THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049
Appellate Case No. 2016-000185

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., (from December 16, 2008 to present),.....Respondents,

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspectors, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mikey Mason d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc.,.....Defendants,

And Mt. Hawley Insurance Company.....is the Appellant/Proposed Intervenor.

INITIAL BRIEF OF RESPONDENTS

THURMOND KIRCHNER & TIMBES, P.A.
Michael A. Timbes, SC Bar No. 69730
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200

Justin O' Toole Lucey, Esquire
LUCEY LAW FIRM
415 Mill Street
Mount Pleasant, South Carolina 29464
843-849-8400 (office)

W. Jefferson Leath, Jr., Esquire
LEATH, BOUCH & SEEKINGS, LLP
92 Broad Street
Charleston, South Carolina 29401
843-937-8811 (office)

Phillip W. Segui, Jr., Esquire
SEGUI LAW FIRM, PC
864 Lowcountry Boulevard, Suite A
Mt. Pleasant, South Carolina 29464
843-884-1865 (office)

John T. Chakeris, Esquire
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, South Carolina 29402
Phone: (843) 853-5678
Facsimile: (843) 853-5677

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 10

ARGUMENT AND CITATION OF AUTHORITY 12

I. CONTRARY TO MT. HAWLEY'S SUGGESTION, JUDGE HARRINGTON AND THE MASTER IN EQUITY, HAD SUBJECT MATTER JURISDICTION TO ENTER THE ORDERS IN QUESTION, AND MT. HAWLEY CANNOT COLLATERALLY ATTACK THE ORDERS COMPLAINED OF IN THIS APPEAL 12

A. Mt. Hawley confuses the key distinction between an order that is void, as opposed to one that may be voidable. 13

B. Respondents gave proper notice of the default hearing before Judge Scarborough and therefore the judgment is not void. 17

II. NORTH FLORIDA FRAMING WAS NEVER DISMISSED FROM THE LAWSUIT 18

A. The Partial Settlement Approval Order is not an order of dismissal, which is why there was a subsequent Order of Dismissal, which leaves North Florida Framing in the case. FACTS 18

B. Respondents never said they had no further claims against North Florida Framing 19

III. THE TRIAL COURT PROPERLY DENIED MT. HAWLEY'S MOTION TO INTERVENE BECAUSE THE RECORD DOES NOT ESTABLISH THAT MT. HAWLEY IS ENTITLED TO INTERVENE IN THIS MATTER 22

A. Mt. Hawley's Motion to Intervene is untimely 23

B. Mt. Hawley does not have an interest relating to the property or transaction which is the subject of the underlying action that Respondent brought against Mt. Hawley's insured, North Florida Framing, in 2009 27

C. Mt. Hawley is not in a position such that without intervention,

disposition of the action will impair its ability to protect the interest it claims. 29

D. To the extent Mt. Hawley alleges the interest that it claims is not adequately represented by other parties, this is a result of its own making. 30

IV. MT. HAWLEY HAS NO BASIS IN LAW OR FACT UPON WHICH TO SET ASIDE THE JUDGEMENT AGAINST NORTH FLORIDA FRAMING UNDER RULE 60. 31

A. Mt. Hawley's Rule 60(b) motion is not preserved for appellate review....31

B. Even if preserved, Mt. Hawley's Rule 60(b) motion was properly denied. 34

C. The authority relied on by Mt. Hawley does not support a finding that the trial court abused its discretion. 39

V. MT. HAWLEY'S ARGUMENT REGARDING JUDICIAL ESTOPPEL IS NEITHER PRESERVED FOR REVIEW, NOR PROPERLY BEFORE THIS COURT, AND NONETHELESS FAILS ON THE MERITS 41

CONCLUSION 46

TABLE OF AUTHORITIES

Cases

Ackerman v. Travelers Indem. Co., 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995)..... 20

Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)..... 27

Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001)..... 32

Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990) 11, 22, 24

Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010)..... 38

Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995)..... 40

Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997)..... 20

Coon v. Coon, 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003) 15, 16

Cosgrove v. Butler, 1 S.C. 241 (1869)..... 15

Cousar v. New London Eng'g Co., 306 S.C. 37, 410 S.E.2d 243 (1991) 37

Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991)..... 23, 25

Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (ex Parte Reichlyn), 310 S.C. 495, 427 S.E.2d 661 (1993) 22, 23, 24, 25

Ex parte Gov't Emples. Ins. Co. v. Goethe, 373 S.C. 132, 644 S.E.2d 699 (2007) ... 11, 27, 28

Fryer v. S.C. Law Enf't Div., 369 S.C. 395, 631 S.E.2d 918 (Ct. App. 2006) 15, 16

Hailey v. Hailey, 357 S.C. 18, 590 S.E.2d 495 (Ct. App. 2003)..... 41

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)..... 33

Hunnicutt v. Rickenbacker, 268 S.C. 511, 234 S.E.2d 887 (1977)..... 11

I'on, LLC, v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 31

Jackson City Bank & Trust Co. v. Fredrick, 271 Mich. 538, 260 N.W. 908 (1935) 14

Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 633 S.E.2d 143 (2006) 11

Joe Harden Builders v. Aetna Cas. & Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997) 3

Johnson v. Sam English Grading, Inc., 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015).. 31

McCLurg v. Deaton, 308 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) 33

McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996) 34

Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) 41

Pelican Bldg. Centers of Horry-Georgetown, Inc., v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) 32

Petroleum Transportation Inc. v. SCPSC, 255 S.C. 419, 179 S.E.2d 326 (1976) 14

Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961) 13, 14, 35

Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987) 35, 36

Quinn v. Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) 43

Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) 11, 25

Redmond v. Devine, 152 Ill. App. 3d 68, 504 N.E.2d 138 (1987) 16, 40, 41

S.C. DMV v. Holtzclaw, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009) 13

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) 22

Sijon v. Green, 289 S.C. 126, 345 S.E.2d 246 (1986) 17

Skipper v. ACE Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37 (2015) 35

Sloan v. S.C. Dep't of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014) 32

Spur at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 781 S.E.2d 115 (Ct. App. 2015) 30

St. Paul Travelers v. Payne, 444 F. Supp. 2d 519 (D.S.C. 2006) 39

State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008) 14

State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007) 14

State v. Rhinehart, 312 S.C. 36, 430 S.E.2d 536 (Ct. App. 1993) 14

Teseniar v. Prof'l Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014) 38

Thomas & Howard Co. v. T. W. Graham & Co., 318 S.C. 286, 457 S.E.2d 340 (1995) . 14

Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006) .. 14

Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).... 34

Watson v. Watson, 319 S.C. 92, 460 S.E.2d 394 (1995) 13

Widman v. Widman, 348 S.C. 97, 557 S.E.2d 693 (Ct. App. 2001) 42

Wright v. Craft, 372 S.C. 1, 640 S.E.d 486 (Ct. App. 2006) 43

Statutes

2005 Act No. 27, §16(4) 38

S.C. Code Ann. § 15-38-10 37

Other Authorities

21 C. J. S., Courts, § 26 13

Toal, *Appellate Practice in South Carolina*, 2 ed. (2010) 31

Rules

Rule 24, SCRCP 22, 27

Rule 4, SCRCP 17

Rule 5, SCRCP 17

Rule 53, SCRCP 12

Rule 60, SCRCP 29, 31, 36, 42

STATEMENT OF THE ISSUES

I. **Did the Circuit Court properly deny an insurance carrier's motion to intervene where that carrier refused to defend its insured in the underlying action and instead sought to intervene for the purpose of collaterally attacking a final judgment more than two years after it was entered, and more than six years after the carrier received notice of the claim against its insured?**

STATEMENT OF THE CASE

Respondents Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated ("Teseniar"), along with the Twelve Oaks Property Owners Association, Inc. ("Respondents"), commenced this class action lawsuit for construction defects on January 4, 2008. North Florida Framing, Inc. ("NFF") was added to the case by an amended complaint on June 17, 2009. Two of NFF's three insurance carriers retained defense counsel to defend it. Appellant Mt. Hawley Insurance Company ("Mt. Hawley") also provided coverage to NFF and upon receiving notice of the claim issued a reservation of rights asserting coverage defenses, but refused to participate in NFF's defense. (Mt. Hawley Initial Brief, p. 4).

The case was designated as complex, and assigned to the Honorable Roger Young for all pre-trail motions and other matters pertaining to the case. (Complex Case Designation Order). Judge Young then issued an order assigning the case to the Honorable Kristi L. Harrington and set a date certain trial before her on May 9, 2011. (Order Assigning Case to Judge Harrington).

On the morning of trial before Judge Harrington, Respondents informed the court they had reached an agreement to settle with the two liability carriers defending NFF. In essence, Respondents accepted $400,000 paid by the two defending carriers, along with various assignments discussed more fully herein, and gave NFF a Covenant Not to Execute

against any of its assets except insurance policies issued by carriers that did not participate in the settlement, specifically including Mt. Hawley.

Respondents did not dismiss NFF from the action. However, at the defending carriers' request, Respondents consented to a motion made by NFF's defense attorneys to be relieved as counsel, which the circuit court granted. (Consent Order Relieving Counsel). Because no one appeared for NFF at the call of the trial and its defense counsel was relieved, Respondents requested that NFF be placed in default and referred to the Master in Equity for a damages hearing.

On August 9, 2011, the circuit court filed an order memorializing its prior oral rulings placing NFF in default and referring the matter to the Master in Equity for a damages hearing. (Order of Default and Reference to Master). On, May 14, 2013, the Master in Equity, the Honorable Mikell R. Scarborough, held the damages hearing, and found NFF jointly and severally liable for construction defect damages in the amount of $15,748,225.56. (Default Judgment). As contemplated in the settlement, Respondents thereafter sought to collect the judgment from NFF's non-participant carrier, Mt. Hawley. (Complaint, Case No. 2015-CP-10-2994) (the "Collection Action")

In addition to defending the separate Collection Action, on July 28, 2015, Mt. Hawley moved to intervene in this action for the sole purpose of collaterally attacking the Order of Default and Default Judgments entered against NFF. Following hearings on January 12, 2016, and January 14, 2016, the circuit court denied the motion to intervene. (Order Denying Motion to Intervene). Mt. Hawley did not file a motion under Rule 59, SCRCP, to request a ruling from the circuit court with regard to the arguments it makes to this Court under Rule 60. This appeal follows.

