THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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., 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 Nava Guzman Construction, Inc., ... Respondents,
And Mt. Hawley Insurance Company, ... Appellant/Intervenor.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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2. DID THE TRIAL COURT ERR IN DENYING MT. HAWLEY'S MOTION TO INTERVENE, WHERE RESPONDENTS PROCURED A DEFAULT JUDGMENT AGAINST MT. HAWLEY'S INSURED (NORTH FLORIDA FRAMING) TWO YEARS AFTER ENDING THEIR CLAIMS AGAINST THE INSURED WITH PREJUDICE?

STATEMENT OF THE CASE

This controversy arises from a construction lawsuit brought by Mark F. Teseniar, Nan M. Teseniar, and Twelve Oaks at Fenwick Property Owners Association, Inc. (collectively "Respondents") against multiple defendants, including North Florida Framing, Inc. ("North Florida Framing"), regarding alleged construction defects at the Twelve Oaks at Fenwick Plantation project located on John's Island, South Carolina.[1] On June 9, 2009, Respondents filed their Second Amended Complaint, naming North Florida Framing as an additional defendant.[2] North Florida Framing's insurance carriers assumed its defense and hired counsel to represent North Florida Framing in this case; its defense counsel answered the Second Amended Complaint on August 17, 2009.[3]

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[1] Mark and Nan Teseniar originally filed this action on January 4, 2008. Shortly thereafter, Twelve Oaks at Fenwick Property Owners Association, Inc. filed a separate suit on March 28, 2008. The cases were consolidated and certified as a class action matter on October 20, 2008.

[2] Respondents served North Florida Framing with the complaint on June 17, 2009.

[3] North Florida Framing's responsive pleadings have never been withdrawn.

On September 9, 2010, then-Chief Judge for Administrative Purposes in the 9th Circuit Court of Common Pleas, Judge Markley Dennis ("Judge Dennis"), designated this case as complex and assigned exclusive jurisdiction of the case to Judge Roger Young ("Judge Young"). Whether proper or not, as at this time Judge Dennis was still the Chief Administrative Judge, Judge Young then referred solely the date certain trial to begin on May 9, 2011 to Judge Kristi Harrington ("Judge Harrington").

Prior to trial, Respondents drafted a proposed settlement agreement with North Florida Framing. (The settlement extinguished all of North Florida Framing's liability and assigned *all of its rights and claims* in the case to Respondents. As a result, neither North Florida Framing nor its counsel appeared for trial on May 9, 2011. However, on the morning of trial, *counsel for Respondents* presented Judge Harrington with a Consent Order Relieving Counsel *for North Florida Framing* ("Consent Order Relieving Counsel") that left North Florida Framing without counsel to represent it. Respondents, after moving *on behalf of North Florida Framing* to relieve its counsel, stepped back into their adversarial shoes and asked the court to place North Florida Framing in default for not appearing at trial. Although Professional Plastering and Stucco, Inc. ("Professional Plastering"), the only defendant actually proceeding to trial against Respondents, objected to the proposed default, Respondents' counsel assured the court that North Florida Framing no longer had any interest in the litigation. Thereafter, Judge Harrington granted Respondents' requests and signed the Consent Order Relieving Counsel.

After a two-day trial in which Respondents obtained a $7,723,225.00 verdict against Professional Plastering, Respondents filed a motion asking the trial court to preliminarily approve its final settlement with North Florida Framing. The court issued an order preliminarily approving the settlement on June 3, 2011 and entered a final order approving the settlement on

June 10, 2011. The final order directed Respondents to execute general releases or stipulations ending this case and all claims against North Florida Framing with prejudice.[4] Despite the dismissal with prejudice, and three months after representing to the court that Respondents had no interest against North Florida Framing, Respondents presented the court with an Order of Default against North Florida Framing. The order was signed by the court and subsequently filed on August 9, 2011.

Two years later, with no notice to Mt. Hawley, and defective notice as to North Florida Framing, a damages hearing was held on May 14, 2013 in which Respondents' counsel asked the Master in Equity for a $15,748,225.56 joint and several judgment against North Florida Framing.[5] Respondents failed to disclose material facts to the Master in Equity at that hearing. However, relying on the representations of Respondents' counsel, the Master in Equity issued a $15,748,225.56 joint and several default judgment against North Florida Framing.

On May 26, 2015, more than two years after procuring the default judgment against North Florida Framing, Respondents filed a judgment creditor suit against Mt. Hawley. Prior to being served with this suit,[6] Mt. Hawley had no notice of a default order, default hearing, or default judgment against North Florida Framing. On July 28, 2015, while final approval of the settlement with Professional Plastering was still pending, and this case quite active, Mt. Hawley moved to intervene and for relief from judgments in this case.

Mt. Hawley argued its motions to intervene and to set aside the judgment as void on January 12, and January 14, 2016. On January 19, 2016, a Form 4 judgment denying Mt.

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[4] This order still stands and has not been modified in any way.

[5] This $15,748,225.56 figure represented the total estimated damages attributable to every defendant in this case.

[6] Respondents served the South Carolina Department of Insurance on June 2, 2015, who then mailed process to Mt. Hawley. Respondents filed the acceptance of service on July 2, 2015.

Hawley's motions was filed. Only ten days after its motions were denied, on January 29, 2016, Mt. Hawley appealed the denials to this Court. Before Mt. Hawley's initial brief was due, Respondents filed a motion to dismiss Mt. Hawley's appeal on May 4, 2016, arguing that the case had already ended before Mt. Hawley filed its intervention and SCRCP 60(b)(4) & (5) relief motions—despite the fact that Respondents were still actively seeking final approval of a settlement agreement with Professional Plastering at that time. This Court denied Respondents motion on August 1, 2016, allowing this appeal to proceed.

FACTS

I. BACKGROUND AND PARTIES

Respondents represent the interests of the Twelve Oaks at Fenwick Property Owners Association and the individual homeowners of the units at Twelve Oaks at Fenwick Plantation. Respondents filed this action in 2008 against numerous defendants alleging design and construction defects in the buildings at Fenwick Plantation. (*See* Respondents' Class Action Complaint, R. p. 44). North Florida Framing, named as a defendant in 2009, was a subcontractor for the project who contracted to help frame the buildings. (*See* North Florida Framing's Trial Brief at 4(1), R. p. 98).

At various times alleged in the complaints, North Florida Framing obtained insurance policies from multiple carriers. When Mt. Hawley was tendered this claim, it asserted a reservation of rights setting forth its coverage defenses. Other carriers retained Barnwell Whaley Patterson & Helms to handle North Florida Framing's defense. North Florida Framing's counsel continued to defend North Florida Framing until it settled out. (*See, e.g.*, North Florida Framing's May 2, 2011 Motion to Bifurcate Trial, R. p. 102; E-mail Settlement, R. p. 107).

II. DESIGNATION AS A COMPLEX CASE

On September 9, 2010, Judge Dennis, then-Chief Judge for Administrative Purposes, "ORDERED that this case be designated as complex and that the trial of the case take place at a time to be determined." (Complex Case Designation Order, R. p. 92). Furthermore, Judge Dennis "ORDERED that this case be assigned to the Honorable Roger Young to hear and handle all pre-trial motions and other matters pertaining to this case." (*Id.*). Thereafter, and perhaps without authority to do so as he was not the Chief Administrative Judge, on November 18, 2010, Judge Young signed an order assigning this case to Judge Harrington for one limited purpose—"a date certain trial to begin on Monday, May 9, 2011." (Trial Assignment Order, R. p. 94). Despite this limited grant of jurisdiction, Respondents made concerted efforts to have Judge Harrington hear every aspect of this case, up to and including Mt. Hawley's motions to intervene and for relief from judgments. In almost every document presented to the court, Respondents inserted the following provision stating that she retains jurisdiction. (*See e.g.*, Final Order Approving Class Action Partial Settlement, R. p. 214, ¶6(d) ("This Court shall retain jurisdiction of this matter until it is concluded."); Order Preliminarily Approving Class Action Partial Settlement, R. p. 199, ¶6 (same)).

III. THE PROPOSED PRE-TRIAL SETTLEMENTS

On August 5, 2010, North Florida Framing filed a Third Party Complaint against its subcontractor, Nava Guzman Construction, Inc. ("Nava"), asserting several causes of action, including a claim for full indemnity in the case. (North Florida Framing's Third Party Complaint, R. pp. 84–85). Respondents entered into many pre-trial settlement agreements, leaving only a few parties remaining in the time leading up to the trial, including Nava and North Florida Framing. Although Respondents had asserted no claims against Nava, they eventually entered into a settlement agreement prior to trial with the third party defendant wherein Nava paid

Respondents $137,500 in exchange for Respondents agreeing to *defend and indemnify Nava from any and all claims made by North Florida Framing against them.* (Jury Trial – Volume 1 Transcript, R. pp. 116-17, lines 25–10); *see also* Joint Stipulation of Dismissal in *Teseniar v. Atlantic Cas. Ins. Co.*, Civil Action No.: 2:11-cv-00860-RMG, (D.S.C. 2011). This fact became important in light of the subsequent settlement proposal with North Florida Framing and Respondents the day of trial.

