RECEIVED
JAN 31 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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., ...Defendants,

And Mt. Hawley Insurance Company,...Appellant/Intervenor.

FINAL REPLY BRIEF OF APPELLANT

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ATTORNEYS FOR APPELLANT/INTERVENOR

TABLE OF CONTENTS

I. RESOLUTION OF THE QUESTION OF JURISDICTION MUST PRECEDE ANY DISCUSSION OF THE STANDARD OF REVIEW 1

A. Respondents Failed to Respond to Mt. Hawley's Argument Regarding Exclusive Jurisdiction and Thus Conceded the Point 2

B. Judge Harrington Lacked Jurisdiction Because Exclusive Jurisdiction was Vested in Judge Young to Handle the Case from Beginning to End 3

II. MT. HAWLEY SHOULD BE PERMITTED TO INTERVENE 7

A. The Appropriate Standard of Review is *de Novo* 7

B. Mt. Hawley's Intervention Argument Succeeds Under Either *de Novo* or Abuse of Discretion Review 9

III. MT. HAWLEY SHOULD BE GRANTED RELIEF FROM JUDGMENT 11

A. Argument Properly Preserved for Appeal 11

B. This Court Should Review the Circuit Court's Denial of Mt. Hawley's Motion *de Novo* and Reverse; but Even Under an Abuse of Discretion Standard, Mt. Hawley Prevails ... 12

1. The Default Judgment Order Is Void, not Voidable 13

a) Judge Scarborough Lacked Jurisdiction to Enter the Default Judgment 13

b) At the Time the Default Judgment was Entered, There Was No Case or Controversy as to NFF 14

2. Mt. Hawley's Motion was Timely 16

3. Respondents Attempt to Bind Mt. Hawley to a Default Judgment That Resulted from an Improper Settlement 18

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129, 130 (1944) 6

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189 (1990) 8, 9

Bryan v. All Out Die Cutting, Inc., 32 F. App'x 651, 652 (3d Cir. 2002) 14

Bunkum v. Maor Props., 321 S.C. 95, 99 (Ct. App. 1996) 17

Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) 6

Cook v. Boorstin, 763 F.2d 1462, 1468 (D.C. Cir. 1985) 8

Doe v. Pub. Citizen, 749 F.3d 246, 257 (4th Cir. 2014) 11

Ex parte Gov't Emp.'s Ins. Co. v. Goethe, 373 S.C. 132 (2007) 9, 10

First State Ins. Co. v. W. Inv. & Dev. Corp., 895 F.2d 1576 (9th Cir. 1990) 14

First Union Nat. Bank of S.C. v. FCVS Comms., 321 S.C. 496, 502 (Ct. App. 1996) 2

Gatling v. Beach Palace, Inc., 294 S.C. 464 (Ct. App. 1988) 16

Holden v. Cribb, 349 S.C. 132, 137 (Ct. App. 2002) 14

In re Marriage of Gonzalez, 1 P.3d 1074, 1077 n.2 (Utah 2000) 8

In re Physicians Reliance Ass'n, Inc., 415 F. App'x 140, 141 (11th Cir. 2011) 12

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 34 (1993) (per curiam) 11

Jalapeno Prop. Mgmt., LLC v. Dukas, 265 F.3d 506, 515 (6th Cir. 2001) 12

Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 438 (2006) 9

Lennon v. S.C. Coastal Council, 330 S.C. 414, 415 (Ct. App. 1998) 14

McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 642, 643 n.1 (Ct. App. 1996) 13, 17

Penza v. Pendleton Station, LLC, 404 S.C. 198, 204 (Ct. App. 2013) 6

Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp., 804 F.2d 311, 314 (5th Cir. 1986) 12

Ross v. Marshall, 426 F.3d 745, 761 & n. 68 (5th Cir. 2005) 11

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

Sidman v. Travelers Cas. & Sur., ___ F.3d ___, No. 15-15197, 2016 WL 6803034 (11th Cir. Nov. 17, 2016)....... 18, 19

Sijon v. Green, 289 S.C. 126, 128 n. 2 (1986)....... 16

State v. Campbell, 376 S.C. 212, 216 (2008)....... 5, 13

Stone v. Instrumentation Lab. Co., 591 F.3d 239, 242–43, 250 (4th Cir. 2009)....... 6

Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291 (1995)....... 14

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110 (2008)....... 12

Yarbrough v. Collins, 293 S.C. 290, 292 (1987)....... 13

Other Authorities

1 S.C. Litig. Forms & Analysis § 13:11....... 4

5 Am. Jur. 2d Appellate Review § 512 (2016)....... 2

John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 Charleston L. Rev. 479, 531 (2010)....... 4

Pamela J. Roberts et al., *South Carolina's Business Court Pilot Program,* S.C. Law., May 2008 4

S.C. Supreme Court Admin. Order 2006-07-26-01....... 3, 5

Treatises

Wright & Miller, Federal Practice & Procedure § 1902 (2016)....... 8

Constitutional Provisions

S.C. Const. art. V, § 11....... 6

S.C. Const. art. V, § 4....... 3

INTRODUCTION

At the heart of this case is an effort by Respondents to (i) have this Court sanctify trial against a party in absentia and (ii) deny an insurer even its coverage defenses by claiming they failed to defend.[1] Mt. Hawley Insurance Company ("Mt. Hawley") replies to Respondents' Brief as follows:

1. The lower court's jurisdiction must be decided before this Court reaches the question of the standard of review (Part I, p.1);
2. This Court's standard of review for the denial of Mt. Hawley's right to intervene is *de novo* because Mt. Hawley sought to intervene as a matter of right (Part II, p. 7);
3. If the underlying judgment is void, itself a question of law, this Court's review of the lower court's failure to vacate the judgment is *de novo* (Part III.B, p. 12);
4. The judgment entered by the lower court is void as the party against whom it is entered was released from the case on a covenant not to execute, and therefore there was no case or controversy in which Respondents could continue to litigate so as to obtain a judgment so as to bind a non-party (Part III.B.1, p. 13);
5. The effort to obtain a judgment against an insurer by entering default against an insured who has no interest is repulsive to notions of justice and fair play (Part III.B.3, p. 18).

I. RESOLUTION OF THE QUESTION OF JURISDICTION MUST PRECEDE ANY DISCUSSION OF THE STANDARD OF REVIEW

Respondents argue in their brief (at pages 10–12) (i) that Judge Harrington's rulings — placing North Florida Framing ("NFF") in default and denying Mt. Hawley's Motion to Intervene and for Relief from Judgment — should be reviewed for abuse of discretion and (ii)

[1] Respondents' Complaint in the collection action claimed Mt. Hawley provided coverage under three policies, numbered MGL0124405, MGL0132152, and MGL0134726. (*See* Complaint, R. p. 250, ¶ 5). As noted in the Complaint, the policies expired prior the events that Respondents claimed rendered NFF liable. (*Id.*).

should therefore be affirmed. Mt. Hawley's disagreement with these arguments notwithstanding, first must come the question of whether Judge Harrington had jurisdiction to enter these orders.[2]

As discussed herein, Judge Kristi Harrington lacked jurisdiction over this matter. As lack of jurisdiction forms in part the basis for Mt. Hawley's appeal, this Court reviews *de novo* and should reverse.

A. Respondents Failed to Respond to Mt. Hawley's Argument Regarding Exclusive Jurisdiction and Thus Conceded the Point[3]

A respondent's failure to respond to an argument raised in an appellant's opening brief constitutes a concession of that argument. *See* 5 Am. Jur. 2d Appellate Review § 512 (2016) (when a respondent "fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct"); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290 (1997). Respondents do not address Mt. Hawley's contention that the vesting of exclusive jurisdiction in Judge Young by Judge Dennis precluded the possibility of Judges Harrington and Scarborough having jurisdiction over this case. In fact, at no point in their forty-six-page brief do Respondents refer to the South Carolina Supreme Court's Administrative Order regarding complex cases, Judge Dennis' order, or the exclusive jurisdiction granted to Judge Young.

For this reason, this Court should regard Respondents as having conceded that Judges Harrington and Scarborough had no jurisdiction.

---

[2] While Judge Harrington's actions in this case may all be reversible for lack of jurisdiction, because Mt. Hawley is the only party objecting, and only to discrete rulings, this Court need not review all of Judge Harrington's rulings in the case.

[3] While the standard of review is a threshold issue for an appellate court to consider, procedural deficiencies can and should be addressed even before such review is undertaken.

