THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

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

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

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspectors, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc. d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., 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,.

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

RESPONDENTS' RETURN TO APPELLANT'S MOTION TO TRANSFER

COME NOW Respondents, pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, in Return to Appellant's Motion to Transfer. Appellant's Motion to Transfer is unfounded and improper and should be denied for the reasons stated herein:

SUMMARY OF ARGUMENT

Appellant seeks transfer of this Appeal to the Supreme Court for two reasons: First, to advocate the adoption of a new appellate standard of review applicable to the denial of a Rule 24(a) motion to intervene as a matter of right; and Second because it claims—without support—that the Court of Appeals is prohibited from interpreting an Order of the Supreme Court. Both arguments are without merit and the motion should be denied.

I. This Case Does Not Warrant Certification to the Supreme Court Under Rule 204(b).

Rule 204(b), of the South Carolina Appellate Court Rules—under which Appellant's instant motion is made—sets out that the transfer of a case is generally limited to those circumstances where the "case involves an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. Appellant has offered no argument or reason why this matter is of such significant public interest or major legal importance that the Court of Appeals cannot address the issues. While questions regarding the appropriate appellate standard of review and interpretation of certain Supreme Court Orders are important, such questions are commonplace at the Court of Appeals which is both a proper and capable forum to decide such issues. In reality, if the instant case is not properly heard by the Court of Appeals, then it could hardly be argued that any case would be properly argued before the Court of Appeals. In sum, this case is not of the type to warrant transfer to the Supreme Court. *Compare* Rule 245, SCACR (providing that the Supreme Court can maintain actions in its original jurisdiction or upon writ of extraordinary relief when there exists an emergency or the matter is one of substantial public

interest).

II. By Appellant's Own Argument There is No Basis to Warrant Transfer on the Issue of the Applicable Standard of Review.

Appellant's argument for transfer to the Supreme Court on the issue of the standard of review is fatally flawed, and the fatal blows are self-inflicted.

First, Appellant claims that transfer to the Supreme Court is necessary because our appellate courts have not determined whether a separate standard of review applies to intervention as a matter of right under Rule 24(a), as opposed to permissive intervention under Rule 24(b). Specifically, Appellant states that the Supreme Court in *Ex Parte Government Employees Insurance Company*, 373 S.C. 132 (2007) did "not address whether the standard of review should be different for a motion to intervene as a matter of right [] than for a motion for permissive intervention." (App. Mot. to Trans., p. 1). Assuming for the sake of argument this is correct[1], Appellant is hoisted by its own petard. If this issue has not been addressed—as Appellant claims—then there is no need to argue against precedent, thus nullifying the purported need to transfer the appeal to the Supreme Court. If Appellant is correct, the Court of Appeals is free to adopt the argument Appellant has put forth[2] as there is no binding authority prohibiting such ruling.

Second, and in the alternative, Appellant goes on to suggest that to the extent there is precedent against its position, this Court should nonetheless order the transfer of the case in order to declare that the proper standard of review is *de novo*. Here again, Appellant's own argument refutes the need for the transfer of this case. Specifically, Appellant has conceded that the application of the *de novo* standard has no effect on the outcome of this Appeal. (App. Reply Br., p. 9) (stating that Appellant succeeds under either standard). It is settled that what makes no

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[1] Respondents do not concede or agree that this is correct.
[2] Assuming this argument is preserved and properly presented to the Court of Appeals.

difference does not matter. *See generally e.g., McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) (Sanders, J., stating: "whatever doesn't make any difference, doesn't matter."). In the absence of some reason why this issue is one of substantial importance, there is no need to transfer the case to the Supreme Court. *See* Rule 204(b) SCACR.

Finally, as yet another example of how Appellant's own argument forbids the relief it requests, the circular logic of Appellant's argument should not go without note. Specifically, Appellant submits that it is not seeking the adoption of a *de novo* standard of review to apply to **all** motions to intervene, but instead, it "is narrowly arguing that **when a motion to intervene is denied by a court lacking jurisdiction to rule on that motion**, this Court should review the denial *de novo*." (App. Reply Br., p. 8) (emphasis added). What Appellant would have this Court ignore is that there is absolutely no reason to have a special standard of review applicable only to review an Order, which was entered without jurisdiction, or in other words a standard of review applicable only to a scenario that cannot arise.