On May 6, 2011, three days before trial, counsel for North Florida Framing and Respondents drafted a preliminary settlement agreement via e-mail. (*See* E-mail Settlement, R. p. 107). Under "the proposed settlement: [Respondents] ha[d] settled with Crum & Forster and Scottsdale [(two of North Florida Framing's insurers)] ***on behalf of North Florida Framing***" for $400,000 and "an assignment of those *rights and claims belonging to [North Florida Framing] . . .* ***against all other parties***." (*Id.*, ¶3) (emphasis added). In exchange for the assignment of *every right North Florida Framing had in the case*, including, but not limited to the right to enforce its indemnity claim against Nava, Respondents covenanted "not to execute" against North Florida Framing. (*See id.* at ¶2). Respondents further agreed that they "*will* satisfy and *retire any outstanding judgment(s) . . . and shall file a Stipulation of Dismissal with Prejudice* in favor of [North Florida Framing]" after completing "their collection of funds *from non-settling parties* and carriers, to whatever extent they may collect funds."[7] (*Id.* at ¶4) (emphasis added). Finally,

[7] It is unclear whether this was intended to be read as "non-settling parties and [their] carriers" or "non-settling parties and [non-settling] carriers." While the former phrase is logically consistent, the latter is an error of law. Respondents did not file any direct claims against insurance companies in this action. Accordingly, if Respondents settle its claims *in this case* they are settled against that party, the liability for those claims is extinguished. It cannot then pursue those *same claims against non-party insurance carriers*. Thus, a non-settling carrier is a misnomer. Respondents consistently muddled this distinction because they were attempting to adjudicate the liability of absent non-parties in hopes of limiting their defenses in any subsequent proceedings.

under the proposed settlement, Respondents "consent[ed] to counsel for [North Florida Framing] . . . withdrawing from the case." (*Id.* at ¶5). Importantly, there was no mention of notifying Mt. Hawley that Respondents had been assigned all of North Florida Framing's rights in this case or that Respondents would move to relieve North Florida Framing's counsel and place them in default to pursue a $15,748,225.56 joint and several judgment.

IV. THE MORNING OF TRIAL: RELIEVING AN "ADVERSARY'S" COUNSEL AND MOVING FOR ITS DEFAULT

On the morning of the trial on May 9, 2011, Respondents' counsel represented to the court that it had "reached a settlement with North Florida Framing." (Jury Trial – Volume 1 Transcript, R. p. 112, lines 21–22). At this time, ***counsel for Respondents, not North Florida Framing nor its absent counsel***, presented to the court the Consent Order ***Relieving Counsel for North Florida Framing***, that purportedly allowed North Florida Framing's counsel to withdraw, *(Id.),* as the liability of North Florida Framing had been extinguished by their settlement. (E-mail Settlement, R. p. 107). Although no motion to relieve counsel had ever been filed by North Florida Framing or Respondents prior to this time, and although neither North Florida Framing nor its counsel was present at the trial, the Consent Order Relieving Counsel stated that "**On motion of North Florida Framing, Inc.** . . . it is hereby ordered that Barnwell Whaley Patterson and Helms, LLC and attorneys Randell C. Stoney, Jr. and Barbara J. Wagner are relieved as counsel for North Florida Framing, Inc." (Consent Order Relieving Counsel, R. p. 186). The Consent Order Relieving Counsel was *neither signed by North Florida Framing nor its counsel.* Instead, only Respondents' counsel signed the order and one of Respondents' attorneys, Justin Lucey, signed for North Florida Framing's counsel. (*Id.*).

Implicit in these actions is that Respondents were attempting to exercise North Florida Framing's rights in this case—rights that were purportedly subject to assignment in the proposed

e-mail settlement—by acting on behalf of their former adversary and motioning to relieve its counsel. The trial transcript shows that despite the fact that neither North Florida Framing nor its counsel were present to make the motion, and despite the fact that neither North Florida Framing nor its counsel actually signed the Consent Order Relieving Counsel, Judge Harrington signed the order on the morning of trial. (*Id.*).

Immediately after presenting the Consent Order Relieving Counsel to the court, Respondents' counsel, Attorney Justin Lucey ("Mr. Lucey"), asked the court to place North Florida Framing in default, reasoning that no one showed up to represent its interests, including its counsel which Respondents had just relieved:

> MR. LUCEY: With that, ma'am, North Florida Framing is actually still in the case but they have a covenant. They -- it is the call of the case. They're not here. We ask the Court to place them in default. We have one other defendant that's already in default and there's a default hearing set in front of Judge Scarborough in several weeks' time. We would ask that North Florida Framing be referred to that same default hearing for a final resolution.[8]

(Jury Trial – Volume 1 Transcript, R. p. 113, lines 12–20). In response, Professional Plastering, the only co-defendant left in the case, sought to prevent Respondents from placing North Florida Framing in default. Specifically, Professional Plastering's counsel, Attorneys J. J. Anderson ("Mr. Anderson") and Christy Mahon ("Ms. Mahon"),[9] objected on the grounds that Respondents should not be allowed to assert that North Florida Framing was still a part of the

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[8] Accordingly, it appears that once Respondents exercised North Florida Framing's assigned rights by motioning on its behalf to relieve its counsel, Respondents then stepped back into their own shoes and declined to exercise both North Florida Framing's assigned *right to defend itself* in this case and its assigned *right to pursue its indemnity claim against Nava—a claim against which Respondents had agreed to defend and indemnify Nava.*

[9] The trial transcript incorrectly spelled Ms. Mahon's name as "Christi Mann" or "Ms. Mann."

trial, or to place them in default, because Respondents had already reached a settlement with North Florida Framing:

> THE COURT: All right. Does anyone-- I'll be happy to hear -- have any position? Mr. Anderson?
>
> MR. ANDERSON: As I understand it, he's indicating that North Florida Framing is still part of this trial, although they have-- he's trying to place them in default; is that correct? We would --
>
> THE COURT: Mr. Lucey?
>
> MR. ANDERSON: Simply put, we would object to that. Either -- we believe that they -- ***if they've got a settlement, they've got a settlement.***

(*Id.*, R. pp. 113, line 21–p. 114, line 6) (emphasis added). Importantly, Professional Plastering also cautioned that Respondents were likely trying to manufacture a joint and several liability verdict against North Florida Framing:

> MS. MA[HO]N: Your Honor, I believe -- it comes down to this. The nuts and bolts of it is whether what -- what they're doing is, I assume, would be to ***keep them in as name only so that they can have a joint and several liability verdict***[.][10]

(*Id.*, R. p. 114, lines 16–20) (emphasis added). Respondents' counsel denied this allegation and assured the court that Respondents no longer had any interest against North Florida Framing and that its liability was fully, finally, and completely settled:

> MR. LUCEY: 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, which is the developer and the developer entities.
>
> MS. MA[HO]N: 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, we have no objection*** to that at all.
> . . .

[10] Professional Plastering was correct.

> MR. LUCEY: In the present context, ***North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them*** in this proceeding. And ***the two active carriers that were defending have agreed to pay us a substantial sum of money to settle the current liability***[.][11]

(*Id.*, R. p. 115, lines 13–21, p. 116, lines 7–13) (emphasis added). Notwithstanding the conflicting positions on the record, Judge Harrington granted Respondents' requests and signed the Consent Order Relieving Counsel (and every other order requested by Respondents, *see* Facts § II *supra*).

V. PROFESSIONAL PLASTERING'S TRIAL AND JUDGMENT

Having orchestrated North Florida Framing out of the case, Respondents proceeded to trial against the lone remaining defendant, Professional Plastering.[12] In Respondents' opening statements, Attorney Jeff Leath ("Mr. Leath") repeatedly represented in court that the only liability remaining as of the date of the trial was that of the stucco applicator, that every other party and their attendant liabilities had been satisfied, and that the settling parties had paid their "fair share":

> [W]hen we started this case it was much, much larger than just having this stucco issue. We had many other issues and many other defendants. They had roofing problems, they had framing problems, windows, and mechanical problems, and happily we've been able to resolve those problems with these other defendants. *And that's why they're not here right now.*[13]

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[11] Respondents have not argued that there was any "future" liability incurred in this case, nor could there have been any "future" liability. In other words, all of the liability was "current" and therefore all of the liability was settled.

[12] In Professional Plastering's later appeal, this court also noted that "[w]hile the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, *settled with Respondents. Thus, the trial focused solely on the exterior stucco installed by Professional and the resulting damage*. *See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 88, 754 S.E.2d 267, 269 (Ct. App. 2014).

[13] Admissions in an opening statement qualify as judicial admissions, and, in so admitting, a litigant may give up its right to argue inconsistently with its opening statement. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 678 (U.S. 2010) (quoting

> You'll hear that we have an overall estimate . . . for the total repairs to this project of about $15,718,000.
>
> The other parties have already resolved this for approximately *eight million, their part of it*. What's left, that has not been resolved by the entity largely, if not wholly, responsible for these stucco problems which is the bulk of the building envelope with these associated damages – is about 7.2 million dollars.
>
> . . .
>
> [T]he second question you will answer is how much will it cost to remedy those problems to which Professional Plastering contributed. And we believe it will be the difference between the estimate we will prove to you of the overall damages and what the other persons paid. *They paid their fair share.*

(Jury Trial – Volume 1 Transcript, R. p. 123, line 12–p. 125, line 23) (emphasis added). Later in the trial, Respondents had their expert, Robert Gallagher ("Mr. Gallagher"), testify that $8,761,443.00 of their $15.7 million dollar total damages estimate was exclusively caused by the defective stucco work of Professional Plastering:

> Q. Mr. Gallagher, did I ask you to go through your estimate and break out the items, the cost items that would ***be allocable to just the stucco repair alone -- not these other items that were included in the $15.7 Million dollars, but just the stucco issue***? Did I ask you to do that?
> A. Yes, sir.
>
> . . .
>
> Q. So ***what is your total number for just stucco-related repairs***, putting all those elements together that are necessary?
> A. ***$8,761,443 dollars***.