STATEMENT OF THE FACTS

Mt. Hawley provided liability insurance to NFF at times relevant to the claims asserted by Respondents in this construction defect action.[1] Despite having time on the risk for these claims, at no time during the pendency of the lawsuit did Mt. Hawley provide a defense to NFF. Mt. Hawley concedes it had notice of Respondents' lawsuit against NFF because the claims were tendered to it. (Mt. Hawley Initial Brief, p. 4-5). Rather than defend NFF, Mt. Hawley acknowledged notice of the claim and asserted a reservation of rights and coverage defenses. (Id.). Thus, Mt. Hawley consciously chose not to involve itself in this action in any manner, despite knowing of its pendency, as far back as 2009. These facts are undisputed.

Two of NFF's **other** insurance carriers, specifically, Crum & Forster Insurance Company and Scottsdale Insurance Company (the "Participating Carriers"), did participate, hiring attorneys from Barnwell Whaley Patterson & Helms, LLC ("Barnwell Whaley") to defend NFF. Mt. Hawley did not share in the defense provided by Barnwell Whaley. This, too, is undisputed.

More than six years after NFF tendered the claims to Mt. Hawley, and without any involvement by it during the pendency of the action, Mt. Hawley moved to intervene in this action in order to collaterally challenge certain judgments that were entered against NFF.

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[1] The coverage provided by Mt. Hawley is implicated by the continuous trigger theory in South Carolina. *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (1997) (holding "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage[]").

For clarity and the convenience of the Court, a procedural timeline of relevant events is helpful:

May 6, 2011 – Settlement Email: Confirming the terms of the proposed partial resolution with NFF. (*See* May 6, 2011 Settlement Email)

May 9, 2011 – The Morning of Trial

- *Motion to Relieve Barnwell Whaley* is granted. (*See* Order Relieving Counsel).
- Respondent's explain conditions of NFF's partial settlement and covenant not to execute. (*See* May 9 Trial Trans. pp. 60-64).
- *Motion to Place NFF in default and refer them to Master in Equity for Damages Hearing* is orally granted. (*See* May 9 Trial Trans, p. 64, ln. 18).

May 19, 2011 – Respondents file Motion for Approval of Partial Class Action Settlement. (*See* Motion for Approval of Partial Class Action Settlement).

June 10, 2011 – Order Approving Partial Settlement is entered by trial court, permitting parties to preform terms of their respective settlement agreements. (*See* Settlement Approval Order ¶6).

August 8, 2011 – Order of Dismissal of Certain Defendants is entered by trial court. This Order excludes NFF. (*See* Order of Dismissal of Certain Defendants) (emphasis added)

August 9, 2011 – Written Order of Default Against NFF and Reference to Master for Damages Hearing which confirmed the May 9, 2011 oral order of the same. (*See* Order of Default)

May 14, 2013 – Damages Hearing was held before the Master in Equity and an Order of Judgment by Default in amount of $15,748,225.56 was entered against NFF. (*See* May 14, Trans. pp. 1-7; and Default Judgement).

Because Respondents disagree with Mt. Hawley's distortion of what occurred in the proceedings below, the true facts, as gleaned from the record, are explained here.

A. Respondents reach an agreement with NFF and two of its carriers on the eve of trial.

In the final days before the trial, Respondents negotiated and entered into an agreement with NFF[2] and the two Participating Carriers defending it, each pledging separate consideration. In exchange for payment from the Participating Carriers of $400,000 and various assignments, Respondents agreed not to seek any further recovery from **those two carriers** as a result of NFF's liability. Respondents also gave NFF a Covenant not to Execute. A key feature of the Covenant is that it reserved the right of Respondents to pursue a claim against any insurance proceeds that might be available from Mt. Hawley, because it did not contribute to the settlement or participate in NFF's defense. NFF was not dismissed or released by the agreement or the Covenant. Everyone participating in the lawsuit knew this. (May 9 Trans., p. 60, ln. 21 – 64., ln 21) (Covenant Not to Execute). Respondents made it clear to the circuit court that "[NFF] is actually still in the case but they have a covenant." (May 9 Trial Transcript, p. 61, ln. 12-13).

There was no confusion amongst those that were present about what was happening.[3] Respondents explained it in detail:

> **There is a third carrier [Mt. Hawley] that's refusing to defend the insured**, [NFF]. [NFF] has been [given], a covenant not to execute, **except as to proceeds, if any, that are procured from that recalcitrant third carrier at some other date and time.**

(May 9 Trial Transcript, p. 64, ln. 2 – 13) (emphasis added).

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[2] The circuit court also was informed of several other settlements reached with additional defendants. (May 9, 2011 Trans., p. 64, ln 25 – 67, ln. 6).

[3] Given Mt. Hawley's lack of participation in the lawsuit, it presumably did nothing to monitor the proceedings in order to inform itself of these developments.

Having pledged $400,000 and additional consideration in the form of assignments, the Participating Carriers desired to have Barnwell Whaley, which they had paid to defend NFF for the entirety of the action, relieved of further responsibly to defend the case. As part of the agreement, Respondents consented to Barnwell Whaley's withdrawal, and the circuit court approved.[4] (Consent Order Relieving Counsel) (January 14 Trans., p. 12, ln. 9 – 13, ln. 9). Respondents further agreed they would consent to allow Mt. Hawley to substitute new defense counsel for NFF, provided this caused no delay, but it never did. (May 9 Trans., p. 61, ln. 2 – 9) (May 6th Settlement Email).

B. The Request for an Order of Default and Reference to the Master.

On the morning of trial, NFF did not appear, and its counsel was relieved. Thus, Respondents requested that NFF be placed in default and referred to the Master in Equity for a damages hearing.[5] (May 9 Trial Transcript, p. 61, ln. 12-20, p. 62, ln. 11-15).

At first, counsel for Professional Plastering (who was headed to trial against Respondents) objected out of concern that Respondents would to keep NFF **in the same**

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[4] Mt. Hawley remarkably argues, for the first time on appeal, that Respondents somehow took on representation of NFF to have its counsel relieved, then "stepped back into their adversarial shoes" requesting to place NFF in default. That is not true. The Consent Order Relieving Counsel is unambiguous—NFF and Barnwell Whaley "so moved" and Respondents "consented." As a matter of convenience, Barnwell Whaley authorized Respondents' trial counsel to sign the Consent Order for it, "with permission," to accomplish the same withdrawal Barnwell Whaley memorialized in its May 6th Settlement Email. Considering the several hundred pages of materials brought *day-of* to the hearing on its motion to intervene (see January 12, 2016 Trans., p. 5, ln. 5-6), surely Mt. Hawley could have obtained an affidavit from someone, whether it be NFF or Barnwell Whaley, if it truly thought the consent order was signed without authority. This is but one among a school of red herring in Mt. Hawley's Brief.

[5] One other defaulting defendant had already been referred to the Master in this action, and Respondents asked for NFF to be similarly referred for a final resolution of Respondents claims against it.

jury trial with Professional Plastering, in name only (i.e., as an empty-chair defendant), just to get a joint and several verdict against Professional Plastering that would "impugn [NFF]'s fault to both defendants." (May 9 Trial Transcript, p. 62, ln. 16 – 63, ln. 5). However, once Respondents explained they were not intending to try the case to the jury against both NFF and Professional Plastering, but rather intended to proceed to trial solely against Professional Plastering with NFF being referred to the Master in Equity for a separate hearing,[6] Professional Plastering withdrew its objection. (*See* May 9 Trial Transcript, p. 63, ln. 18). This was all clear to everyone in the courtroom. (May 9 Trial Transcript, p. 62, ln. 16 – 63, ln. 5). Therefore, the circuit court approved Respondents' request, and jury trial proceeded against only Professional Plastering.[7]

C. Respondents sought and received judicial approval of the settlements reached with NFF and others and all settling defendants except NFF were dismissed.

Because this case proceeded as a class action, the proposed settlements required judicial approval under Rule 23, SCRCP. Therefore, on May 19, 2011, Respondents

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[6] Respondents clarified: "We're not seeking to keep them in this trial. We're asking for our default and we're asking that [NFF] be referred to the default hearing that's already been scheduled for the other default defendants, which is the developer and the developer entities." (May 9 Trial Transcript, p. 63, ln. 13-17). Professional Plastering's counsel then responded, "Then no objection, Your Honor. As long as they are not trying to keep them in for a joint and several liability in **this** case [(i.e., the trial)], we have no objection to that at all." (May 9 Trial Transcript, p. 63, ln. 18-21).

[7] Respondents also informed the circuit court of additional settlements it reached with others. Defendants APS Stucco, Magna Wall, Albert (Nava) Gooseman, and General Aluminum, for example, all reached settlement agreements with Respondents before trial, as did one of Professional Plastering's liability carriers, AIG. (May 9 Trial Transcript, p. 64, ln. 22 – 66, ln. 16).[7] Respondents placed on the record that its settlement with NFF involved a payment of $400,000 "**plus the situations that Mr. Lucey mentioned**" regarding the non-participating carrier—Mt. Hawley. (May 9 Trial Transcript, p. 66, ln. 6-7) (emphasis added); (January 14, Trans., p. 13, ln. 10 – 16, ln. 5).

moved before the circuit court for judicial approval of the **partial** class action settlements reached with various defendants, including NFF, which were discussed at the start of the trial. (Motion for Approval of Partial Class Action Settlement). The request covered settlements totaling $1,287,500 and included the $400,000 promised by NFF's Participating Carriers. The circuit court approved these **partial** settlements and entered a Partial Settlement Approval Order on June 10, 2011.

Naturally, because class action settlements must be approved **prior** to commencement, the Order contemplated and required that Respondents would **later** dismiss each settling defendant upon satisfaction of their respective settlements. Contrary to Mt. Hawley's insistence, nothing in the Order requires the dismissal of any defendant **before** it had completed the obligations of its promised settlement.[8] (Settlement Approval Order, ¶ 6).

The unambiguous terms of the settlement agreement and Covenant not to Execute both provide that NFF will not be dismissed until Respondents' collection efforts are completed as to any non-participating carriers, specifically Mt. Hawley. NFF was not dismissed by, nor was Respondents required to dismiss NFF until Respondents' rights under the agreement and Covenant are fully exhausted by seeking recovery from Mt. Hawley. (May 6th Settlement Email; Covenant not to Execute).

