 should be vacated on that basis alone.

Certainly, for a court to issue an order affecting the rights of a party to a contract, the court would need to have personal jurisdiction over that party. In the case before the Court, the Special Referee entered an Order which stripped Alea London of rights when the Referee did not have personal jurisdiction of Alea London. That is to deprive Alea London of property without due process of law inasmuch as a court's having jurisdiction of the subject matter and the person are essentials of due process.

The Circuit Court erred⁵ in upholding the Special Referee's jurisdiction.

CONCLUSION

This Court should reverse the Circuit Court's Order of May 2, 2011 because it was an error of law to hold that it did not have jurisdiction to overturn the order of a special referee who had completed his assigned task.. He was no longer a special referee, so the rule that one circuit court judge cannot overrule another circuit court judge was inapplicable. Under the law articulated in Wachovia Bank of S.C., N.A. v. Player, quoted *supra.*, p. 6, the Circuit Court had jurisdiction to address Alea London's motion under Rule 60(b).

The Court should also vacate the Order of the Special Referee entered May 8, 2010. The Special Referee lacked subject matter jurisdiction to enter that Order because

⁵ The issue of the special Referee's jurisdiction to issue the March 8 Order was raised to the Circuit Court. R___.

his charge was to conduct supplementary procedures, but he did not follow the statutory directives regarding such procedures. He did not examine Alea London, as a potential third-party debtor of the judgment debtor, as the relevant statutes require. The Reference also did not ascertain the ownership of funds represented by the insurance policy prior to assigning all rights under Alea's policy to the Plaintiff, as required by our law. He, therefore, exceeded his authority – subject matter jurisdiction – in issuing that Order.

The Special Referee also lacked personal jurisdiction over Alea when he issued his Order of March 8. No summons and complaint had been served on Alea and it had made no voluntary appearance before the Special Referee or the Court of Common Pleas in the relevant case. The Special Referee, therefore, had no legal basis to issue an order which affected, much less infringed,⁶ Alea's rights under its insurance contract. The Referee could not issue such an order affecting Alea London's rights under its contract without having jurisdiction over Alea London, which it did not have.

Finally, the Circuit Court erred in not considering Alea's action as an independent action in equity, as provided by Rule 60(b), SCRCF. Such an action appears eminently appropriate in a case such as this, in which, according to the Circuit Court, Alea cannot make a Rule 60 motion because it was not a party below. There are enough irregularities and procedural shortcomings to make the use of such an independent action in equity appropriate.

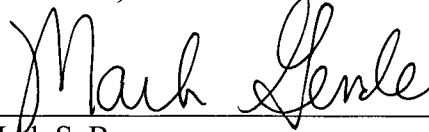
The appealed order of the Circuit Court should be reversed and the Special

⁶ The Special Referee's Order violated Art. I, §4 of the South Carolina Constitution and Art. I, §10 of the United States Constitution. It also overstepped a South Carolina court's duties regarding contracts.

Referee's Order of March 8, 2010, should be vacated as void because of a lack of jurisdiction to issue such an Order.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow

Mark V. Gende

William R. Calhoun, Jr.

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

**ATTORNEYS FOR APPELLANT ALEA
LONDON**

Columbia, South Carolina
July 20, 2011

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843

238-5648

FAX: 238-5050

May 20, 2011

RECEIVED

MAY 23 2011

SC Court of Appeals

Brenda R. Babb
Court Reporter
P. O. Box 4800
Calabash, N. C. 28467-9820

Re: Elisa Narruhn vs Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-4112
Our File No.: 2008-0383C

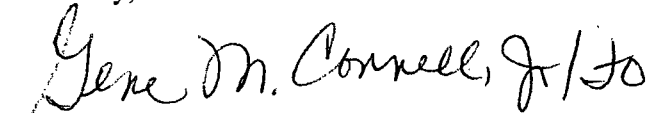
Dear Mrs. Babb:

On March 1, 2011, the above case was tried before the Honorable Larry B. Hyman, Circuit Court Judge, in Horry County. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Sincerely,



Gene M. Connell, Jr.