Oscanyan v. Arms Co., 103 U.S. 261, 263 (1881)) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel [in its opening statement] is as plain as its power to act upon the evidence produced."); *Id.* at 676 (quoting *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905) ("Litigants, we have long recognized, '[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established.'"); SCRCP 41(b)-(c) (involuntary dismissal for plaintiff's failure to show right to relief on claim against a party).

(Portion of Jury Trial of May 11–13, 2011, R. p. 126, line 23–p. 127, line 5, p. 133, lines 15–18) (emphasis added). In its closing statements, Respondents' counsel, Justin Lucey, reiterated these positions:

> Everybody did wrong that was in the suit." The only difference is – huge difference, huge difference – the only difference is all the other parties have stepped up to the plate and taken responsibility for what they did wrong.
>
> . . .
>
> As I said, there's only one party left in this case. Eight million has been paid by those other participants that they want to blame for some of the problems. *And we're good with that, that eight million has been paid.* ***And we're not going to ask you for it again.***
>
> . . .
>
> We have an estimate in evidence, Plaintiff's Exhibit Number 15, the ProCon estimate, $15.7 Million. *This is an older estimate. It applied to everybody who was in the case.* You have frankly been told repeatedly this week that the plaintiffs have been paid $8 Million dollars.
>
> . . .
>
> Just to make sure that everybody was correct about the numbers, Mr. Gallagher also produced what's been admitted into evidence as Plaintiff's Exhibit 14. It itemized the ***stucco-related-only damages in this case***. It totals $8.7 Million, a million dollars more than what we have remaining on the original estimate.

(*Id.*, R. p. 136, lines 1–6 & 14–20, p. 147, line 8–p. 148, line 14, p. 148, lines 20–22) (emphasis added). Finally, Respondents' counsel, Mr. Leath, offered his last remarks, confirming these facts:

> Now, if you'll recall, the analysis done by Mr. Gallagher was that *the stucco itself, just that portion of it, repair would cost $8.7 Million.* But we're not asking for that. We're asking for less than that, and Mr. Lucey explained that.
>
> And why is that? *Because it wouldn't be fair and wouldn't be appropriate for us to ask you for more than the total repair on these buildings, which is $15,778.00 as you'll see in Mr. Gallagher's estimate.* And, yes, some of the other folks have paid some part of Professional Plastering's part.

(*Id.*, R. p. 185, lines 10–22) (emphasis added). On May 13, 2011, after a two-day jury trial, Respondents obtained a $7,723,225.00 "stucco-only" judgment against Professional Plastering. However, Professional Plastering would later appeal this judgment.

VI. THE CLASS ACTION SETTLEMENT

On May 19, 2011, six days after receiving its favorable verdict against Professional Plastering, Respondents filed a motion and proposed order asking the trial court to preliminarily approve its settlement with North Florida Framing and other ***settled*** co-defendants. Respondents proposed order, *which they drafted*, states that "[o]n Monday, May 9, 2011, counsel indicated [to the Court] that Plaintiffs ha[d] reached a ***full, final and complete settlement*** with the following Defendants: . . . ***North Florida Framing, Inc.*** . . . (hereinafter referred to as the 'Settling Defendants'"). (Proposed Order Preliminarily Approving Partial Class Action Settlement, R. pp. 194–95) (emphasis added). The proposed order also stated that the settlement "***ends the Plaintiff's claims against the Settling Defendants***." (*Id.*, R. p. 195) (emphasis added). The court granted Respondents' motion and signed their proposed order preliminarily approving the settlement on June 3, 2011. Notice was sent to all class members.

After no class members objected, the court entered a final order approving the settlement on June 10, 2011. (Final Order Approving Class Action Partial Settlement, R. p. 207). This final order held that "Settling Defendants are . . . ***North Florida Framing, Inc.***" and that "[a]s a result of lengthy, arms-length negotiations, Plaintiffs have reached a ***full, final and complete settlement*** *with the Settling Defendants* ***in the amount of One Million Two Hundred Eighty-Seven Thousand Five Hundred and No/100 Dollars*** ($1,287,500.00)." (*Id.*, R. p. 208, n.1, p. 209) (emphasis added). Following payment of the $1,287,500 in settlement proceeds (which was paid) by the Settling Defendants, the order directed Respondents to "execute a general release(s)

as to the Settling Defendants, and/or settlement agreement(s) on behalf of the Class and an order(s) or stipulation(s) **ending this case and all claims *with prejudice against the Settling Defendants***." (*Id.*, R. p. 213–14, ¶6) (emphasis added). In other words, the class action settlement ended the case against North Florida Framing with prejudice.

VII. A COVENANT NOT TO EXECUTE.

Although Respondents and North Florida Framing had already entered into a Court-approved dismissal with prejudice, *Respondents* then drafted and signed a "Covenant Not to Execute" on July 7, 2011. (Covenant Not to Execute, R. p. 218). The agreement stated that:

> WHEREAS, the [Respondents] have settled ***all claims against NFF's carriers***[14]. . . .
>
> . . .[Respondents] do covenant not to execute on NFF [(North Florida Framing)]'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.
>
> Upon the completion of all collection activity . . . Plaintiffs *shall dismiss NFF from this suit with prejudice and satisfy any outstanding judgments against NFF and shall release and forever discharge NFF*, their officers, directors, employees, agents, heirs, personal representatives, successors and assigns, *and their insurers* and indemnitors, or and from any and all claims, demands, damages, actions, causes of action, or suits of law or in equity, of whatsoever kind or nature[.]"

(*Id.*, R. pp. 218–19) (emphasis added). It is unclear whether North Florida Framing or the court reviewed or signed this agreement, but in any event, it is void on several grounds.

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[14] Respondents never made any claims against North Florida Framing's carriers in this case, their claims were filed against North Florida Framing. This language indicates a common theme: that Respondents were attempting to litigate the liability of insurers instead of the liability relevant to their claims in this case. This is impossible "[s]ince the rights and liabilities of persons not parties cannot be adjudicated." 49 C.J.S. Judgments § 34; *See Branham v. Ford Motor Co.*, 390 S.C. 203, 238–39, 701 S.E.2d 5, 23–24 (2010) (reversing award of punitive damages award where it was based on defendant's conduct against non-parties because they were "strangers to the litigation."); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 350, 353 (2007) (same).

VIII. THE ORDER OR DEFAULT AND THE DEFAULT JUDGMENT

On July 22, 2011, Professional Plastering filed an appeal of its stucco judgment alleging six reversible errors. Only twelve days after Professional Plastering filed its appeal, but three months after representing to the court that it had no interest against North Florida Framing, Respondents—apparently *ex parte*—presented the court with an Order of Default against North Florida Framing. (Order of Default, R. p. 233). No notice was given to North Florida Framing or Mt. Hawley of this *ex parte* correspondence. Nonetheless, the order was signed by the court and subsequently filed on August 9, 2011. (*Id.*).

Almost two years later, with no notice to Mt. Hawley, and defective notice as to North Florida Framing, a damages hearing was held on May 14, 2013 in which Respondents' counsel asked the Master in Equity for a $15,748,225.56 joint and several judgment against North Florida Framing. Respondents failed to disclose several material facts to the Master in Equity, including that: (1) they had already settled with North Florida Framing; (2) that they had motioned before the trial court to relieve North Florida Framing's counsel; (3) that they had already represented to the trial court that they had no interest against North Florida Framing and that they would not be seeking a joint and several verdict in a default proceeding; (4) that they asked the trial court to place their adversary in default immediately after making a motion on its behalf to relieve its counsel; (5) that they had already received approximately $8,025,000.00 in settlements; (6) that even though Respondents had already had the same expert testify under oath that at least $8,761,443.00 of the $15,748,225.56 was caused exclusively by Professional Plastering's stucco work, the expert's report that they provided to the Master was the initial report covering *all the damages attributable to every defendant in the case.*

Relying on the representations of Respondents' counsel, the Master in Equity issued a $15,748,225.56 joint and several default judgment against North Florida Framing. (Order Granting Default Judgment, R. p. 242).

IX. PROFESSIONAL PLASTERING'S SUCCESSFUL APPEAL

On January 8, 2014, this Court held that Judge Harrington thrice abused her discretion. *See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. at 88, 754 S.E.2d at 269. Accordingly, this Court reversed and remanded the case against Professional Plastering for a new trial. *Id.* A request for rehearing on this Court's opinion was denied on February 20, 2014, and the Supreme Court denied certiorari on August 21, 2014. *Id.* Respondents eventually reached a preliminary settlement agreement with Professional Plastering pursuant to a March 26, 2015 mediation between the parties. (Notice of Proposed Settlement with Professional Plastering, R. p, 280). The settlement they reached was for $92,500.00; approximately $7,630,725.00 less than their initial verdict. (*Id.*).