Proof of this is clear in the record. On August 8, 2011, the circuit court entered an "Order of Dismissal as to **Certain** Defendants" (emphasis added). This Order of Dismissal

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[8] For example, it provides:**Upon payment** of the settlement proceeds by the Settling Defendants, the Class Representatives **are authorized to** execute a general release(s) as to the Settling Defendants, and/or settlement agreements on behalf of the Class **and an order(s) or stipulation(s) ending this case and all class claims with prejudice** against the Settling Defendants[.] (Settlement Approval Order, ¶ 6).

covered all "Settling Defendants" listed in the Partial Settlement Approval Order, **except NFF**, which was not dismissed and which remained a defendant in the action because its settlement was not complete. (August 8, 2011 Order of Dismissal). The existence of this Order of Dismissal demonstrates that contrary to what Mt. Hawley would have this Court believe, the Partial Settlement Approval Order did not operate to dismiss any defendant, particularly NFF. Mt. Hawley neglects to draw attention to this August 8, 2011 Order of Dismissal, presumably because it makes plain NFF was not dismissed.

Nowhere in the record is there an Order of Dismissal as to NFF. Instead it was placed in default and referred to the Master for a damages hearing. (Order of Default and Reference) (May 9 Trans., p. 61, ln. 12 – 64, ln. 21). No one participating in the case was confused about this, and Mt. Hawley cannot rewrite the record after the fact.

D. The circuit court enters an Order of Default and Order of Reference to the Master regarding NFF, memorializing its approval of this request from the morning of trial.

Because NFF was not dismissed by the August 8, 2011 "Order of Dismissal as to **Certain** Defendants," on August 9, 2011, the circuit court entered a written Order of Default and Order of Reference referring NFF to the Master in Equity for a damages hearing consistent with what was previously discussed on the morning of trial. (Order of Default and Reference).

When the matter came before the Master in Equity for a damages hearing, again the record speaks for itself. NFF was not the first defendant to proceed before the Master in a damages hearing in this case. Judge Scarborough quickly recalled presiding over the default hearing against the Developer in this same action. (May 14, 2013 Trans., p. 3, ln. 4-8). The methods of giving notice of the hearing were explained to the court, and Judge

Scarborough ruled, "I'll find they've been provided with notice of the hearing for today." (May 14, 2013 Trans., p. 3, ln. 9 – 4, ln 12). Respondents presented their expert's damages report in the amount of $15,748,225.56, which was the very same report presented to the Master in Equity during the default proceedings against the Developer. (May 14, 2013 Trans., p. 6, ln. 4-12). The court was first informed of the nature and scope of NFF's particular work on the project, and then informed that the $15,748,225.56 figure was for all of the damages at the complex. (May 14, 2013 Trans., p. 4, ln. 24 – 5, ln. 11). The various elements of damages were broken out in the expert's report. (May 14, 2013 Trans., p. 5, ln. 14-17). The Master, inquired "All right, I'm assuming, is that joint and several?" Respondents answered yes, because it was. The Master in Equity accepted the evidence presented and entered a joint and several judgment against NFF in the full amount of all damages presented. (May 14, 2013 Trans., p. 5, ln. 2 – 6, ln 13) (Default Order and Judgment).

Two years after this Default Judgment was entered against NFF, Mt. Hawley finally attempted to get involved through the filing of its motion to intervene. The circuit court, in a proper exercise of its discretion, denied Mt. Hawley's motion.

THE STANDARD OF REVIEW

Mt. Hawley has misstated this Court's standard of review. The matter before the circuit court was Mt. Hawley's motion to intervene pursuant to Rule 24, SCRCP, and the issue before this Court is whether the trial court properly denied Mt. Hawley's motion to intervene. Our Supreme Court has settled that "[t]he decision to grant or deny a motion to . . . intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d

699, 701 (2007); *citing Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); *and Hunnicutt v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Goethe*, 373 S.C. at 135; 644 S.E.2d at 701 (citing *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006)).

In its appeal, Mt. Hawley also asserts that it raised a motion for relief from the judgments pursuant to Rule 60, SCRCP, and it encourages this Court to adopt a *de novo* standard of review for such matters. This is not correct. First, the only matter ruled on by the circuit court was a motion to intervene pursuant to Rule 24, not Rule 60. But further, our Supreme Court has clearly articulated that the standard of review applicable to Rule 60 is the abuse of discretion standard, not *de novo*. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion.") (citation omitted). Therefore, even to the extent this Court finds the trial court ruled on Mt. Hawley's purported Rule 60 motion such that it is preserved for review, it is to be reviewed by the same abuse of discretion standard applicable to the grant or denial of a Rule 24 motion to intervene. Had the Supreme Court been inclined to adopt a *de novo* review it has certainly had the opportunity and declined to do so. *Id.*

ARGUMENT AND CITATION OF AUTHORITY

I. CONTRARY TO MT. HAWLEY'S SUGGESTION, JUDGE HARRINGTON AND THE MASTER IN EQUITY, HAD SUBJECT MATTER JURISDICTION TO ENTER THE ORDERS IN QUESTION, AND MT. HAWLEY CANNOT COLLATERALLY ATTACK THE ORDERS COMPLAINED OF IN THIS APPEAL.

Mt. Hawley filed its motion to intervene in the Charleston County Court of Common Pleas, which is the court presiding over the entire case. Mt. Hawley cannot sustain an argument that the circuit court where it brought its own motion lacks subject matter jurisdiction over the case and, therefore by extension, its motion. Neither NFF, nor anyone else for that matter, ever questioned the circuit court's subject matter jurisdiction, because there was no basis to do so. In fact, NFF stated in its Third-Party Complaint, "The parties, matters, and all things hereinafter alleged **are within the jurisdiction of this Court**." (NFF Third-Party Complaint) (Emphasis added). NFF was right.

Carefully viewed, the argument made by Mt. Hawley is not that the circuit court lacked subject matter jurisdiction; rather, Mt. Hawley argues that certain **judges**, namely Judges Harrington[9] and Scarborough, lacked "subject matter jurisdiction" even though the court unquestionably does. [10] Mt. Hawley is wrong.

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[9] At the first hearing, Mt. Hawley conceded, "I don't doubt judge, that you had the authority to try this case." (January 12 Trans., p. 9, ln. 2-3). NFF was not present for the trial of the case. In her role as trial judge, she ordered NFF in default. (January 14, Trans., p. 12, ln. 9 – 13, ln. 9). Having conceded this authority in the hearing on its motion, Mt. Hawley cannot change its position on appeal.

[10] A Master in Equity has the full power and authority of the Circuit Court sitting without a jury, to regulate all proceedings in every hearing before them, and to perform all acts and take all measures necessary or proper for the efficient performance of their duties under the order of reference. Rule 53, SCRCP. By rule this specifically includes default cases. *Id.* This includes the power to rule on all motions, require the production of evidence, and call witnesses and examine them under oath.

Mt. Hawley's ill-fated "subject matter jurisdiction" argument is surely the product of its recognition of the well-settled distinction between an order that is "void" (as in a case where subject matter jurisdiction is lacking) and an order that is merely "voidable" (where subject matter jurisdiction exists, but some other irregularity renders the order subject to being reversed on direct appeal). Because the law does not permit Mt. Hawley to collaterally attack a "voidable" judgment through Rule 60(b)(4), Mt. Hawley insists the Order of Default and Default Judgment are void despite to a wealth of authorities to the contrary.

A. Mt. Hawley confuses the key distinction between an order that is void, as opposed to one that may be voidable.

Without questioning the circuit court's subject matter jurisdiction, Mt. Hawley focuses on the jurisdiction of the particular **Judges**—i.e., Harrington and Scarborough—to claim their Orders are void, *ab initio*. But, Mt. Hawley conflates subject matter jurisdiction, which undoubtedly is present, with alleged irregularities not involving subject matter jurisdiction, which do not render a judgment void, but may render it voidable. This fundamental distinction is essential to this Court's review.

"Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *S.C. DMV v. Holtzclaw*, 382 S.C. 344, 349, 675 S.E.2d 756, 758 (Ct. App. 2009); *see also Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995). "The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, **the decision of all other questions arising in the case is but an exercise of that jurisdiction.**" *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961) (quoting from 21 C. J. S., Courts, § 26) (Emphasis added). "There is a **wide**

difference between a want of jurisdiction[11] in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal." *Id.* (quoting *Jackson City Bank & Trust Co. v. Fredrick,* 271 Mich. 538, 260 N.W. 908, 909 (1935) (emphasis added); s*ee also Petroleum Transportation Inc. v. SCPSC,* 255 S.C. 419, 179 S.E.2d 326, 329 (1976).

It is settled law in this state that irregularities not involving jurisdiction do not render a judgment void. *Thomas & Howard Co. v. T. W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect **and must be distinguished from one which is merely 'voidable.'"** *Id.* (emphasis added).[12]

"A judgment will not be vacated for a mere **irregularity** which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him." *Id.* at 291, 475 S.E.2d at 343 (citations omitted) (emphasis added). Mt. Hawley explained its view of things at the hearing, "Now, I wasn't in this case, Judge, but I've gone through this record pretty carefully. And so I'm just

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[11] The South Carolina Supreme Court explained that appellate decisions sometimes use the phrase "lack of jurisdiction" to mean that the trial court simply lacks the power to act in a particular manner because, for example, the term of court has ended. Cases mentioning the term of court rule as being a rule of subject matter jurisdiction, however, are incorrect. *See State v. Campbell*, 376 S.C. 212, 216, 656 S.E.2d 371, 373 (2008) (pointing out that *State v. Davis*, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007); *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006) and *State v. Rhinehart*, 312 S.C. 36, 430 S.E.2d 536 (Ct. App. 1993), all **incorrectly** used the phrase "subject matter jurisdiction" when discussing other mistakes made in the exercise of the court's power).

[12] Mt. Hawley quotes only part of this sentence in its Initial Brief at p. 20, failing to include the key distinction given to judgments that are merely voidable.

pointing out things that I think are **irregular**." (January 12 Trans., p. 9, ln. 7-9) (emphasis added). It chose the right word to use. At best, and without conceding the point, any "irregularities" related to the assignments of the case and various matters to Judges Harrington and Scarborough do not implicate subject matter jurisdiction, but instead these irregularities merely leave the orders voidable, not void. Also, they are not subject to collateral attack by Mt. Hawley, and the appellate decisions of this state so hold.