GMCjr:fo

cc: Mark V. Gende, Esquire
Susan Taylor Wall, Esquire
S. C. Court Administration
Clerk, S. C. Court of Appeals ✓



SWEENEY WINGATE & BARROW P.A.

May 16, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

Brenda R. Babb
Court Reporter
Post Office Box 4800
Calabash, NC 28467-9820

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Babb:

On March 1, 2011, the above case was tried before the Honorable Larry B. Hyman, Circuit Court Judge, in Horry County. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record of the hearing.

I agree to pay per page charge for this transcript, as provided by Rule 607, SCACR.

Should you have any questions, please feel free to contact me.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.

Mark V. Gende

MVG/csh

cc: The Honorable Melanie Huggins-Ward, Horry County Clerk of Court
Gene M. Connell, Jr., Esquire
Susan Taylor Wall, Esquire

RECEIVED
MAY 20 2011
SC Court of Appeals

S·W·B

SWEENEY WINGATE & BARROW P.A.

May 19, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street, Suite 5
Post Office Box 11629
Columbia, South Carolina 29201

RECEIVED
MAY 20 2011
SC Court of Appeals

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Case No.: 2011191646
Our File: 4150-7551

Dear Ms. Gee:

Pursuant to Rule 207, enclosed please find correspondence ordering the transcript of hearing in this matter.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/csh

Enclosure

cc: Gene M. Connell, Jr., Esquire, w/enclosure

Susan Taylor Wall, Esquire, w/enclosure

S·W·B

SWEENEY WINGATE & BARROW P.A.

May 19, 2011

RECEIVED

MAY 20 2011

Reply to: **SC Court of Appeals**

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

South Carolina Court of Appeals
Office of Court Administration
1015 Sumter Street, Suite 200
Post Office Box 11629
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Case No.: 2011191646
Our File: 4150-7551

Dear Sir/Madam:

Pursuant to Rule 207, enclosed please find correspondence ordering the transcript of hearing in this matter.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/csh

Enclosure

cc: Gene M. Connell, Jr., Esquire, w/enclosure
Susan Taylor Wall, Esquire, w/enclosure

Should you have any questions or concerns, please feel free to contact me.



SWEENEY WINGATE & BARROW P.A.

May 16, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

RECEIVED

MAY 20 2011

SC Court of Appeals

Brenda R. Babb
Court Reporter
Post Office Box 4800
Calabash, NC 28467-9820

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Babb:

On March 1, 2011, the above case was tried before the Honorable Larry B. Hyman, Circuit Court Judge, in Horry County. My records indicate that you were the court reporter for this case.

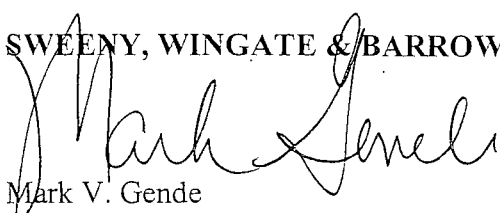
I request that you provide me with a transcript of the proceedings. Please transcribe the entire record of the hearing.

I agree to pay per page charge for this transcript, as provided by Rule 607, SCACR.

Should you have any questions, please feel free to contact me.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.


Mark V. Gende

MVG/csh

cc: The Honorable Melanie Huggins-Ward, Horry County Clerk of Court
Gene M. Connell, Jr., Esquire
Susan Taylor Wall, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 17, 2011

Mark Steven Barrow, Esquire
Sweeny Wingate & Barrow, PA
P.O. Box 12129
Columbia, SC 29211

Re: Narrhun, Elisa v. Alea London Limited
2011191646

Dear Mr. Barrow:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, it has come to the Court's attention that the caption should read as follows:

Elisa Narrhun, Respondent,

v.

Alea London Limited and Anderson Genral Insurance, Defendants,

Of whom, Alea London Limited is the, Appellant.