X. THE JUDGMENT CREDITOR SUIT, MOTIONS TO INTERVENE AND FOR RELIEF FROM JUDGMENTS, AND MT. HAWLEY'S APPEAL

On May 26, 2015, more than two years after procuring a default judgment against North Florida Framing, and only two months after settling with Professional Plastering for $92,500.00, Respondents decided it was time to file a judgment creditor suit against Mt. Hawley. (*See* Complaint in *Teseniar v. Mt. Hawley Insurance Co.*, Case No. 2015-CP-10-2994 (S.C. Comm. Pleas), R. p. 249). Prior to being served with the complaint, Mt. Hawley had no notice of a default order, default hearing, or default judgment against North Florida Framing. With limited time to prepare a strategy for protecting its interests in this complex case, on July 28, 2015, while final court approval of Respondents' settlement with Professional Plastering was still pending, Mt.

Hawley quickly moved to intervene *in this case, which was still pending as an active case on the Charleston County docket.*

A hearing on Mt. Hawley's motion was scheduled for January 12, 2016 in front of Judge Harrington. On January 12, the court commenced the hearing and then rescheduled it for another day. (*See* January 12 Motions Hearing Transcript, R. p. 5). Mt. Hawley argued the remainder of its motion on January 14, 2016. (*See* January 14 Motions Hearing Transcript, R. p. 15). On January 19, 2016, a Form 4 judgment denying Mt. Hawley's motions was filed. (Order Denying Intervention and Relief, R. p. 4). This appeal timely followed.

ARGUMENTS

I. STANDARD OF REVIEW

In this appeal, Mt. Hawley seeks reversal of the trial court's order denying its motion to intervene under SCRCP 24(a)(2) & (b)(2) and its motion for relief from judgments under SCRCP 60(b)(4) & (5), both heard and denied by the trial court. Reversal is necessary to ensure that Respondents cannot assert that Mt. Hawley is precluded from litigating the validity of the default judgment obtained in this case. In the suit against Mt. Hawley, Respondents have sued as a judgment creditor, claiming that Mt. Hawley is directly liable for the void judgment. Respondents claim Mt. Hawley's interests have been adjudicated in this current action in which it was not a party.

Appellants ask this Court to review the lower court's ruling denying its SCRCP 60(b)(4) & (5) motions; as to such motions, this Court has not articulated a standard of review, although most every judicial circuit, including the Fourth Circuit, uses a *de novo* review of decisions on the federal parallel of Fed. R. Civ. P. 60(b)(4).[15] *See Wendt v. Leonard*, 431 F.3d 410, 412 (4th

[15] This Court should adopt such a standard.

Cir. 2005); *Cent. Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003) ("[W]e know of no Circuit that defers to the district court on a Rule 60(b)(4) ruling."); *see also Vinten v. Jeantot Marine Alliances, S.A.*, 191 F. Supp. 2d 642, 649–50 & nn.12–13 (D.S.C. 2002) (collecting cases). The principle behind this is sound: "a deferential standard of review is not appropriate because if the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001). Moreover, when a ruling indicates no discretion was exercised, an error of law has occurred and reversal is required. *Roesler v. Roesler*, 396 S.C. 100, 110, 719 S.E.2d 275, 281 (Ct. App. 2011). As this Court is being asked to set aside a judgment for, inter alia, want of jurisdiction, it is an abuse of discretion[16] to fail to grant intervention so as to set aside a void judgment.

II. THIS CASE BELOW WAS ACTIVE ON THE CHARLESTON COUNTY DOCKET AND HAD NOT ENDED.

Despite Respondents previous assertions to the contrary, the case below continued until November 6, 2015, after Mt. Hawley's motions to intervene and for relief from judgments:

(a) On May 13, 2015, the Court granted APS Enterprises' Motion to Reconsider and denied C&N Stucco & Plastering's Motion for Summary Judgment.

(b) On June 24, 2015, Respondents themselves filed a Notice of and Motion for Preliminary Approval of a Settlement of a Class Action and also requested a hearing on this motion.

[16] However, the majority of federal authorities have determined that a denial of a motion to intervene *as of right* on any ground besides timeliness must be reviewed non-deferentially for legal correctness. *See, e.g.*, *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298 (11th Cir. 2008); *Haspel & Davis Milling & Planting Co. v. Bd. Of Levee Comm'rs*, 493 F.3d 570 (5th Cir. 2007); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), *as amended* (May 13, 2003); *South Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783 (8th Cir. 2003). This Court should hold this is the law in South Carolina.

(c) On June 25, 2015, the Court issued an Order Preliminarily Approving Class Action Partial Settlement, Attorneys' Fees, Approving Settlement Notice Program, and *Setting Final Hearing*.

(d) On July 21, 2015, a returned Notice of Order Preliminarily Approving Class Action Partial Settlement for Robert David Waltz was filed with the Court.

(e) On July 27, 2015, Respondents filed the Affidavit of J. Ashley Garrett.

(f) ***On July 28, 2015, Mt. Hawley filed its Motion to Intervene & For Relief from Judgments.***

(g) On July 29, 2015, the Settlement Agreement between Respondents, Professional Plastering, and Professional Plastering's insurance carrier, National Fire and Marine Insurance Company, was filed with the Court.

(h) On August 4, 2015, the Court issued the Final Order Approving Class Action Settlement.

(i) On October 19, 2015, a returned Notice of Final Order Approving Class Action Settlement for Robert David Waltz was filed with the Court.

(j) On November 6, 2015, Respondents and Professional Plastering filed a Stipulation of Dismissal with Prejudice as to Professional Plastering and Stucco, Inc.

(Docket for 2008CP1000049, R. p. 285) (emphasis added). By reference to the docket, it is apparent from Respondents' own activity that this case continued, not even considering Mt. Hawley's motions, through November 6, 2015, when Professional Plastering was dismissed from the case. (*Id.*). Therefore, the entire case had not ended on the date Mt. Hawley filed its motions. Furthermore, because this is a case involving multiple claims against multiple parties, an order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), SCRCP. Pursuant to the plain language of the South Carolina Rules of Civil Procedure, this case was not terminated prior to

Mt. Hawley's motion, and the orders Mt. Hawley seeks to void are subject to revision even *as to North Florida Framing*, *see, e.g., Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), *reversed on other grounds* (allowing a motion to intervene in an appeal), and would remain subject to revision until the lower court denied Mt. Hawley's motion on January 19, 2016.

Further, whether Mt. Hawley's motions to intervene and for relief from judgments were timely must be analyzed in the context of the time permitted to *set aside the judgment* and not for North Florida Framing to appeal a judgment.[17]

III. BECAUSE THE DEFAULT JUDGMENTS WERE ENTERED AGAINST A PARTY THAT HAD BEEN COMPLETELY SETTLED OUT OF THE CASE AND BECAUSE THE JUDGMENTS WERE ENTERED BY JUDGES WITHOUT PROPER JURISDICTION, THE JUDGMENTS WERE VOID AB INITIO, AND THE TRIAL COURT ERRED IN DENYING MT. HAWLEY'S MOTION FOR RELIEF FROM THESE JUDGMENTS AND ITS MOTION TO INTERVENE TO ACCOMPLISH THAT RELIEF.

A. Mt. Hawley's Right to Intervene in This Case Is Based Upon Its Interest in Setting Aside a Void Judgment Under Its Contemporaneous SCRCP 60(b)(4) & (5) Motions.

As set forth in § IV below, one of—and likely the most important of—the elements of an intervention as of right is that the intervenor claim an interest in the subject matter of the litigation. Without first understanding the interest which Mt. Hawley is seeking to protect, it is unlikely that this Court could fully analyze the validity of Mt. Hawley's motion to intervene. Because Mt. Hawley's interest—i.e., setting aside a void judgment—is best understood in the context of its motions for relief under SCRCP 60(b)(4) & (5), Mt. Hawley presents the SCRCP 60(b) issues first. Accordingly, Mt. Hawley will first show how the lower court erred in denying

[17] North Florida Framing was relieved of liability and likely could not appeal as it is not an "aggrieved party." Rule 201(b), SCACR. ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

Mt. Hawley's motions for relief under SCRCP 60(b)(4) & (5) and in failing to find that the judgments were in fact void.

B. SCRCP 60(b)(4) is the Appropriate Means of Attacking a Void Judgment.

As an initial matter, "[t]he proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP." *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985); *see also Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) (insurer successfully moving under SCRCP 60(b) to set aside default judgment against its insured). SCRCP 60(b)(4) provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." "A void judgment [under SCRCP 60(b)(4)] is one that, from its inception, is a complete nullity and is without legal effect." *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (citation omitted). Void judgments include those "from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *see also Ex parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 663 (1993) (finding that a trial judge was divested of subject matter jurisdiction such that it could not enter any valid judgment after an automatic stay had been initiated upon the filing of a bankruptcy petition); *Chapliski v. Churchill Coal Corp.*, 503 A.2d 1 (Pa. Super. Ct. 1985) (order entered after debtor files bankruptcy petition is a legal nullity *even though based on pre-petition settlement*). Furthermore, "[a] valid judgment cannot be rendered where there is a want of necessary or indispensable parties, and an adjudication made without joining such a party to the litigation is null and void." 49 C.J.S. Judgments § 33.