"When a court acts with proper subject matter jurisdiction, but takes action outside of its authority, **the party against whom the act is done must object and directly appeal**." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (citing *Coon v. Coon*, 356 S.C. 342, 347-48, 588 S.E.2d 624, 627 (Ct. App. 2003), *aff'd as modified*, 364 S.C. 563, 614 S.E.2d 616 (2005) (emphasis added); *see also Cosgrove v. Butler*, 1 S.C. 241, 243 (1869) ("If such departures be not excepted to, the Court may consider objection to them as *waived*. And it may be asserted, as a general rule, that where there is no want of jurisdiction . . ., [the Court's] **judgment will be binding, even although affected by irregularity which would have defeated the proceeding if objection had been timely and properly made.**") (italics in original, bold emphasis added). Any irregularities complained of by Mt. Hawley are not involving subject matter jurisdiction, and therefore are waived for want of any objection at the time.

It is undisputed that the sole reason Mt. Hawley sought to intervene was to collaterally attack the judgments against NFF. Its counsel made that clear: "I think, Judge, you should rule that we can intervene **for the sole purpose of contesting the validity of the judgment**." (January 14, 2016 Hearing Trans., p. 8, lines 22-24) (Mt. Hawley Motion to Intervene). NFF, who is undoubtedly "the party against whom the act is done," did not

object and did not appeal. Likewise, NFF has never sought to set aside the judgments. The record is devoid of any evidence from Mt. Hawley that NFF disputes the entry of the judgments against it or, that Mt. Hawley attempted to obtain such evidence but was stymied.[13] Mt. Hawley's collateral attack on the judgments rendered against its insured is wholly improper in light of the foregoing.

It boils down to this: without question the circuit court had subject matter jurisdiction over the type and class of lawsuit Respondents brought against NFF. Even assuming *arguendo*, that Judge Harrington should not have heard and decided the matters related to default, such irregularities would not divest the circuit court of subject matter jurisdiction.[14] At best, it would yield a potentially voidable result subject to direct appeal only by NFF, the party against whom the act was taken, which has not occurred. *Accord Fryer,* 369 S.C. at 399, 631 S.E.2d at 920; *Coon*, 356 S.C. at 347-48, 588 S.E.2d at 627 (noting that, if the court "acts with proper subject matter jurisdiction, but takes action outside of its authority, the party **against whom the act is done** must object and directly appeal") (emphasis added).

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[13] *Compare Redmond v. Devine*, 152 Ill. App. 3d 68, 72, 504 N.E.2d 138, 141 (1987) (involving a case where the isured hid the existence of the underlying lawsuit from the carrier and would not help when the carrier investigated and sought the insured's assistance). None of those facts exist here.

[14] Mt. Hawley's various arguments at times contradict each other. It first contends Judge Harrington's Partial Settlement Approval Order had the effect of dismissing NFF with prejudice (which it did not). But, Mt. Hawley contends Judge Harrington had no subject matter jurisdiction to decide any matter in the case unrelated to the trial (if even the trial). (January 14, 2016 Hearing Trans., pp. 8, line 24 – 9, line 6). If Mt. Hawley were correct on this point, Judge Harrington's alleged lack of subject matter jurisdiction would, by its own argument, render the Partial Settlement Approval Order "void" and thus NFF could not have been dismissed by it regardless of its interpretation. Mt. Hawley further conceded that if Judge Harrington lacked subject matter jurisdiction, all of the arguments made to her regarding its motion to intervene are moot. (January 14, 2016 Hearing Trans., pp. 6, line 25 – 7, line 10).

B. Respondents gave proper notice of the default hearing before Judge Scarborough and therefore the judgment is not void.

Mt. Hawley's argument that the Master's Default Judgment is void for lack of "service of process" or notice of the default proceeding is misplaced. Service of process is related to the summons and complaint and governed Rule 4, SCRCP, and is not questioned in this case. On the other hand, Rule 5 governs the service of papers subsequent to the service of the summons and complaint, including "written notices." *See* Rule 5(a)(4), SCRCP. To satisfy Rule 5, service upon a party shall be made by delivering a copy to him or "by mailing it to him at his last known address . . . ." *Id.* The service of a written notice under Rule 5 is **complete** upon placing the notice in the mail. *Id.*

Respondents sent **multiple** notices of the default hearing to NFF at its last known addresses and directed to the company's registered agent, David Anderson. A notice sent by certified mail to NFF's last known street address was received and signed for by a Catherine Anderson. A copy sent by regular US mail to that same street address never came back and is presumed delivered. Respondents also sent notices to a post office box known to be associated with NFF. Only the certified mail sent to that post office box was returned unclaimed. These several efforts more than satisfy Rule 5. Judge Scarborough specifically found NFF was served with proper notice of the hearing, and this was correct. (May 14, 2013 Trans., p. 3, ln. 9 – p. 4, ln. 12). *Cf. Sijon v. Green*, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986) (holding a judgment must stand in the face of a challenge based on lack of notice of the hearing if it is determined that notice was given).

Consequently, Mt. Hawley has failed to demonstrate the challenged judgments are "void" for want of subject matter jurisdiction or notice. All of its numerous arguments that depend upon the challenged orders being void, rather than voidable, must fail.

II. NORTH FLORIDA FRAMING WAS NEVER DISMISSED FROM THE LAWSUIT.

The Partial Settlement Approval Order entered by Judge Harrington on June 10, 2011, does not dismiss NFF from the action. This is another example of where the record reveals what truly occurred is far different than the picture painted by Mt. Hawley.

A. The Partial Settlement Approval Order is not an order of dismissal, which is why there was a subsequent Order of Dismissal, which leaves NFF in the case.

The sole function of the Partial Settlement Approval Order was for the court to approve the agreements made so that the class and settling parties could move forward with carrying out their respective agreements. Respondents sought approval for partial settlements totaling $1,287,500, which included the $400,000 promised by NFF's Participating Carriers. For simplicity, the Settlement Approval Order included a footnote listing the "Settling Defendants," with NFF identified among them. It was necessary to get approval of NFF's agreement in order to move forward with receiving and disbursing the $400,000 that formed part of the agreement. Rule 23, SCRCP requires as much. But, the terms of the agreement with NFF did not require Respondents to dismiss NFF as a party **until** "completion of [Respondents'] collection of funds from non-settling parties and carriers, to whatever extent they may collect any funds." (May 6 Settlement Email) (Covenant not to Execute).

As set forth in the Statement of Facts and materials in the record, the Partial Settlement Approval Order is **not** an order of dismissal. Naturally, until each "Settling Defendant" performed the terms of its settlement, none would be entitled to dismissal.

Once the **other** Settling Defendants, who had not special stipulations, tendered their respective settlement proceeds, the actual Order of Dismissal as to **Certain** Defendants

was filed on August 8, 2011. This Order of Dismissal follows the Partial Settlement Approval Order and, as authorized, dismissed with prejudice all claims against only the "Certain Defendants" identified therein. NFF is **not** included in the Order of Dismissal and is not dismissed by it. There is no later Order of Dismissal as to NFF. This is because, unlike other settling parties, Respondents are still pursuing recovery for claims associated with NFF, which was the obvious intent from the terms of the May 6 Settlement Email and the Covenant not to Execute.

B. Respondents never said they had no further claims against NFF.

It cannot be earnestly questioned that a material term of the agreement Respondents made with NFF and its Participating Carriers involved preserving Respondents' claims against NFF under a Covenant not to Execute in order to pursue recovery of available insurance proceeds from its recalcitrant insurer, Mt. Hawley. The payment of $400,000 by carriers who, unlike Mt. Hawley, actually defended their insured was only a part of the consideration for the settlement.

Regardless of how Mt. Hawley presents it, Respondent's colloquy with the trial court on this point speaks for itself. Respondents clarified, for Professional Plastering's sake, their intention to have NFF referred to the Master in Equity for a separate damages hearing rather than keeping NFF as an empty chair defendant in the jury trial against Professional Plastering. It was clear to everyone in the courtroom what was intended, which was reiterated to the circuit court during the motion hearing. (January 14 Trans., p. 19, ln. 16 – 20, ln. 1). Conveniently, the only party who claims confusion about this is Mt. Hawley.

To be certain, the Covenant not to Execute does not release NFF, nor does it release Mt. Hawley as its insured. A covenant not to execute is treated differently than a settlement agreement which is a release. *Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). "To determine whether an instrument is a covenant not to execute or a release, we look to the intention of the parties." *Id.* (holding an agreement not to execute a judgment against a defendant, but specifically reserving the right to proceed against any available UIM coverage, was a covenant not to execute, rather than a release). *Accord Ackerman v. Travelers Indem. Co.,* 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995).

Here, the Covenant not to Execute, consistent with the Respondents' agreement with NFF and the Participating Carriers, specifically provides that Respondents agree "not to execute against on NFF's assets **except insurance policies (and related rights) issued by carriers which have not contributed to the within settlement, specifically including Mt. Hawley Insurance Co.**" (Covenant not to Execute)(emphasis added). Further, under the settlement and the Covenant not to Execute, it was agreed that Respondents would not dismiss NFF until "the completion of all collection activity pertaining to the aforementioned assignments," at which point, and only then, would Respondents then dismiss NFF and discharge any judgments against it. This agreement is unambiguous, clear, and explicit in its terms and meaning.

As this Court observed in *Cobb*, "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Cobb,* at 578. 482 S.E.2d at 591-92. This Court should find that the Covenant not to Execute given by Respondents to NFF

did not release it, and, instead, reserved Respondents' rights to pursue any insurance policy proceeds recoverable from Mt. Hawley.

Finally, any suggestion that Respondents **intended** to dismiss NFF from the action with prejudice via the Partial Settlement Approval Order is belied by the host of reserved rights in the agreement and Covenant not to Execute, as well as the direct actions taken by Respondents to pursue those rights. [15] Respondents never dismissed NFF, and infact informed Judge Harrington that NFF "is actually still in the case." *See* (Jury Trial Trans., pp. 60, line 21 – 61, line 20). Thereafter, Respondents pursued the damages hearing before the Master in Equity, obtained a Default Judgment, commenced an action to enforce the Default Judgment, and have steadfastly pursued its reserved rights in every way contemplated and expressed under the agreement and the Covenant not to Execute. All demonstrating NFF was never dismissed. (Complaint, Case No. 2015-CP-10-2994). The entirety of the record proves Respondents did not intend to dismiss NFF, nor did Respondents do or say anything to imply any different. Mt. Hawley's suggestion that Respondents dismissed NFF, or even represented that they had no further interest against NFF, holds no water. Every step taken by Respondents has been directed toward pursuing rightful claims against a negligent contractor that caused and contributed to occurrences and substantial damages suffered by Respondents.