Any future filings by any party to this appeal must feature the above caption.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee

CLERK

TAG/mpm

cc: Gene McCain Connell, Jr, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

May 17, 2011

Mark Steven Barrow, Esquire
Sweeny Wingate & Barrow, PA
P.O. Box 12129
Columbia, SC 29211

Re: Narrhun, Elisa v. Alea London Limited
2011191646

Dear Mr. Barrow:

This office has received your Notice of appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/mpm

cc: Gene McCain Connell, Jr, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions, 1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:2

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

PH 5/13/11
POS 5/13/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

RECEIVED
MAY 13 2011
SC Court of Appeals

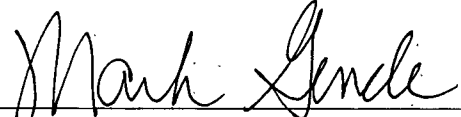
Case No. 2010-CP-26-4112

Alea London Limited.....Appellant,
v.
Elisa Narruhn.....Respondent.

NOTICE OF APPEAL

Alea London Limited appeals the order of the Honorable Larry B. Hyman dated April 14, 2011.
Appellant received written notice of entry of this order on May 2, 2011.

May 13, 2011



Mark S. Barrow
Mark V. Gende
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803) 256-2233
Attorneys for Appellant

Other Counsel of Record:
Gene M. Connell, Jr., Esquire
Kelaher, Connell & Connor, P.C.
1500 U.S. Highway 17 North
The Courtyard, Suite 209
Post Office Box 14547
Surfside Beach, SC 29587-4547
Attorney for Plaintiff/Respondent Elisa Narruhn

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein L.L.P.
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Co-Defendant Anderson General Insurance

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

RECEIVED

MAY 13 2011

SC Court of Appeals

Case No. 2010-CP-26-4112

Alea London Limited.....Appellant,

v.

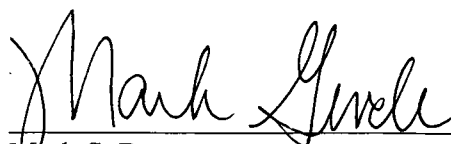
Elisa Narruhn.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Elisa Narruhn by depositing a copy of it in the United States Mail postage prepaid on May 13, 2011, addressed to her attorney of record, Gene M. Connell, Jr., Esquire, Kelaher, Connell & Connor, P.C., 1500 U.S. Highway 17 North, The Courtyard, Suite 209, Post Office Box 14547, Surfside Beach, SC 29587-4547.

I also certify that I have served the Notice of Appeal on Anderson General Insurance by depositing a copy of it in the United States Mail postage prepaid on May 13, 2011, addressed to its attorney of record, Susan Susan Taylor Wall, Esquire, Parker Poe Adams & Bernstein L.L.P., 200 Meeting Street, Suite 301, Charleston, SC 29401.

May 13, 2011



Mark S. Barow
Mark V. Gende
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803) 256-2233
Attorneys for Appellant

S·W·B

SWEENEY WINGATE & BARROW P.A.

May 13, 2011

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x 121
mvg@swblaw.com

VIA HAND DELIVERY

RECEIVED

MAY 13 2011

SC Court of Appeals

Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street, #5
Columbia, South Carolina 29201

RE: Elisa Narruhn v. Alea London Limited and Anderson General Insurance
Civil Action No.: 2010-CP-26-4112
Our File: 4150-7551

Dear Ms. Gee:

Enclosed for filing are the original and one copy each of the Notice of Appeal and Proof of service in this case. Also enclosed is this firm's check in the amount of \$100.00 for the filing fee. We have also included a copy of the Order denying Appellant Alea London Limited's Motion to Set Aside the Order of a Special Referee, which is the basis for this appeal.

Please return with the courier who delivers these at least one filed, stamped copy of the Notice of Appeal and Proof of Service. Should you have any questions or concerns, please do not hesitate to contact me at any time.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/csh

Enclosures

cc: Gene M. Connell, Jr., Esquire, w/enclosures
Susan Taylor Wall, Esquire, w/enclosures

MAIN OFFICE: T • 803-256-2233 F • 803-256-9177 1515 LADY ST. (29201) • POST OFFICE BOX 12129 • COLUMBIA, SC 29211
PEE DEE OFFICE: T • 843-383-2146 F • 843-383-6150 323 WEST HOME AVE. • POST OFFICE BOX 88 • HARTSVILLE, SC 29551

RECEIVED

MAY 13 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-26-4112

SC Court of Appeals

Elisa Narruhn,)
)
Plaintiff,)
)
vs.)
)
Alea London Limited and Anderson)
General Insurance,)
)
Defendants.)