This case also concerns issues such as those recently decided by the South Carolina Supreme Court in *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 36, 775 S.E.2d 37, 38 (2015), and involves a "potential for collusion and inflated consent judgments [which] undermines the very nature of the jury system." Ultimately, Rule 60 "need not necessarily be read as depriving the court of the power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than a motion." *United States v. Jacobs*, 298 F.2d 469, 472 (4th Cir. 1961). Like smell infuses taste, the facts and conduct in this case should infuse the result; and here, it is quite a bitter result.

C. Mt. Hawley's Motion Was Made Within a Reasonable Time After Receiving Notice of the Default Judgment Via Respondents' Judgment Creditor Action.

Motions to intervene and to set aside a judgment often occur after the procedural time limit for a party to appeal that judgment.[18] *See generally McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) (intervention granted to attack, via SCRCP 60(b)(1) & (3), a default judgment entered approximately three and a half months prior to the motion); *see also Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991) ("[T]he fact that a motion to intervene is filed after judgment may prove relevant . . . [b]ut the applicant need not plead extraordinary . . . circumstances to show that the intervention motion itself was timely."); *Redmond v. Devine*, 504 N.E.2d 138, 143 (Ill. App. Ct. 1987) (granting motion to intervene twenty months after a default judgment, where attacking the judgment as void was necessary to protect the rights of the intervenor). This time limit is more flexible because it is fact and circumstance specific, and the purpose of a SCRCP 60(b)(4)

[18] Even if it were true that the case had ended, any judgment in the case can be challenged in that case pursuant to Rule 60 SCRCP. Respondents err not just on the ground that the case had ended, as it had not, but on the mistaken ground that if ended, a Rule 60 motion would always be untimely.

motion is to set aside a void, inequitable, fraudulent, or otherwise defective judgment that never had any legal effect to begin with.

Accordingly, a SCRCP 60(b) motion must only be made, at most, within a reasonable time,[19] unless it is made for the reasons under 60(b)(1)-(3), in which case it cannot be made "more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP. Although more than one year has passed since the judgment, Mt. Hawley is not pursuing relief from the default judgment under the reasons enumerated under 60(b)(1)–(3). Mt. Hawley's motion to intervene is for the purpose of setting aside a judgment that is void under 60(b)(4) & (5). Therefore, it must only be made within a reasonable time. Generally, the facts of each case determine what is a reasonable time for Rule 60 motions, but leniency may be appropriate when a judgment is prospective in nature. *See United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (five year delay reasonable under Rule 60); *Clarke v. Burkle*, 570 F.2d 824 (8th Cir. 1978) (six-year delay not unreasonable in bringing Rule 60 motion); *see also Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 610 (5th Cir. 1963) ("While this award of damages sounds in the past, rather than the future, no judgment has yet been paid, and in practical effect

[19] This Court noted, however, that "[t]here [wa]s inconsistency among the decisions of South Carolina appellate courts as to whether the 'reasonable time' requirement applies to Rule 60(b)(4) motions," and while deciding to follow a reasonable time constraint, also noted that requiring a reasonable time is "what can best be described as the minority view" across other state and federal jurisdictions. *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 642, 643 n.1, 478 S.E.2d 868, 870, 870 n.1 (Ct. App. 1996). The majority view is that "a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception." *Id.* This Court should so hold and adopt this as law. This majority view is consistent with the majority federal principles mandating a *de novo* review of a denial of a 60(b)(4) motion. *See, e.g., Jalapeno Prop. Mgmt.,* LLC, 265 F.3d at 515. Regardless, Mt. Hawley made its motion within a reasonable time. This Court should adopt the majority view that there is no time limit when attacking a void judgment.

we are dealing with the prospective application of the judgment, not the unscrambling of the past.").

Because Mt. Hawley's SCRCP 60(b)(4) motion was made within a reasonable time, the court erred in failing to find the judgment void for the reasons enumerated in Subsections D-J below.

D. North Florida Framing Was Dismissed with Prejudice by the Class Action Settlement Before the Default Judgment Was Entered.

Mt. Hawley sought to have the default judgment lifted as the Court had, prior to entering default on August 9, 2011, and prior to the default judgment on May 14, 2013, dismissed North Florida Framing with prejudice on June 10, 2011. (Final Order Approving Class Action Partial Settlement, R. pp. 213–14, ¶6). Mt. Hawley contended below that there was no case or controversy and thus no subject matter jurisdiction when the default judgment was entered. Respondents at no time ever sought to lift the dismissal with prejudice.[20] It is not disputed by Respondents that North Florida Framing had no liability after May 9, 2011. Counsel for Respondents, Mr. Lucey, stated this on the record: "In the present context, North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them in this proceeding." (Jury Trial – Volume 1 Transcript, R. p. 116, lines 7–10).

When the Order of Default was signed on August 9, 2011, Judge Harrington had no defaulting party before her as this party was dismissed with prejudice by her final settlement order on June 10, 2011—two months earlier. If an order ending a case is entered, then that case is ended, there is no further controversy, and the judge cannot enter an order barred by a standing order in place. *See Green v. Green*, 327 S.C. 577, 491 S.E.2d 260 (Ct. App. 1997) (finding trial

[20] As this dismissal with prejudice involved distribution of funds to and from multiple parties, including class members in a class action, the order likely cannot be altered.

judge was without authority to issue a "final order" modifying the judge's previously issued and standing order approving a settlement agreement, where the settlement agreement stated that it was "a complete and final settlement of all claims" between the parties); *Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986) (explaining that while a court may correct errors or mistakes in its own process, the trial judge cannot change the scope of a settlement order *ex parte*).

"A dismissal with prejudice acts as an adjudication on the merits and therefore precludes subsequent litigation just as if the action had been tried to a final adjudication." *Laughon v. O'Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004) (citing *Jones v. City of Folly Beach*, 326 S.C. 360, 366, 483 S.E.2d 770, 773 (Ct. App. 1997)); *see also Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*, 280 Ga. App. 207, 211, 633 S.E.2d 614, 618 (2006) ("[N]o judgment may be obtained if the defendant has been dismissed."); *Howell v. TS Commc'ns, Inc.*, 209 S.W.3d 921, 924-25 (Tex. App. 2006) (where plaintiff has dismissed "the defendant whose conduct is directly at issue, [] a judgment cannot be entered against him."). The case as to North Florida Framing ended on June 10, 2011 when the lower court dismissed North Florida Framing with prejudice or when North Florida Framing had no liability. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). As North Florida Framing was dismissed or had no liability, the controversy ended as to North Florida Framing. Accordingly, Judge Harrington was without jurisdiction to enter an order of default, and Judge Scarborough was without jurisdiction to enter a judgment of default, and therefore these judgments have no practical legal effect.

E. While The Class Action Settlement Ended Respondents' Claims Against North Florida Framing in and of Itself, the Initial Proposed Settlement and the Covenant Not to Execute Would Have Also Ended the Case Against North Florida Framing Before the Default Judgment Was Entered.

The issue presented here is not whether a covenant released a joint tortfeasor, but whether the agreement ended the liability of the actual party to the covenant. The covenant would have ended North Florida Framing's liability and no further judicial proceeding against it could have moved forward. In the entire line of cases involving joint tortfeasors, no case even raises the notion that the party to the covenant remains liable. While Respondents have disguised their claims, releases, and arguments as if they were asserted against insurers, the insurers are not parties to this case and are not joint tortfeasors. *See Cobb v. Benjamin*, 325 S.C. 573, 579, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding that a liability carrier was not a joint tortfeasor and was not directly liable for its insured's damages).

Under a liability policy, "an insurance company is only obligated to pay 'those sums which the insured becomes legally obligated to pay.'" *Id.* at 579, 482 S.E.2d at 592 (quoting *Smalls v. Blackmon*, 269 S.C. 614, 617, 239 S.E.2d 640, 641 (1977)). A liability insurance policy is a contract of indemnity and the carrier is placed in the same position as its insured.[21] *Id.* As in *Cobb*, when Respondents removed the obligation to pay a judgment from North Florida Framing, they also relieved Mt. Hawley of its liability to pay under North Florida's policy. *See*

[21] Respondents should be familiar with the concept of indemnity, as they took control of North Florida Framing's indemnity claim against Nava and forfeited it by relieving its counsel and seeking a default. Of course, the reason behind this was that Respondents had already settled with Nava despite not having any claims against them, and agreed to defend and indemnify Nava against claims made by North Florida Framing. Once they took control of North Florida Framing's rights against the other parties in this case, they then forfeited its claim for full indemnity against Nava by putting North Florida Framing in default.

id. at 578-79, 482 S.E.2d at 591-92; *Howell*, 209 S.W.3d at 925 ("In the absence of any possibility of a binding finding of liability, proving up [ ] damages would be meaningless.").