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[15] As another example, it would have been wholly unnecessary to consent to have counsel relieved if the intention was to dismiss NFF as a party to the case. (Jury Trial Trans., pp. 61, lines 2-5; p. 63, lines 11-21; p. 64, lines 14-19) It also would have been unnecessary to consent to allow Mt. Hawley to substitute new counsel—there would been no action to get into. This further demonstrates there was no express or implied action taken to dismiss NFF.

III. THE TRIAL COURT PROPERLY DENIED MT. HAWLEY'S MOTION TO INTERVENE BECAUSE THE RECORD DOES NOT ESTABLISH THAT MT. HAWLEY IS ENTITLED TO INTERVENE IN THIS MATTER.

Rule, 24(a)(2), SCRCP, provides for intervention when "the applicant claims an interest relating to the property or transaction which is the **subject of the action** and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." (emphasis added). To be entitled to intervention, the applicant must:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley, 302 S.C. at 189-90, 394 S.E.d2 at 714 (*citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). **"[F]ailure to satisfy any one of the four requirements precludes intervention."** *Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (ex Parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993) (emphasis added).

"Intervention controversies arise in a myriad of contexts." *Berkeley*, 302 S.C. at 189-90, 394 S.E.2d at 714. When intervention is sought for the purposes of promoting judicial economy courts will liberally construe the intervention requirements. *Id.* However, when intervention will undermine judicial economy, as is the case in the matter at hand, our courts have espoused no preference for liberal construction. Indeed, the Court must "consider the pragmatic consequences of a decision to permit or deny intervention and . . . [e]ach case will be examined in the context of its unique facts and circumstances, [and] the granting or denial of a Rule 24(a)(2) motion, we must determine **whether the trial judge abused his discretion**" *Id.* (Emphasis added).

A. Mt. Hawley's Motion to Intervene is untimely.

South Carolina applies a four-part test to determine timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Ex parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (1993); *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991).

The first of these considerations is fatal to Mt. Hawley, because it admittedly "knew, or should have known, of [its] interest in the suit" when it received tender of Respondents' lawsuit against NFF in 2009. The "interest" that Mt. Hawley claims in this action is as **"an insurer of a defendant in this case."** (Br. p. 40). Of significance is that Mt. Hawley admits that it was tendered notice of the suit filed by Respondents back in 2009, and reserved it coverage defenses. (Mt. Hawley Initial Brief, p. 4-5) (**"When Mt. Hawley was tendered this claim, it asserted a reservation of rights setting forth its coverage defenses."**) (emphasis added). Rather that exercising its alleged "interest" as "an insurer of a defendant in this case" at that point in time, Mt. Hawley refused to participate or defend its insured. One must wonder: If Mt. Hawley was unaware of NFF's potential liability for the claims alleged against it in the underlying lawsuit, how could Mt. Hawley possibly analyze what coverage defenses to assert? Mt. Hawley plainly knew of the nature of judgment that was sought against its insured, and by extension was aware of its interest as "an insurer of a defendant in this case" back in 2009. This six-year delay supports the circuit court's decision to deny the motion to intervene. (January 12 Trans., p. 4, ln. 7-16; January 14 Trans., p. 11, ln. 23 – 12, ln. 8, p. 16, ln. 6 – 12).

In sum, Mt. Hawley's suggestion that the "timeliness" of its motion to intervene should be measured from its receipt of Respondents' Collection Action to recover the Default Judgment is a faulty premise. The interest Mt. Hawley claims, as an insurer of Mt. Hawley in relation to Respondents' claims, is the same interest it ignored for six years despite admittedly having notice of the claim against its insured. Its motion is untimely by every measure of the word.

The second consideration of timeliness inquires of the reason for the delay. *Ex parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664. Because Mt. Hawley contends it acted promptly after being served in the separate Collection Action, it relies on the fiction that "there was no delay." (Mt. Hawley Initial Brief. p. 39). Thus, the record is devoid of any evidence from Mt. Hawley demonstrating the reason that Mt. Hawley waited six years from the correct starting point, *to wit*, when it knew of its interest as an insurer when the lawsuit was tendered to Mt. Hawley in 2009. The absence of evidence demonstrating a reason for the delay measured from 2009, alone, is grounds to affirm the circuit court. *Berkeley*, 302 S.C. at 189-90, 394 S.E.2d at 714 (a denial of a motion to intervene is reviewed for abuse of discretion)

Turning to the third consideration of timeliness, "the stage to which the litigation has progressed," Mt. Hawley admits the litigation had progressed to a "relatively late stage." (Br. p. 40). In fact, as far as NFF is concerned (which is the source of Mt. Hawley's alleged interest in the action), the action had ended two years before Mt. Hawley sought to intervene. The Supreme Court has recognized: "It is important to note that, particularly when a case has been settled, the fact that a motion to intervene is filed after judgment may prove relevant to the merits of the intervenor's access claim." *Davis*, 304 S.C. at 503-505,

405 S.E.2d at 603 (motion to intervene for limited purpose of seeking access to sealed records did not affect the finality of the proceedings and was therefore allowed); *see Ex Parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (addressing a post-settlement motion to intervene the court noted "in our view, **there is no ongoing judicial 'action' into which [the intervenor] can intervene**") (emphasis added). Unlike the limited purpose for intervention in *Davis*, Mt. Hawley seeks to collaterally undermine the entire merits and finality of the litigation against NFF. The sole reason Mt. Hawley seeks to intervene is to void the Default Judgment, which undermines the very strong public interest in finality of judgments. *See Raby*, 358 S.C. at 20, 594 S.E.2d at 483 (stating our Supreme Court has a "longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments") (internal quotations omitted).

Whether to allow Mt. Hawley to intervene requires balancing its alleged interest against the interest in resolution of this dispute. *Id.* Here, Mt. Hawley can certainly seek resolution of its dispute over the enforcement of the Default Judgment in the separately pending Collection Action. Intervention is untimely and unnecessary. Further, when considering the "pragmatic consequences" of allowing Mt. Hawley, an insurance carrier, to intervene after years of litigation and a final judgment, public policy must strongly weigh against finding Mt. Hawley's application timely, or proper. Mt. Hawley's hands are not clean as a result of its utter refusal to participate in the lawsuit for its insured even after NFF gave Mt. Hawley notice of the claim. (January 14 Trans., p. 17, ln. 24 – 18, ln. 4). The result Mt. Hawley seeks would encourage carriers to engage in post-judgment gamesmanship rather than encouraging the exercise of good faith in defending claims against an insured.

In examination of the final element of timeliness—the prejudice to the parties—Respondents would suffer extreme prejudice in having to re-litigate a matter that was resolved long ago. While Mt. Hawley would have this Court believe that no further recovery would be possible against NFF given other settlements obtained from co-defendants, this simply is not correct. Notably, Professional Plastering contended that much of the damages Respondents attributed to its work at trial was, instead, caused by the faulty work of NFF. (May 9 Trial Trans., p. 62, ln. 24 – 63, ln. 5). Regardless, this fact does not alter the total damages suffered by Respondents, which exceed $15 Million as separately found by the Master in Equity. [16]

On the other hand any prejudice believed to be suffered by Mt. Hawley is fully ameliorated first by the fact that such prejudice is the result of its own decision not to participate to protect its insured, and, secondly, by the fact that a separately pending lawsuit exists in which Mt. Hawley is free to assert whatever defenses it may have, including the coverage defenses it chose to reserve back in 2009. *See infra.*

In sum, there is no evidence in the record to support Mt. Hawley's assertion that its request for intervention is timely or warranted. Consequently the trial court did not abuse its discretion in denying Mt. Hawley this relief.

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[16] Again, Mt. Hawley distorts the facts in an effort to belittle Respondents' claims. Mt. Hawley mistakenly asserts that Professional Plastering only paid $92,500 to settle after its appeal from the underlying judgement. In truth, Professional Plastering, though its insurers, paid that amount in addition to another $1,300,000 to settle Respondents' claims against it. (Final Order Approving Class Action Settlement, dated August 4, 2015).

B. Mt. Hawley does not have an interest relating to the property or transaction which is the subject of the underlying action that Respondent brought against NFF in 2009.

In order to intervene, a purported party must have standing. *Goethe*, 373 S.C. at 138, 644 S.E.2d at 702 (*citing* Rule 24, SCRCP and *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). Standing to intervene requires that a party have "a personal stake in the subject matter of the lawsuit **and** is a real party in interest." *Id.* "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, **as distinguished from one who has only** a nominal, formal, or technical interest in, or **connection** with, the action." *Id.* (emphasis added). In order to intervene a purported party must have "a real proprietary interest **in the subject matter of the proceedings**;[17] an interest which is merely peripheral and not the real interest at stake will not warrant intervention. *Id.* (internal quotations and citations omitted) (emphasis added).

Our Supreme Court rejected the idea that an insurance carrier has standing to intervene in an action in which its insured is involved, even where the outcome of that action implicates the indemnity obligations of the carrier. *Id.* at 139, 644 S.E.2d at 703. In *Goeth*, a claimant was denied coverage by an insurance carrier on the carrier's opinion that the claimant was not the spouse of the named insured. The claimant filed an action in the Family Court seeking an order validating its purported common law marriage to the named

[17] Applying the timeliness analysis cited above, the standing issue presents a real problem for Mt. Hawley. To have standing, Mt. Hawley must have had an interest in the subject matter of the underlying proceedings, and if it did, such interest would have existed throughout the pendency of the case against NFF—standing did not arise suddenly by virtue of the default judgment being entered. At best it would have arisen when the suit seeking that judgment was commenced in 2009.

insured. *Id.* The carrier moved to intervene, and the Supreme Court affirmed the denial of its motion, holding that the interest of an insurance carrier in a proceeding—even one that necessarily determines whether or not the insurance carrier may have financial exposure—is "peripheral" where the subject of the proceeding is not for the "determination of insurance benefits." *Id. Goeth* directs the result here.

Respondents' suit against NFF related to a transaction involving the defective construction of certain buildings. Mt. Hawley is as much a stranger to that "transaction" as it was this litigation for six years. Its only interest derives from its contractual relationship with its insured, NFF. The outcome of Respondents' underlying action against NFF does not impair Mt. Hawley's ability to protect or litigate its rights under its policy. *See* Rule 24(a) (providing that intervention may be allowed when "the applicant claims an interest **relating to the property or transaction which is the subject of the action**) (emphasis added); *accord Goethe*, 373 S.C. at 138, 644 S.E.2d at 702 (finding that in order to claim joinder under Rule 19, SCRCP, a party must claim an "interest relating to the subject of the action and [be] so situated that the disposition of the action in his absence may . . . impair or impede his ability to protect that interest"). As proof, Mt. Hawley stood on its rights under its policy to refuse to defend Mt. Hawley relative to the "transaction" that was the subject of suit.