To put Appellant's position in context, if the trial court has no jurisdiction to enter an order on a motion to intervene, then the order must be set aside. In this scenario, it makes no difference whether the court properly decided the merits of the motion to intervene. There is simply no need to review the merits of the court's ruling on the motion to intervene if it lacked jurisdiction and thus no reason to have a special standard of review. Requesting transfer to the Supreme Court to establish an unnecessary and illogical exception to the standard of review is just another of the many delay tactics Appellant has employed over the last nine-plus years of litigation of this case.

III. This Court's Administrative Order regarding Complex Cases does not Warrant Transfer of this Appeal.

Appellant's argument in support of transfer on this issues is equally meritless. First, Appellant has no standing to assert any opposition to Judge Harrington exercising jurisdiction over

the case unless and until Appellant has first been permitted to intervene in the action—which has not occurred. Thus, to seek transfer on this issue alone still leaves open the question of whether Appellant can intervene.

Second, Appellant presumes, without any support, that Administrative Order No. 2006-07-26-01, denied Judge Young the authority to assign the case to Judge Harrington for trial. Notwithstanding that Appellant waited nearly 5 years to raise this argument, the notion that the Court of Appeals does not have the authority to interpret an Order of the Supreme Court is unfounded. The Court of Appeals engages in such interpretation daily. If the Court of Appeals lacks the ability to interpret Orders or Opinions of the Supreme Court then there would be hardly a case that could ever be heard before the Court of Appeals.

Finally, Appellant argues that Judge Harrington, who presided over the trial and issued the allegedly defective post trial orders, did not have jurisdiction because Judge Young lacked the authority to assign the case to her. Appellant specifically attributes this alleged lack of jurisdiction to the fact that Judge Harrington was not the Chief Administrative Judge. *See* (App. Br., p. 29) ("Nor was Judge Harrington the Chief Administrative Judge or the judge with exclusive jurisdiction over this 'complex case.' "). However, this is misleading. Appellant neglects that Judge Harrington **was the Chief Administrative Judge** both at the time of the trial **and** at the time of entry of the challenged orders. *See* **Exhibit A** – (Roster of Chief Administrative Judges for the year 2011). Thus, because Administrative Order No. 2006-07-26-01 specifically provides that the Chief Administrative Judge has the authority to assign the management of any complex case **upon her own motion**, even if Appellant is correct that Judge Young did not have the power to assign the case to Judge Harrington, the fact that Judge Harrington was the Chief Administrative Judge, makes this a distinction without consequence. *See* Admin. Order. 2006-07-26-01 ("On the

Chief Administrative Judges' own motion . . . [she] can designate a case as complex . . . and assign the case to a judge[.]").

CONCLUSION

For the reasons set forth above, certification of the aforementioned issues and/or transfer of the instant appeal to the Supreme Court is neither necessary nor proper.

Respectfully submitted,

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The Honorable Kristi Lea Harrington, Circuit Court Judge

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Appellate Case No. 2016-000185

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

EXHIBIT A
2011 Chief Administrative Judge Roster

Chief Judges for Administrative Purposes
July 3, 2011 - December 31, 2011

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AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for Respondents, do hereby certify that I have on this date, delivered via U.S.

Mail, a true and correct copy of the Respondents' Return to Appellant's Motion to Transfer to the following counsel of record:

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Paralegal to Michael A. Timbes

April 13, 2017
Charleston, South Carolina

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April 13, 2017

Via US Mail
The Honorable Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais St.
Columbia, South Carolina 29201

Re: Appellate Case No. 2016-000185
Mark F. Teseniar, et al. v. Fenwick Plantation, et al.

Dear Mr. Shearouse:

Please find enclosed the following documents in connection with the above-referenced appeal:

(1) an original and seven (7) copies of Respondents' Return to Appellant's Motion to Transfer; and
(2) an original and one copy of the Affidavit of Service.

I would appreciate it if you would please file these originals with the Court and return any extra file-stamped copies to me using the enclosed self-addressed, stamped envelope provided for your convenience. Your assistance is appreciated. Should you have any questions or concerns, please do not hesitate to contact us.

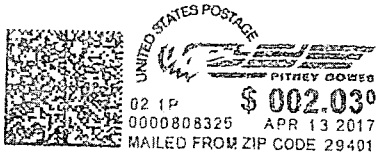
With warmest regards, I am

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.

Moira Kerrigan
Paralegal to Michael A. Timbes

cc: The Honorable Jenny Abbott Kitchings
All Counsel of Record



First Class Mail

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