F. Assuming, *Arguendo*, that the Subsequent Covenant Not to Execute is Given Effect, so as to Trump a Class Action Settlement, and Assuming Further that it Could Somehow Be Interpreted as to Allow a Plaintiff to Relieve its Defendant's Counsel and Shepard That Defendant into a Joint and Several Default Judgment, the Agreement Itself Would Be Invalid.

There is no judgment that might be obtained to use against a carrier in this case as such judgment would be invalid for this very purpose. Although South Carolina case law has not fully addressed this issue, the Fourth Circuit Court of Appeals has interpreted South Carolina law in similar situations. Those cases hold that a party should be prevented from seeking proceeds from a liability carrier for amounts that the insured never intends to pay out of its own pockets. *See Stonehenge Eng'g Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 306 (4th Cir. 2000).. "[A] settlement agreement between an insured and an injured party in which the insurer remains liable while the insured is insulated from any personal liability is presumptively unreasonable and therefore invalid." *St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519, 521 (D.S.C. 2006); *see also Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (recognizing that an individual released from liability will have no incentive to negotiate favorable terms for another party who may be potentially affected by a settlement).

If the end result is that the insured will never have to pay the judgment pursuant to an agreement with the injured party, but that the insurer becomes and remains liable on that judgment, the result is unreasonable and the judgment is a nullity. If the end result is a nullity, the means to that end must fail.

G. Even if The Covenant Not to Execute Was Given Respondents' Post-Settlement Interpretations, the Default Order, the Default Judgment, and the Denial of Mt. Hawley's Motions Were Entered by Judges Who Did Not Have the Proper Jurisdiction to Enter Those Judgments in This Case.

1. Judge Harrington Did Not Have Jurisdiction to Enter a Default Order, to Transfer Any Part of This Case, or to Hear and Deny Mt. Hawley's Motions.

Under the South Carolina Constitution, the grant of power to assign circuit court judges within the unified judicial system and jurisdiction therewith belongs exclusively to the Chief Justice of the Supreme Court of South Carolina. *See* S.C. Const. art. V, § 4 ("The Chief Justice . . . shall have the power to assign any judge to sit in any court within the unified judicial system."). As such, this power may only be divested through Administrative Orders or Rules issued by the Chief Justice. *See State ex rel. Riley v. Martin*, 274 S.C. 106, 112, 262 S.E.2d 404, 407 (1980) (affirming the Legislature's general authority to create the South Carolina Court of Appeals, but striking certain portions of the Act attempting to divest the power to assign circuit court judges). Accordingly, unless the power to assign is specifically divested to another by an Administrative Order of the Chief Justice of the Supreme Court, any act of assigning exclusive jurisdiction to a judge by someone other the Chief Justice is unconstitutional and void. As is relevant to this case, the assignment of judges and the grant of exclusive jurisdiction in complex cases is governed by the July 26, 2006 Administrative Order of the Chief Justice of the Supreme Court of South Carolina ("Administrative Order for Complex Cases"):

> IT IS ORDERED that the following procedures shall be followed in the management and disposition of all complex common pleas cases now pending or hereafter filed in each circuit: . . . [T]he Chief Administrative Judge can designate a case as complex . . . and assign the case to a judge assigned to the circuit . . . who will be given **exclusive jurisdiction to handle that case from beginning to end.** . . . The Chief Administrative Judge will assign the case to a judge assigned to the circuit . . . and **all pretrial motions and other matters pertaining to that case will be under the exclusive**

> **jurisdiction of the judge assigned to the case**. When appropriate, the case should be given a date certain for trial with the trial of the case also handled by the assigned judge.

available at http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=339 (emphasis added). The policy behind this is rooted in the desirability of having one judge handle all the issues in a complex case. The background and the facts of complex cases can become a procedural mess of multiple tortfeasors and multiple settlements.

In this case, Judge Dennis assigned exclusive jurisdiction to Judge Young, who then purported to assign the trial to Judge Harrington. (*See* Complex Case Designation Order, R. p. 92; Trial Assignment Order, R. p. 94). Presumably, Judge Harrington was exercising jurisdiction based on this November 18, 2010 order from Judge Young assigning her ***the trial*** of the case. (*See* Trial Assignment Order, R. p. 94). All of the jurisdictional orders in this case themselves distinguish between the assignment of jurisdiction for trial and the grant of exclusive jurisdiction for all other matters. (*See* Complex Case Designation Order, R. p. 92; Trial Assignment Order, R. p. 94). Notwithstanding this fact, in any event, the Administrative Order for Complex Cases, the South Carolina Constitution, and *State ex rel. Riley v. Martin* are controlling law. While it appears that Judge Young lacked authority to delegate any portion of this case because he was not the Chief Judge for Administrative Purposes, certainly Judge Harrington's jurisdiction, if any, was limited to conducting the date certain trial. Nor was Judge Harrington the Chief Administrative Judge or the judge with exclusive jurisdiction over this "complex case." Having acquired jurisdiction for a limited purpose, she could not confer further jurisdiction upon herself to enter an order three months after trial.[22] Also relevant to this case are Respondents' efforts to

[22] Mt. Hawley Objected to Judge Harrington hearing the motion to intervene and for relief from judgments for the same reason that Judge Harrington could not have entered the default against North Florida Framing. (*See* Transcript of Hearing, R. p. 20).

have Judge Harrington hear every aspect of this case, up to and including Mt. Hawley's motion to intervene and for relief from judgments, by inserting a provision stating that she retains jurisdiction. (*See e.g.*, Final Order Approving Class Action Partial Settlement, R. p. 214, ¶6(d) ("This Court shall retain jurisdiction of this matter until it is concluded."); Order Preliminarily Approving Class Action Partial Settlement, R. p. 199, ¶6 (same)). These instruments could not confer jurisdiction because "[s]ubject matter jurisdiction may not be waived *even with consent of the parties*." *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (citing *Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943)). Therefore, the Order of Default was entered without jurisdiction.

2. The Master in Equity Did Not Have Jurisdiction to Enter the Default Judgment.

Unlike Judge Young, neither Judge Harrington nor Judge Scarborough had exclusive jurisdiction over this case.[23] Moreover, Judge Harrington did not have the authority to assign the case for a damages trial, as only Judge Dennis had that authority. Accordingly, just as Judge Harrington did not have jurisdiction to enter the default, she did not have jurisdiction to transfer the case to the Master-in-Equity, Judge Scarborough. As such, Judge Harrington never had the power to assign the default hearing to Judge Scarborough because she never had jurisdiction to assign any part of this case. Because Judge Harrington lacked jurisdiction to enter and assign the default hearing to Judge Scarborough, Judge Scarborough likewise had no jurisdiction to enter any judgment. Even though North Florida Framing was purportedly in default, "[s]ubject matter

[23] Furthermore, neither Judge Harrington nor Judge Scarborough was the Chief Judge for Administrative Purposes for Common Pleas or the Chief Justice of the Supreme Court of South Carolina.

jurisdiction may not be waived *even with consent of the parties*. *Id.*[24] Therefore, the default judgment is void as it was entered without subject matter jurisdiction.

H. Notwithstanding the Arguments Above, Respondents Were Also Judicially Estopped from Seeking an Adverse Judgment Against North Florida Framing.

1. Because Respondents Represented to the Court That They No Longer Had Any Interest Against North Florida Framing in This Case and That They Had Completely and Finally Settled with It, They Were Judicially Estopped from Thereafter Changing These Pre-Trial Positions to Obtain a Multi-Million Dollar Judgment Against North Florida Framing.

Litigants must approach the judicial process in a professional manner for it to function properly. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–52, 489 S.E.2d 472, 477 (1997). "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine is intended to protect the integrity of the judicial process by precluding litigants from misrepresenting facts to gain an unfair advantage. *Carrigg v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 771 (Ct. App. 2001). If a litigant has formally asserted one version of the facts, he cannot change the very same facts in a later proceeding simply because the first version no longer suits his interests. *Id.* The truth-seeking function of the judicial system "is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by *newly-discovered* evidence." *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477 (emphasis added). Accordingly, judicial estoppel penalizes litigants "who take the truth-seeking function of the

[24] The judgment was also void because service of process was not proper. There was no valid service of process on North Florida Framing because the certified letter was returned. There was no service on Mt. Hawley. To the extent Respondents claim that Mt. Hawley is solely liable for this judgment, the judgment is also void for failure to serve notice of the default motion or the damages hearing on the proper party.

system lightly." *Id.* There are generally five elements that must be satisfied for judicial estoppel to apply:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Wright v. Craft, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct. App. 2006).

In this case, Respondents' first took a position that they had no interest against North Florida Framing:

> MR. LUCEY: In the present context, *North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them* in this proceeding. And the two active carriers that were defending have agreed to pay us a substantial sum of money to settle the current liability and get their attorneys out of the cases.

(Jury Trial – Volume 1 Transcript, R. p. 114, lines 16–20) (emphasis added). Furthermore, when questioned by Professional Plastering about their intentions, and whether they were actually trying to orchestrate a joint and several judgment, Respondents specifically denied this. (*Id.*, R. p. 115, line 9–p. 116, line 14). However, despite their representations, Respondents then did *exactly* that, and pursued a $15,748,225.56 joint and several judgment against North Florida Framing at the default hearing before the Honorable Mikell R. Scarborough:

> MS. HIGGISON: For North Florida Framing they were engaged in framing the buildings. . . . And Mr. Gallagher's repair estimate for all of the damages at Twelve Oaks is 15,748,225.56.
>
> THE COURT: 15,748,225.56?
>
> MS. HIGGISON: Yes, sir.