Just as in *Goeth*, any interest Mt. Hawley has in this action is merely "peripheral." Even if its interest is "connected" to the underlying suit, this connection does not warrant intervention because the interest in the underlying action is not "real, actual, or material." *See id.* ("A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, **as distinguished from one who has only** a

nominal, formal, or technical interest in, or **connection** with, the action.") (emphasis added). Any collateral attack Mt. Hawley wishes to make against the judgment based the arguments presented to the circuit court must be asserted in the separately pending Collection Action, where it certainly has standing.

C. Mt. Hawley is not in a position such that without intervention, disposition of the action will impair its ability to protect the interest it claims.

There is no basis for Mt. Hawley's claim in this proceeding "that if it tried to contest the judgment in the separate action, Respondents would claim there can be no collateral attack in a separate action." (Br. p. 41). To be clear, Respondents claim there can be no collateral attack **in this action**; hence, intervention is improper. However, Respondents stated in the hearing on Mt. Hawley's motion to intervene that Mt. Hawley is free to assert whatever defenses it might have against the Default Judgment in the separately pending Collection Action. **"If they [i.e., Mt. Hawley] want to try to collaterally attack the judgment or argue they are entitled to a set off, all those issues can be decided in that case** [i.e., the Collection Action]." (January 14 Trans., p. 17, ln. 18-21) (emphasis added). Rule 60 also allows an "independent action" for relief from a judgment. Rule 60(b), SCRCP ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding[.]"). Unlike here, Mt. Hawley is a proper party to the Collection Action and is free to asset every sustainable ground it believes appropriate in the Collection Action.

The record is devoid of any indication that Mt. Hawley will be prohibited from protecting whatever interest or defenses it purports to have in the separately pending Collection Action. Therefore, the trial court did not abuse its discretion and its ruling should be affirmed.

D. To the extent Mt. Hawley alleges the interest that it claims is not adequately represented by other parties, this is a result of its own making.

Mt. Hawley is vague as to what interest is not adequately represented in the matter in which it seeks to intervene. Specifically, it is unclear whether Mt. Hawley is asserting its interest as an insurance carrier is not adequately represented or whether it arises from its apparent belief that NFF is not protecting its own interest in the judgment that resulted from its negligent construction.[18] *See* (Br. 42). The distinction, while seemingly minor, is significant. Logic demands that the interest an intervenor claims must naturally be the same interest that is not protected if intervention is denied.

Mt. Hawley asserts its interest in this matter is as "an insurer of a defendant in this case." (Br. p. 40). To the extent the interest Mt. Hawley claims is a contractual one, as an insurer, this right was not, and could not, be implicated in the underlying case against NFF because the issue in that case was the negligent work of NFF, among others. If it is this interest that is not adequately represented, it is of no consequence and intervention is not warranted.

On the other hand, to the extent Mt. Hawley claims the interest of NFF is not adequately represented, this is the result of Mt. Hawley's refusal to defend its insured, despite having been aware of the claim and standing on a reservation of rights for years. (Br. p. 4-5). Consequently, this claim is waived as Mt. Hawley was aware of the right to defend NFF and voluntarily and intentionally abandoned it by refusing to defend NFF subject to its reservation of rights. *See e.g. Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015) ("Waiver is a voluntary and

[18] Respondents assume Mt. Hawley is not arguing that NFF should have protected Mt. Hawley's Interest. Considering Mt. Hawley's refusal to defend, that would be ironic.

intentional abandonment or relinquishment of a known right, [applicable when] the party against whom waiver is asserted possessed . . . actual or constructive knowledge of his rights.").

For these reasons there is no evidence in the record to support that Mt. Hawley is entitled to intervene in the present action. Therefore, the trial court did not abuse its discretion and this Court should affirm the denial Mt. Hawley's motion to intervene.

IV. MT. HAWLEY HAS NO BASIS IN LAW OR FACT UPON WHICH TO SET ASIDE THE JUDGEMENT AGAINST NFF UNDER RULE 60

Mt. Hawley dedicates the substantial majority of its argument to this issue because it claims setting aside the Default Judgment against NFF is the sole reason it sought intervention. For the reasons that follow, this Court should reject its arguments and affirm the circuit court's refusal to grant intervention.

A. Mt. Hawley's Rule 60(b) motion is not preserved for appellate review.

To preserve an issue for appeal it must be timely raised to the trial court with sufficient specificity, and also ruled upon by the trial court. *See* Toal, *Appellate Practice in South Carolina*, 2 ed. pp.57-66 (2010); *see e.g. Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015). The arguments raised in Mt. Hawley's brief relating to Rule 60, SCRCP were never ruled upon and are not preserved. *See e.g., I'on, LLC, v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing that issues not ruled on by the trial court are not preserved unless raised in a subsequent motion to alter or amend). "If a losing party has raised an issue in the lower court, but the court fails to rule upon it, **the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review**." *See* Toal, *Appellate Practice in South Carolina*, 2 ed. p. 59 (2010); *I'on,* 338 S.C. 406, 526 S.E.2d 716; *see*

Pelican Bldg. Centers of Horry-Georgetown, Inc., v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993).

The Order on appeal states in its entirety, "Mt. Hawley Insurance Company's **Motion to Intervene** is Denied." (Order Denying Motion to Intervene) (emphasis added). The circuit court made no ruling whatsoever on Mt. Hawley's purported Rule 60 arguments, assuming one was made with sufficient specificity to satisfy the rule. "Where a party raises multiple arguments in support of a **single** form of relief, and the trial court issues a form order, the party is not required to file a rule 59(e) motion. *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 912 (Ct. App. 2001). Here, there are two separate forms of relief—a motion to intervene (a right that affects Mt. Hawley's status as a party) and a separate request for relief for the judgment (a right that affects the finality of the judgment against NFF). These are separate and distinct remedies under separate and distinct rules, with separate and distinct elements. Thus, Mt. Hawley was required to seek reconsideration in order to preserve its separate claim for relief under Rule 60. *Compare Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 552, 762 S.E.2d 687, 688-89 (2014) (where the trial court issued a form order "denying **all relief**" there was no need to file a rule 59(e) motion) (emphasis added). Here, the circuit court only ruled on the motion to intervene, which is clearly not all of the relief Mt. Hawley seeks on appeal.

Mt. Hawley filed no Rule 59 motion seeking a ruling on its purported Rule 60 motion, and consequently the matter is not preserved for appellate review. Because Rule 60 forms the basis for all arguments (and sub-arguments) made in Section "III" of Mt. Hawley's brief to this Court, none of these arguments are properly before the Court.

Moreover, it is also doubtful that Mt. Hawley sufficiently raised many arguments under Rule 60 to the circuit court's attention. [19] It is fundamental that an issue must be raised with sufficient clarity to bring the issue to the attention of the trial court. While no magic language is required, the argument or objection must be sufficient to bring the precise nature of the request into focus. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (holding "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge").

Although the title of Mt. Hawley's motion includes the words "relief from judgments," this is not the deciding factor considering Mt. Hawley was seeking first to intervene so that, once it was a party, it could collaterally attack the judgments against NFF. Its written motion clearly states it is made under Rules Rule 24(a) and 24(b). (Motion to Intervene and for Relief). It makes no mention of Rule 60. (Id.). Although Mt. Hawley claimed the judgments were "invalid," it only raised a lack of "jurisdiction" as a reason why. This argument is plainly incorrect, and none of the other several arguments in its initial brief, such as judicial estoppel or Rule 60(b)(5) were ever raised to the circuit at all, and certainly not with sufficient specificity to preserve the matter. The arguments focused on the fact that Mt. Hawley needed to first be party,[20] hence the motion to intervene, so it

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[19] The fact that there was no ruling on this issue lends support to the fact that Mt. Hawley did not raised the issue with sufficient specificity to bring the precise nature of the issue into focus for the circuit court.

[20] It is axiomatic that a litigant must be a party to an action before it can seek relief pursuant to Rule 60. *See* Rule 60(b), SCRCP (stating that "upon motion . . . the court may relieve **a party** or his legal representative from a final judgment") (emphasis added); *see also McCLurg v. Deaton*, 308 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) (acknowledging that the party's motion to intervene was granted *prior* to the court's consideration of its motion for relief under Rule 60).

could then challenge the judgments. (January 14 Trans., p. 8, ln. 22-24, p. 18, ln. 7-23 & Motion to Intervene) ("Mt. Hawley is entitled to intervene for the purpose of challenging the judgments entered against North Florida."). Thus, Mt. Hawley's arguments related to Rule 60, are not preserved.

B. <u>Even if preserved, Mt. Hawley's Rule 60(b) motion was properly denied.</u>

It is undisputed that the instant motion was made more than two years after the entry of the Default Judgment. (Mt. Hawley's Initial Brief, p. 22). Grounds normally available under Rule 60(b)(1), (2) or (3) are foreclosed by the one year limitation assigned to motions made on those grounds. Therefore, Mt. Hawley cannot sustain a challenge under Rule 60(b) unless it can demonstrate grounds under Rule 60(b)(4) or (5). It cannot.

A motion under Rule 60(b)(4) requires proof that the underlying judgment is void. A voidable order plainly will not suffice. *Accord Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (observing, "[A]ny problems which may exist with the October 1990 order do not fall within Rule 60(b)(4)'s definition of 'void.' The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction."). The Court in *McDaniel* went on to find that because both subject matter jurisdiction and personal jurisdiction were present, the order in question was, at best, voidable, not void. *Id.*

As explained herein, subject matter jurisdiction existed and NFF received proper notice of the default hearing. Thus, the judgments challenged by Mt. Hawley are not void—at best, they would only be voidable. This distinction is fatal to a Rule 60(b)(4) challenge,

which must be premised upon a void order. A voidable order, as opposed to a void order, **"is equally as binding as a right one"** until it is set aside on direct appeal by the party against whom it is entered. *Piana*, 239 S.C. at 371-72, 123 S.E.2d at 299 (emphasis added). Such an order **"cannot be attacked collaterally[,] and [t]he only way its binding force can be escaped or avoided is by appeal or writ of error."** *Id.* Even if the judgments below are infected by some irregularity or error, this renders them merely voidable, and only then by NFF who is the party against whom they were entered. Mt. Hawley's collateral attack is not allowed for the purpose of challenging a voidable order entered against another and, by extension, it cannot be mounted via a motion to intervene or via this appeal.