ORDER

MELANIE HUGGINS-WARD
CLERK OF COURT
MAY -2 AM 11:11
COUNTY

This matter is before the Court based on Defendant Alea London Limited's motion to set aside an Order under SCRCP 60 to which Alea London Limited was not a party. Briefly stated, Narruhn sued RKC Entertainment LLC for personal injuries in a prior action and this court awarded a judgment. After the judgment was entered, Plaintiff's counsel obtained a second Order of this Court assigning the case to a Special Referee for purposes of supplemental proceedings. The Special Referee then assigned any right under RKC's liability insurance policy to Narruhn. Narruhn has filed this action against Alea London Limited for bad faith and for failure to defend. Alea London Limited has moved to vacate the Order of the Special Referee.

At the outset it should be noted that Alea London Limited is not a party to the Order it seeks to overturn and thus does not have standing to ask the Court for relief under SCRCP 60. (SCRCP 60(3) allows a party to seek relief from a final judgment.) In this case, Alea London Limited is not a party as the judgment is against RKC Entertainment, LLC, not Alea London Limited. Further, Alea London Limited cannot make this motion since it is more than a year after the Order of judgment was issued. (See SCRCP 60(5).) Here, the Order of the Circuit Court which vested

authority in the Special Referee is dated October 13, 2009, which is almost seventeen (17) months ago.

APPLICABLE LAW

It is settled in South Carolina that special referees and masters have the authority of a circuit court judge. South Carolina Rule of Civil Procedure 53(e) provides in pertinent part:

When a matter has been referred, any appeal from any order or judgment issued by the master or special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

In this case, the Honorable Steven H. John signed an Order on October 13, 2009 which is a part of the Court's files that provides that this matter was referred to Nate Fata with "any appeal from the final judgment entered by Nate Fata, Esquire shall be to the S. C. Court of Appeals."

South Carolina's law has long recognized that when a matter is referred with finality and an order is issued, the special referee is required to make all rulings in the case. The circuit court may not overrule or change the special referee's order. There is ample authority for this proposition in South Carolina. See *Roche v. Young Bros.*, 504 S.E.2d 311 (1998) (Supreme Court reverses Court of Appeals and holds that a defaulting party need not consent to an Order of Reference.). See also S.C. Code Ann. § 14-11-85 which holds "an appeal from an order or judgment of a special referee must be to the Supreme Court or South Carolina Court of Appeals. See also *Wachovia Bank v. Player*, 535 S.E.2d 128 (2000) (A special referee who heard the case must hear the SCRCP 60 motion). See also *Normandy v. S.C. Dept. of Transportation*, 688 S.E.2d 136 (2009) (Once a case is referred the special referee has authority to make all decisions in case).

In sum, the Court finds this case has been referred to the Special Referee with any appeal of his Order being to the South Carolina Court of Appeals. If Defendant Alea London Limited, which is not a party, wishes to file an SCRCP Rule 60 motion, it must be heard before the Special Referee

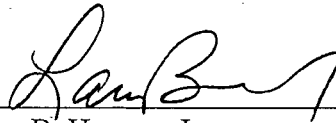
since it relates to an Order issued by him. (See SCRCP 60(a): "A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.") Indeed, in *Wachovia*, the court made clear that a special referee or master's role has changed with new South Carolina Rule of Civil Procedure 53(f) and S.C. Code § 14-11-85. Now, all matters are referred with finality. (See FN 3 *Wachovia Bank of S.C. v. Player*, 535 S.E.2d 128 (S.C. 2000).

Based on the above authority, the Court declines jurisdiction of this case because this matter is vested with the Special Referee who was assigned to it pursuant to Order of this Court. Further, Defendant Alea London Limited has no basis to challenge the Order because Alea London Limited was not a party and thus may not file an SCRCP Rule 60 motion.

Accordingly,

IT IS ORDERED that Defendant's motion is DENIED.

AND IT IS SO ORDERED.



Larry B. Hyman, Jr.
Administrative Judge

4-14, 2011
Lowrey, South Carolina.