THE COURT: Okay. Damages sought.

. . .

THE COURT: All right. I'm assuming, is that joint and several?

MS. HIGGISON: Yes, Your Honor.

(Default Hearing Transcript R. p. 237, line 2–p. 238, line 20).

Judicial estoppel was used to prevent litigants from making similar arguments in *Hayne*.[25] On one hand, Respondents claimed that they had no interest against North Florida Framing. On the other hand, they claimed to have a $15,748,225.56 interest against North Florida Framing. Therefore, Appellees have taken two inconsistent positions. Furthermore, the positions were taken in the same case. Respondents' first position in its motion to place North Florida Framing in default was asserted before trial against Professional Plastering. Thereafter, Respondents attempted to change their position in the default hearing in front of Judge Scarborough. Unlike *Hayne*, where the proceedings were related but not the part of the same case, Respondents' positions were taken in different phases of *the exact same case*. Therefore, like *Hayne*, but perhaps more appropriately, these positions must be considered as taken in the same or related proceedings.

Respondents were also successful. Their intention was to relieve North Florida Framing's counsel and to put it in default to obtain a judgment for millions of dollars. They represented to the court that they had no interest against North Florida Framing and that they

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[25] In *Hayne*, a creditor commenced a foreclosure action on a piece of real property that an individual, Bailey, claimed to own by virtue of a resulting trust. *Id.* at 248, 489 S.E.2d at 475. However, six years prior, Bailey had answered his then-wife's divorce petition stating that he "ha[d] no legal interest" in the property. *Id.* at 252, 489 S.E.2d at 477. When questioned about the divorce pleadings in the foreclosure action, Bailey admitted that he actually had an interest in the property at the time of his prior statement and that his statements in those pleadings were made to protect his own interests. *Id.* The Supreme Court of South Carolina held that under the doctrine of judicial estoppel, Bailey was estopped from asserting that he now had a legal interest in the property. *Id.*

were not seeking a joint and several judgment. They successfully moved to place North Florida Framing in default based on these representations. Yet, Respondents then gamed the system by pursuing a default judgment.

Respondents' change in position was also part of an effort to mislead the court. Respondents' counsel led everyone, including the trial court, Professional Plastering, North Florida Framing, and this Court, to believe that they had no further interest against North Florida Framing. This position was explicitly asserted before the trial court in Respondents' pre-trial motions. Furthermore, on appeal from the judgment against Professional Plastering, this Court was led to believe that at the time of the trial, "[w]hile the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, settled with Respondents." *Teseniar*, 407 S.C. at 87, 754 S.E.2d at 269. Therefore, this Court concluded that the trial appropriately "focused solely on the exterior stucco installed by Professional and the resulting damage." *Id.* Respondents should not be permitted to mislead this Court and to impair the truth seeking function of the judicial system. Accordingly, the fourth element has been satisfied.

Finally, Respondents' positions were totally inconsistent. Initially, they claimed to "have no interest against [North Florida Framing] in this proceeding." Two years later, they claimed to have an interest in the form of a $15,748,225.56 judgment. This was a joint and several judgment, the exact type of scenario counsel for Professional Plastering warned about. (Jury Trial – Volume 1 Transcript, R. p. 114, lines 16–20). Respondents indicated that this was not their intention in attempting to relieve North Florida Framing's counsel and put it into default. Accordingly, Respondents' positions were inconsistent; therefore, Respondents were judicially estopped from seeking a money judgment against North Florida Framing.

2. Even if Respondents Could Somehow Seek a Judgment Against a Party with No Liability, They Were Also Judicially Estopped from Changing Their Position at Trial that $8,761,433.00 was Solely Attributable to the Stucco-Related Work of Professional Plastering and that All of the Other Defendants Had Paid Their Fair Share.

A further inconsistency is revealed in the Respondents' trial against the stucco applicator, Professional Plastering. Respondents, in the trial of the co-defendant Professional Plastering conducted on May 9, 2011, first claimed that $8,761,443.00 of the $15,748,225.56 was exclusively caused by the stucco applicator:

> **Q**. Mr. Gallagher, did I ask you to go through your estimate and break out the items, the cost items that would be allocable to just the stucco repair alone -- not these other items that were included in the $15.7 Million dollars, but just the stucco issue? Did I ask you to do that?
> **A**. Yes, sir.
> . . .
> **Q**. So what is your *total number for just stucco-related repairs*, putting all those elements together that are necessary?
> **A**. *$8,761,443 dollars.*

(Portion of Jury Trial of May 11–13, 2011, R. p. 126, line 23–p.127 line 5; R. p. 133, lines 15–18) (emphasis added). Then, as explained above, Respondents took a drastically different position and were successful in obtaining a $15,748,225.56 judgment against North Florida Framing by the Master in Equity. Thus, there were two different positions taken by the same party in the same case. Furthermore, they were successful in that at the time they argued their second inconsistent position before the Master in Equity, their over $7 million trial verdict was valid. Their first position helped them secure that verdict from the jury. Finally, as shown throughout this brief, this was part of a plan to vex the system. Therefore, judicial estoppel applied to bar their second inconsistent position before the Master in Equity.

I. Even Assuming, *Arguendo*, That the Covenant not to Execute—as Interpreted by Respondents Post-Settlement—Could Have Trumped a Class Action Settlement, that the Judges Below Could Have Divested the Exclusive Jurisdiction of Judge Young, and That Respondents Were Not Judicially Estopped from Seeking an Adverse Judgment Against North Florida Framing, the Judgment is Still Void Because Respondents Withheld Mandatory Set Off and Settlement Information from the Master in Equity.

1. The Judgment is Void for Failure to Disclose the Details of the Final Order Approving Partial Class Settlement or the Invalid Covenant not to Execute.

Respondents failed to disclose to Judge Scarborough the existence or details of the Final Class Action Settlement and the invalid Covenant not to Execute. "Settlement agreements must be carefully scrutinized in order to determine their . . . impact upon the integrity of the judicial process." *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987). In procuring a judgment, "[o]penness and fairness . . . are essential to preserving the effectiveness of our judicial system." *Id.* at 265, 363 S.E.2d at 890. "[A]ny settlement device which does not fully release a defendant, while purporting to do so, is subject to disclosure." *Id.*, 363 S.E.2d at 890 (holding that the fact a covenant not to execute, which was essentially a façade that allowed a defendant to remain as a party defendant while escaping liability, was not disclosed to jury "facilitates inequity and injustice in the judicial process."). To hold otherwise would be to deprive the judge of crucial information to "which it was entitled as to the sources of remuneration available to the plaintiff and by whom such remuneration would be paid." *Id.*, 363 S.E.2d at 890. Because Respondents failed to disclose either the Final Class Action Settlement dismissing North Florida Framing with Prejudice or the invalid Covenant not to Execute, Respondents prevented Judge Scarborough from analyzing his jurisdiction for the default as well as the propriety of Respondents' assertion of North Florida Framing's "liability." For these reasons, the judgment is void.

2. The Judgment is Void for Failure to Disclose the Amount Collected from Other Tortfeasors.

Notwithstanding that the judgment is void for the reasons stated above, Respondents also failed to inform Judge Scarborough of the settlements it had received and therefore the set-off required for the judgment. *See Rutland v. S. Carolina Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). South Carolina's relevant set-off statute, enacted as part of the South Carolina Contribution Among Tortfeasors Act ("SCCATA"), provides that:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

S.C. Code Ann. § 15-38-50. By statute, a claim against remaining defendants must be reduced by the amount of the settlement obtained, *Ellis v. Oliver*, 335 S.C. 106, 109–12, 515 S.E.2d 268, 270–71 (Ct. App. 1999), here $9,577,500. (*See* August 4, 2015 Final Order Approving Class Action Settlement). Because it is statutorily mandated, the set-off arises by operation of law. *Ellis*, 335 S.C. at 109-12, 515 S.E.2d at 270–71.

Prior to the enactment of this statute in 1988, courts utilized set-offs strictly as discretionary equitable remedies intended to prevent injured parties from obtaining a double recovery of damages. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (explaining that the set-off remedy has existed in South Carolina's common law for over 100 years). The subsequent codification of the set-off statute "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010)). Accordingly, "[b]ecause [SCCATA] is in derogation of the common law, it must be strictly

construed." *G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). Therefore, because the set-off is now statutorily mandated, it applies automatically when the statute is invoked, so the court need not determine whether there is an independent equitable need for a set-off. *See Ellis*, 335 S.C. at 113, 515 S.E.2d at 272. Having failed to disclose the amount collected, the default judgment of $15,748,255.56 is void.

J. The Judgment is Also Void Under SCRCP 60(b)(4) Because the Amount Collected Exceeds the Amount of Damages that can be Claimed.

Having said $8,761,443.00 of the $15,748,255.56 was the exclusive fault of the stucco applicator, the amount for which Respondents could sue would be $6,986,782.56. Having already collected $9,577,500, more than what could even be claimed, Respondents have no lawsuit. Accordingly, the default judgment is void.