The likes of *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 775 S.E.2d 37 (2015) and *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987), do not help Mt. Hawley. *Skipper* involved a confession of judgment with no demonstrated, and also involved assignment of a legal malpractice claim between adversaries, creating a concerning "role reversal" on the issue of proving the "claim within the claim." *Skipper*, at 37, 775 S.E.2d at 39. That was the controlling issue in the case. No similar facts exist here. Respondents' damages were determined by the Master, twice in fact. Another distinguishing factor in *Skipper* is that the carrier in that case actually undertook efforts to defend its insured. *Id.* Mt. Hawley did not.

Poston also is distinguishable in a manner favorable to Respondents. NFF was clearly not a "sham" defendant used at trial. Quite the opposite is true. Once Professional Plastering understood Respondents intended to refer NFF to the Master in Equity for a separate damages hearing rather than keeping them in the trial proceedings before the jury,

Professional Plastering had no objection. There was nothing secret about this agreement – it was made known to all parties present and their participating carriers. If Mt. Hawley did not know, that is Mt. Hawley's own fault. Professional Plastering never requested to notify the jury in its trial of the settlement reached with NFF. In fairness, there was no need, because Respondents fully informed the jury of the settlement monies obtained prior to trial. None of the concerning facts from *Poston* exist here, and the complaining party in *Poston* was a co-defendant at trial, which in this instance was PPS who knew what was happening and had no objection. *Compare Poston*, 294 S.C. 261, 264, 363 S.E.2d 888, 890.

Equally flawed is Mt. Hawley's contention that Rule 60(b)(5), SCRCP applies. The application of Rule 60(b)(5) was **never** raised and is not preserved. Regardless, to the extent Mt. Hawley argues that the judgment against NFF was satisfied by virtue of the payment of the $400,000 by the other Participating Carriers, the record easily dispels that argument. The agreement required the $400,000 payment and also specifically reserved Respondents' claim against NFF for the additional recovery now sought against Mt. Hawley in the separate Coverage Action, and dismissal is not required until that recovery effort is complete **against Mt Hawley**. (May 6 Settlement Email, Covenant Not to Execute). If Mt. Hawley truly believes the judgment against NFF has been satisfied as it alleges in its brief, it need not intervene into this action; rather, it need only point out this fact to the court in the Coverage Action.

It is also true that the record below is devoid of any fraud upon the court. Much to the contrary, at every stage the proceedings the circuit court and Professional Plastering was fully informed of the nature of the agreement reached with NFF and its Participating

Carriers, including the Covenant not to Execute, and specifically including the key point that one of NFF's carriers, *i.e.*, Mt. Hawley, was refusing to defend and indemnify its insured. The judgment obtained against NFF was explained to the Master and understood by him to be the **total amount** of construction repair damages caused by **all defendants.**[21] Mt. Hawley cannot complain that a motion for set off was not raised by or on behalf of NFF at the damages hearing and liken that to fraud on the court. Mt. Hawley could have chosen to defend its insured and had counsel present to make such a motion—in fact, the settlement with NFF required Respondents to consent to Mt. Hawley appointing new counsel. (Settlement Email). That never happened, and, as an adversary, it is not Respondents' duty to ensure that it did. To the extent Mt. Hawley demands entitlement to a set off for other settlements received, Respondents do not contest Mt. Hawley's ability to raise that very point in the Collection Action. (See January 14, 2016, Transcript). Even after a set off for the $9,986,782.00 already received, a significant balance of the judgment in the amount of $6,169,725.50 remains outstanding.

It is also incorrect to suggest that Respondents are barred from recovering the full amount outstanding after application of the set off. Foremost, the claims in this case were, in fact, subject to joint and several liability. *See Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40-41, 410 S.E.2d 243, 244 (1991) (South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-10 *et seq.*, expressly applies to causes of action arising or accruing **after** the effective date of the Act **and is not to be retroactively applied**); *see*

[21] The Master accepted this figure twice, actually. The same $15,747,225 repair estimate was presented and accepted as part of the damages awarded by the Master in Equity in the separate, prior, default proceeding that was conducted against the developer, Charleston Tarragon Manager, LLC. The total judgment against the Developer was even higher due to loss of use damages that also were proved in that proceeding.

also 2005 Act No. 27, §16(4) (indicating that S.C. Code Ann. §15-38-10 shall "apply to causes of action arising on or after [July 1, 2005] **except for those causes of action relating to construction torts** . . . and apply[s] to improvements to real property that obtain . . . a certificate of occupancy" prior to July 1, 2005). In this matter, the subject certificate of occupancy issued in 2002, and therefore Respondents' claims accrued against NFF and the other defendants prior to July 1, 2005. As a result there is no prohibition on the imposition of joint and several liability on NFF as a joint tortfeasor. Instead, having contributed to the damages, NFF is liable at law for the entire sum of the damages suffered by Respondents subject only to a set off for amounts already recovered.

It matters not that Respondents contended Professional Plastering was responsible for $8,761,443 in damages for stucco only work, because Professional Plastering defended that allegation by blaming NFF for those very same damages and the Master adjudicated NFF to be at fault. Plus, as a joint tortfeasor, NFF is liable to Respondents anyway. *Branham v. Ford Motor Co.*, 390 S.C. 203, 236, 701 S.E.2d 5, 23 (2010) (reaffirming the applicability of joint and several liability among joint tortfeasors).

After losing at trial, Professional Plastering demonstrated prejudicial error on appeal arising from the exclusion of its expert, who would have testified "that **NFF was responsible for the improper installation** and stated Professional would never have seen the problems when it completed its work." *See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 93, 754 S.E.2d 267, 272 (Ct. App. 2014). Respondents settled with Professional Plastering for a significant sum after remand of the case, but much less than the amount the jury first awarded. Considering the Master in Equity twice found that Respondents suffered $15,747,225 in actual damages, and further considering that

Professional Plastering and its experts attributed fault to NFF for the $8,761,443 in damages complained of against Professional Plastering at trial, it certainly is not inequitable for the judgment to stand against NFF, a joint tortfeaser, for a lesser amount of $6,169,725.50 after applying a set off for recoveries already made. The extraordinary circumstances required for relief under Rule 60(b)(5) are wholly lacking in this record.

C. The authority relied on by Mt. Hawley does not support a finding that the trial court abused its discretion.

Because this Court is limited to reviewing the circuit court's decision for an abuse of discretion, Mt. Hawley's burden is high in this case. In light of Mt. Hawley's six year delay in requesting to intervene, despite knowing all along that its insured was being sued for substantial construction defects, it's hard to conceive that any abuse in discretion occurred. The judgments below are not void, as shown herein, and Mt. Hawley's attempts to twist and contort what happened below to suggest some manner of fraud on the court is flatly disproved by the record. The judge that presided over the relevant trial and associated proceedings Mt. Hawley now attacks is the same judge that who presided over all the proceedings where Mt. Hawley pretends the fraud was committed. Yet this Judge heard and rejected Mt. Hawley's request to intervene. This was well within her discretion on the record presented.

St. Paul Travelers v. Payne, 444 F. Supp. 2d 519 (D.S.C. 2006) does not help Mt. Hawley. In fact, it proves Respondents are correct. *Payne* involved a case where the settling party voluntarily selected the amount to be paid to the plaintiffs by the indemnifying carrier. Here, that did not occur. NFF's liability amount was established by an adjudication of the damages suffered by Respondents in a court of law—not by settlement. Moreover, Mt. Hawley was not a participant in the $400,000 paid by the

Participating Carriers, and, in fact, demands a set off for these amounts received. The circuit court was acutely aware of the existence of the terms of the settlement with NFF and the Participating Carriers, the Covenant not to Execute, and the request for entry of default and order of reference, and the reasons why. (May 9 Trans., p. 60-64). All of this was approved by the circuit court, which distinguishes the present facts from *Payne*. Finally, perhaps the most important takeaway from *Payne*, is that it was not a case involving a motion to intervene, but rather a declaratory judgment action **initiated by the carrier** to avoid the indemnity obligation. *Payne* proves that Mt. Hawley has every opportunity to litigate any defenses it may have in the separately pending Collection Action, itself a declaratory judgment proceeding. There is no need or basis for Mt. Hawley to intervene in this action, and the circuit court was proper to deny its request.[22]

Finally, and perhaps most surprising is Mt. Hawley's reliance on *Redmond v. Devine*, 152 Ill. App. 3d 68, 72, 504 N.E.2d 138, 141 (1987). In *Redmond*, the insurer proved it was **never tendered** the underlying lawsuit, and when it happened to learn about the accident and attempted to investigate, its own insured **concealed the existence of the lawsuit**. After a default judgment was entered against the insured, the plaintiff was given an assignment by the insured to pursue the carrier's coverage in exchange for a release from personal liability. When the carrier learned of the judgment, it sought its insured's assistance in setting aside the default, but those efforts proved futile so it moved to intervene. In *Redmond*, the carrier **first learned of the underlying lawsuit** when the bad

[22] Although relied on by Mt. Hawley, *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), likewise bears no resemblance to the present facts as it turned on a settlement that denied the UIM carriers right to seek a jury trial for its own benefit, when the settling at-fault driver bargained away the carrier's protected right to defend the case **for itself**. Mt. Hawley's current efforts are far from analogous to those in *Broome*.

faith action was filed. *Id.* at 71-72, 504 N.E.2d at 140-41. "Specifically, Comet points out that Devine has admitted that Comet never acknowledged receipt of any papers regarding the Redmond lawsuit[.]" *Id.*

All of the facts that aided the carrier's cause in *Redmond* cut against Mt. Hawley here. Mt. Hawley concedes it had notice of the underlying lawsuit when the claim was tendered back in 2009 as demonstrated by Mt. Hawley's reservation of rights. (Mt. Hawley Initial Brief, p. 4-5). Certainly NFF did not conceal the lawsuit from Mt. Hawley, as was the case in *Redmond.* Mt. Hawley makes no claim, nor does the record demonstrate, that Mt. Hawley ever sought the assistance of NFF in this action (but given Mt. Hawley's refusal to defend NFF, turnabout would seem fair play). In *Redmond*, it was the insured that refused to participate as required to. Here, it was Mt. Hawley who refused to be involved.

Because Mt. Hawley has failed to offer any sustainable argument to demonstrate an abuse of discretion by the circuit court, its appeal must fail.