K. Not Only is the Judgment Void under SCRCP 60(b)(4), but the Trial Court Also Erred as a Matter of Law When It Denied Mt. Hawley's Motion for SCRCP 60(b)(5) Relief Because the Default Judgment Had Already Been Satisfied, Released, and Discharged.

Relief from judgment under SCRCP 60(b)(5) is proper when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." SCRCP 60(b)(5) relief is available "in cases of fraud upon the court or 'rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake,'" *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d 249, 254 (Ct. App. 2012) (quoting *Mr. T v. Ms. T*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008)), or in cases where giving a money judgment prospective application would be inherently inequitable. *See* SCRCP 60(b)(5); *see also Bros. Inc.*, 320 F.2d at 610 ("While this award of damages sounds

in the past, rather than the future, no judgment has yet been paid, and in practical effect we are dealing with the prospective application of the judgment, not the unscrambling of the past.").

Respondents obtained a $15,748,255.56 default judgment against North Florida Framing. However, $8,761,443.00 of this judgment was exclusively related to stucco work, of which North Florida Framing had no part. Thus, with only $6,986,782.56 collectable and $9,577,500.00 already collected, the judgment has been satisfied. (*See also* E-mail Settlement, R. p. 107, ¶2) (wherein Respondents agreed to *"satisfy . . . any outstanding judgment(s)"* after collection of the $400,000, which was in fact collected)). Furthermore, the judgment has been released, (*See* Final Order Approving Class Action Partial Settlement, R. pp. 213–14, ¶6) (directing Respondents to "execute a general release(s)" as to North Florida Framing after collecting the $400,000—which was paid and collected)), and discharged. (*See* Covenant not to Execute, R. p. 219) ("Upon the completion of all collection activity . . . Plaintiffs shall . . . satisfy any outstanding judgments against NFF and shall release *and forever discharge NFF . . . and their insurers*."). This judgment has been satisfied, released, and discharged, and it would be inequitable to let it stand. Accordingly, the lower court committed error by: not setting aside a void judgment under SCRCP 60(b)(4); and not setting aside a judgment that had been satisfied, released, and discharged under SCRCP 60(b)(5). For these reasons, Mt. Hawley has a substantial interest in this case and the trial court erred as a matter of law by denying Mt. Hawley's motion for relief and its motion to intervene as explained more thoroughly below.

IV. BECAUSE RESPONDENTS HAVE SUED MT. HAWLEY AS A CREDITOR ON A JUDGMENT AFTER EXTINGUISHING NORTH FLORIDA FRAMING'S LIABILITY, THE TRIAL COURT ERRED WHEN IT DENIED MT. HAWLEY'S MOTION TO INTERVENE BECAUSE MT. HAWLEY'S INTEREST IN SETTING ASIDE THE VOID JUDGMENT IS NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

Intervention as of right is dictated by SCRCP 24(a)(2), which provides that:

> Upon timely application *anyone shall be permitted to intervene* in an action . . . 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). In South Carolina, courts interpret the rules so as "to permit liberal intervention particularly where . . . judicial economy will be promoted." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Accordingly, in deciding whether to grant a motion to intervene, the court "must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24." *Id.* Under South Carolina law, an applicant must satisfy the four "*Sagebrush*" elements for intervention as of right: (A) make a timely application; (B) claim an interest relating to the property or transaction which is the subject of the action; (C) show that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest as a practical matter; and (D) demonstrate that the existing parties are not adequately representing its interest. *Id.* at 189, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)).

A. Mt. Hawley Made a Timely Application After Receiving Notice That Respondents Had Procured This Default Judgment.

"[W]hen a case has been settled, the fact that a motion to intervene is filed after judgment may prove relevant . . . [b]ut the applicant need not plead extraordinary . . . circumstances to

show that the intervention motion itself was timely." *Davis*, 304 S.C. at 505, 405 S.E.2d at 603. Specifically, in determining whether a motion for intervention is timely, a court *must consider the following factors*: 1) the amount of time that has passed since the applicant either knew or should have known *of the interest it is seeking to protect*; 2) the reasons for the delay; 3) the stage of the litigation; and 4) *the prejudice the applicant would suffer if intervention is denied* and the prejudice that the original parties would suffer if the applicant's intervention is granted. *Ex parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (emphasis added). As to the first element, Mt. Hawley promptly moved to intervene and for relief from judgments *once it received notice* of the default judgment against its insured by way of a judgment creditor's action filed against Mt. Hawley for $15,748,225.56. Furthermore, process was mailed to Mt. Hawley on June 2, 2015, and, despite the years of litigation to sort through, Mt. Hawley moved to intervene and for relief from judgments within 60 days. Because there was no delay, there was no delay to explain for element two.[26]

As to the third element of timeliness, while it is true that the litigation had progressed to a relatively late stage by the time Mt. Hawley moved to intervene, this element is not dispositive. Even if the case *as to North Florida Framing* had ended, this does not mean that Mt. Hawley cannot intervene to attack the default judgment. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742, *reversed on other grounds* (allowing a motion to intervene in an appeal). Nor is the time for Mt. Hawley to intervene in this case limited by the time for a party to appeal a judgment, as previously asserted by Respondents in its motion to dismiss which was denied by

[26] North Florida Framing was dismissed with prejudice on June 10, 2011, Respondents obtained a default judgment before the Master in Equity on May 14, 2013 and filed suit against Mt. Hawley on May 26, 2015. This entire chronology of events and the timing are the actions of Respondents and not Mt. Hawley.

this Court. *See* Order Denying Respondents' Motion to Dismiss; *see also Avery v. Moseley*, 19 Ill. App. 3d 1001, 313 N.E.2d 274 (1974) (holding that time to intervene is not limited by time to appeal).

Finally, as to the prejudice element, Respondents assert the judgment against Mt. Hawley. *See Teseniar v. Mt. Hawley Insurance Co.*, Case No. 2015-CP-10-2994 (S.C. Comm. Pleas). Without intervention, Respondents will be able to assert as binding what is a void judgment. Therefore, Mt. Hawley's motion to intervene was timely.

B. Mt. Hawley Claimed an Interest Relating to the Subject of the Judgment.

The second question of whether an applicant asserted an interest warranting intervention "must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court." *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 190, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc.*, 713 F.2d 525). As a defendant in a separate suit on a joint and several judgment purporting to satisfy the total claimed damages ($15,748,225.56), and thus by implication all the claims in this case, and as an insurer of a defendant in this case, Mt. Hawley asserts an interest in the overall subject matter of the action. An interested third party may move to intervene under SCRCP 24 for the purpose of setting aside a default judgment under SCRCP 60(b). *See, e.g.,* McClurg, 380 S.C. 563, 671 S.E.2d 87, *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (employer intervening for the purpose of setting aside a default judgment entered against its employee). As set forth in § III above, Mt. Hawley has offered a sufficient interest warranting intervention in this case.

C. Mt. Hawley is so Situated that the Disposition of the Action May as a Practical Matter Impair or Impede its Ability to Protect This Interest.

In showing that the disposition of the case *may* impair or impede its ability to protect its interest, "a party need not prove that it would be bound in a res judicata sense by the judgment,

only that it would have difficulty adequately protecting its interests if not allowed to intervene. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 190–91, 394 S.E.2d at 715 (citing *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir. 1980)). Here, Mt. Hawley moved to intervene for fear 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. The South Carolina Supreme Court has recognized that it would "be extremely difficult for [an intervenor] to collaterally attack any ruling adverse to them if not made a party to the original action." *Id.* at 191, 394 S.E.2d at 715. Accordingly, not allowing Mt. Hawley to intervene and contest this judgment *may* impair or impede Mt. Hawley's ability to protect its interest.

D. Mt. Hawley's Interest is Not Adequately Represented by Existing Parties.

"The burden to show that the representation may be inadequate is on the applicant." *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). However, "[t]his burden is minimal and the applicant need only show that the representation of his interests 'may be' inadequate. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 (1972)). South Carolina has adopted the following *Sagebrush* factors for determining whether existing parties can adequately represent an applicant's interest:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

In re Horry Cty. State Bank, 361 S.C. 503, 508–09, 604 S.E.2d 723, 726 (Ct. App. 2004) (quoting *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715).

Here, there is no existing party that will make, or that is otherwise capable and willing to make, Mt. Hawley's arguments. Having orchestrated North Florida Framing's counsel out of the case and having ended North Florida Framing's liability, there is no party to assert the interest of Mt. Hawley or North Florida Framing. Mt. Hawley has a right to intervene in this case.[27] Mt. Hawley also offers a different perspective and an opportunity for this Court to address attempted litigation against a nonparty by litigating against a party who can have no liability or exposure. Therefore, for the reasons stated above, the lower court committed an error when it denied Mt. Hawley's motion to intervene for the purpose of setting aside the void judgments in this case.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

January 27, 2017

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[27] Therefore, while Mt. Hawley's SCRCP 24(a)(2) motion to intervene as of right should have been granted, the court also abused its discretion by not, in the alternative, granting its SCRCP 24(b)(2) permissive intervention motion.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

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 & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T 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., Mickey 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.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b) SCRAP

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b)

SCRAP.

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Dated this 27th day of January, 2017
Charleston, South Carolina