V. MT. HAWLEY'S ARGUMENT REGARDING JUDICIAL ESTOPPEL IS NEITHER PRESERVED FOR REVIEW, NOR PROPERLY BEFORE THIS COURT, AND NONETHELESS FAILS ON THE MERITS.

Mt. Hawley never raised, nor even referenced, judicial estoppel as a basis to support any part of its motion on appeal, nor did Mt. Hawley seek a ruling from the circuit court on this newly-raised theory. Thus, it is not preserved for review. *See e.g., Hailey v. Hailey*, 357 S.C. 18, 24, 590 S.E.2d 495, 498 (Ct. App. 2003) (finding the issue of judicial estoppel not preserved for review because it was not raised to and ruled upon by the trial court) (*citing Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); and *Widman v.*

Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001) (for the proposition that issues if not raised to or ruled upon by the trial court are not preserved for appellate review).

Equally as fundamental, it is significant to note that the enforceability of the subject judgment **against Mt. Hawley** was not an issue before the circuit court in order to invoke consideration of this newly raised issue. It simply has no application here.

Further still, Mt. Hawley's unsupported allegation of judicial estoppel as it applies to relief under Rule 60 is patently untimely. Judicial estoppel, to the extent it is encompassed by Rule 60, would fall within the ambit of Rule 60(b)(3), providing for relief based on "fraud, misrepresentation or other misconduct by a party." Rule 60(b)(3), SCRCP. Any request for relief pursuant this rule "**shall** be made within a reasonable time **not to exceed one year after the judgment**." *Id.* (emphasis added). Mt. Hawley admits, as it must, that its motion to intervene was filed more than one year after the judgments in question were entered. Thus, to the extent Mt. Hawley seeks relief under Rule 60 based on judicial estoppel its claim is time-barred by the Rule.

Regardless of these procedural fatalities, Mt. Hawley's allegation of judicial estoppel fails on the merits as well, and its characterization of the proceedings below strains credulity when the record is reviewed.

Five elements are required for the application of judicial estoppel:

> (1) two inconsistent positions must be taken by the same party or parties in privity with each other;
> (2) the two inconsistent positions were both made pursuant to sworn statements;
> (3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and

> (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position.

Wright v. Craft, 372 S.C. 1, 38, 640 S.E.d 486, 506 (Ct. App. 2006) (citing *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474, 480 (Ct. App. 2000) (Anderson, J., concurring in result only)) (emphasis deleted).

In its brief Mt. Hawley argues that Respondent took inconsistent positions by representing to the court that it had no further claim against NFF, and then stating that it would not seek a joint and several verdict against NFF. The record proves that neither suggestion is true, and fails for all the same reasons and analysis that undermine Mt. Hawley's contention that Respondents dismissed NFF. Those points, set out in Section II above, are incorporated here. And to reiterated, Respondents informed the circuit:

> [W]e reached a settlement with NFF **with two carriers** that were insuring them and defending them in this case. And we reached a settlement **with those carriers** and **we've reached a covenant not to execute with NFF**.

(May 9 Trans., p. 60, ln. 21 – 61, ln. 1).

Respondents also made it clear: "NFF **is still in the case**, but they have a covenant." (May 9 Trans., p. 61, ln. 12-13). Respondents requested that NFF be placed in default and referred to the Master for a damages hearing. That is what happened. Respondents' explanation that they had no further interest against NFF "in this proceedings" was, as previously explained, simply to clear up Professional Plastering's confusion about whether Respondents were seeking to create an "empty chair" defendant with NFF "in this [trial] proceeding" in name only. (May 9 Trans., p. 62, ln.11 – 63, ln. 21). Respondents never expressed or implied they had no further interests against NFF. The clear intent was that Respondents' interest would be pursued in a separate damages hearing before the Master.

(May 9 Trans., p. 63, ln. 13 – 64, ln. 17) (referencing the intent to continue claims against NFF due to the none participating carrier, Mt. Hawley).

This same exchange on the morning of trial is also where Mt. Hawley incorrectly claims that Respondents represented they would not seek a joint and several judgment against NFF. The record proves otherwise. When Professional Plastering first objected to having NFF placed in default, it was out of its concern that Respondents planned to keep NFF **in the jury trial proceeding** as an empty-chair defendant with the goal of holding **Professional Plastering** jointly and severally liable for NFF's negligence.

Specifically, Professional Plastering's counsel stated:

> [W]hat [Respondents] are trying to do, **I assume**, would be to keep them in as name only so that they can have a joint and several liability verdict and try to impugn North Florida Framing's fault **to both defendants** [i.e., against Professional Plastering as well]. . . Do you see what I'm saying? They're going to say [NFF] – **our [Professional Plastering's] allegation has been that North Florida Framing installed the windows where the water is intruding.** If [Respondents] keep them as a defendant in the case, they're going to be able to say that all the defendant's together are jointly and severally liable for them.

(May 9 Trans., p. 62, ln. 18 – 63, ln. 5) (emphasis added). Respondent made it clear:

> Respectfully your Honor, **I think counsel misheard me. We're not seeking to keep them in this trial.** We're asking for our default and **we're asking that they be referred to the default hearing that's already been scheduled for the other default defendants.**

(May 9 Trans., p. 63, ln. 11-17)(emphasis added). This discussion involves joint and several liability only because Professional Plastering was confused about Respondents' intentions. Once explained, Professional Plastering said " . . . we have no objection to that at all. I apologize, Your honor." (May 9 Trans., p. 63, ln. 18-21). Respondents have

never said they would not pursue a joint and several judgment against NFF. It is absurd to suggest that Respondents expressed a desire to waive a lawful remedy against a joint tortfeasor. Plainly there is no inconsistent position taken by Respondents.

There is another point. Respondents did not attempt to impugn Professional Plastering with damages caused by NFF[23] or any other defendant for that matter, which is what Professional Plastering raised a concern about. As Mt. Hawley points out, at the trial against Professional Plastering, Respondents informed the jury of the total damages claimed ($15,747,225) and also told the jury about the settlement amounts already received (which included the partial money received for NFF). Respondents then asked the jury to award the difference between the two. This is **exactly the same** result that would have occurred if Respondents had sought a joint and several verdict against Professional Plastering for the full amount, to which a set off would have applied for the monies already received. Nothing in the manner in which Respondents tried the case or communicated with the court raises an issue for judicial estoppel. Mr. Hawley's argument has no merit. *See Wright*, 372 S.C. at 38, 640 S.E.2d at 506 (requiring two positions that are "totally inconsistent positions such that "the truth of one position must necessarily preclude the veracity of the other position"). Last, there is no evidence of an intent to deceive the court by Respondents, because there was no such intent. This too is fatal to the argument. *Id.* Thus, this argument should be denied.

[23] But, Professional Plastering certainly planned to defend itself by arguing that NFF was actually to blame the problems Respondents argued were caused by PPS. As already demonstrated, Professional Plastering specifically contended NFF was in fact to blame for the water intrusion around windows it installed, rather than Professional Plastering.

CONCLUSION

For the reasons set forth herein, Respondents respectfully requests this Court to affirm the circuit court's denial of Mt. Hawley's motion to intervene.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Michael A. Timbes, SC Bar No. 69730
Thomas J. Rode, SC Bar No. 77480
Jesse Kirchner, SC Bar No. 70479
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000

Justin O' Toole Lucey, Esquire
LUCEY LAW FIRM
415 Mill Street
Mount Pleasant, South Carolina 29464
843-849-8400 (office)

W. Jefferson Leath, Jr., Esquire
LEATH, BOUCH & SEEKINGS, LLP
92 Broad Street
Charleston, South Carolina 29401
843-937-8811 (office)

Phillip W. Segui, Jr., Esquire
SEGUI LAW FIRM, PC
864 Lowcountry Boulevard, Suite A
Mt. Pleasant, South Carolina 29464
843-884-1865 (office)

John T. Chakeris, Esquire
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, South Carolina 29402
Phone: (843) 853-5678
Facsimile: (843) 853-5677

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049
Appellate Case No. 2016-000185

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., (from December 16, 2008 to present),.....Respondents,

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspectors, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mikey Mason d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc.,.....Defendants,

And Mt. Hawley Insurance Company.....is the Appellant/Proposed Intervenor.

AFFIDAVIT OF SERVICE OF RESPONDENTS' INITIAL BRIEF & DESIGATION OF MATTER

I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date, hand-delivered, a true and correct copy of the Respondents' Initial Brief and Designation of Matter to be Included in the Record to the following counsel of record:

FOR APPELLANT/PROPOSED INTERVENOR:
Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
Law Offices of Andrew Epting, LLC
46-A State St.
Charleston, South Carolina 29401
ake@epting-law.com
mne@epting-law.com

Moira W. Kerrigan
Paralegal to Michael A. Timbes and
Thomas J. Rode

November 7th, 2016
Charleston, South Carolina

THURMOND KIRCHNER & TIMBES, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF
CHARLESTON, SOUTH CAROLINA 29401

Paul R. Thurmond
Jesse A. Kirchner
Michael A. Timbes *
Christopher P. Deters
David L. Barnes, Jr.
Thomas J. Rode
Christopher C. Romeo **
Matthew S. Byzet
T. Happel Scurry
Johnny J. Evans, Jr.

* Also admitted in Georgia
** Also admitted in North Carolina

Phone: 843-937-8000
Fax: 843-937-4200
www.tktlawyers.com

November 7, 2016

VIA US MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: ***Case Tracking No. 2016-000185***
Mark Teseniar v. Fenwick Plantation

Dear Ms. Kitchings:

Enclosed for filing, please find the original and three (3) copies of each of the following documents:

(1) Initial Brief of Respondents;
(2) Respondents' Designation of Matter to be included in the Record on Appeal; and
(3) Affidavit of Service of Respondents' Initial Brief and Designation of Matter.

After filing the originals, kindly return any file-stamped copies to me in the enclosed self-addressed, stamped envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact me. Your assistance with this matter is appreciated.

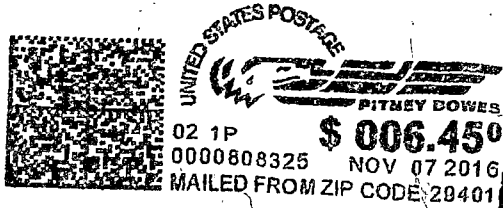
With kind regards, I am

Very truly yours,

THURMOND KIRCHNER & TIMBES, PA

Moira Kerrigan
Paralegal to Michael A. Timbes

cc: All Counsel



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THURMOND KIRCHNER & TIMBES, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF
CHARLESTON, SOUTH CAROLINA 29401

TO:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211