B. Judge Harrington Lacked Jurisdiction Because Exclusive Jurisdiction was Vested in Judge Young to Handle the Case from Beginning to End

Judge Dennis designated this case as complex and, per the July 26, 2006 Administrative Order of the South Carolina Supreme Court, assigned it to the exclusive jurisdiction of Judge Roger Young. This was a proper assignment per the language of the Administrative Order, which provides:

> [T]he Chief Administrative Judge can designate a case as complex, establish a date prior to which the case will not be called for trial and assign the case to ***a judge*** assigned to the circuit or an adjoining circuit ***who will be given exclusive jurisdiction to handle that case from beginning to end.***

S.C. Supreme Court Admin. Order 2006-07-26-01 (hereinafter "Administrative Order") (emphasis added).[4] Thus, Judge Dennis' statement in his designation order — 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" — required Judge Young to preside over the case to the exclusion of all other judges of the Circuit Court. (Complex Case Designation Order at 2, Sept. 10, 2010, R. p. 92) (emphasis added).

In spite of exclusive jurisdiction being vested in Judge Young, the case was purportedly referred to Judge Harrington for the limited purpose of "a date certain trial to begin on Monday May 9, 2011." (Referral Order, Nov. 18, 2010, R. p. 94). Even if this were a valid referral, Judge Harrington's handling of the case exceeded the narrow scope of that referral. In addition to presiding over the trial, she heard and denied Mt. Hawley's motion to intervene and for relief

[4] The Supreme Court's authority to issue binding administrative orders is granted by the South Carolina Constitution. *See* S.C. Const. art. V, § 4. Like other orders of the Supreme Court, the Administrative Orders are binding on lower courts and compliance with them is not discretionary.

from judgment,[5] and also referred elements of the case to the Master in Equity, Judge Michael Scarborough, who entered a joint and several default judgment against NFF in the amount of $15,748,225.56.

The plain language of the Supreme Court's Administrative Order establishes that complex cases are assigned to the *exclusive* jurisdiction of *one* circuit court judge. This is eminently sensible, as it ensures the court is aware of the myriad facts, arguments, and procedural intricacies inherent in a complex case and can be in the best position to see that justice is done.[6] *See* Pamela J. Roberts et al., *South Carolina's Business Court Pilot Program*, S.C. Law., May 2008, at 30 (noting such assignments facilitate litigation of complex matters); *see also* 1 S.C. Litig. Forms & Analysis § 13:11, Practice Notes (acknowledging the "primary benefit" that "parties will have one judge assigned to preside over the trial of the case and all pre-trial matters").

The Order is clear and unambiguous. "[T]he Chief Administrative Judge can designate a case as complex . . . and assign the case to *a judge* . . . who will be given *exclusive jurisdiction* to

---

[5] Mt. Hawley expressly argued to Judge Harrington that she lacked jurisdiction over the motion to intervene and relief from judgment at oral argument. *See* (Hearing Tr. (Jan. 14, 2016), R. pp. 8–10)).

[6] Complex cases are not the only instance in South Carolina in which exclusive jurisdiction can be vested in a single judge. If a South Carolina solicitor serves notice that she intends to seek the death penalty in a criminal case, an order issues from the South Carolina Supreme Court assigning a particular circuit court judge exclusive jurisdiction over that case. *See, e.g.*, John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 Charleston L. Rev. 479, 531 (2010).

Again, this makes sense — it ensures that the judge presiding over the case is aware of all of the surrounding circumstances and is thus able to give the defendant every equitable consideration and every opportunity to avoid a death sentence. If a judge assigned exclusive jurisdiction over such a case attempted to assign a portion to another judge, it would defeat that purpose and render the assignment of exclusive jurisdiction meaningless. Likewise with this case.

handle that case *from beginning to end.*" Administrative Order (emphasis added). Appellant is at a loss to understand how the lower court's actions in this case are consistent with the grant of exclusive jurisdiction to Judge Young pursuant to this Order. Only Judge Young had jurisdiction to preside over the case. What else could "exclusive jurisdiction" mean? And, in addition to using the language "exclusive jurisdiction," the Order makes doubly sure its meaning is understood by stating that the assigned judge will "handle that case from beginning to end."

Respondents argue that, because the Circuit Court has subject matter jurisdiction over cases of this kind, all judges of the Circuit Court have subject matter jurisdiction over this particular case. Respondents' Brief at 12–17. This argument ignores the clear and unambiguous language of the Supreme Court's Administrative Order.

Mt Hawley agrees that subject matter jurisdiction means "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *E.g.*, *Johnson v. S.C. Dep't of Probation, Parole, & Pardon Servs.*, 372 S.C. 279, 284 (2007). Thus, the Circuit Court has subject matter jurisdiction over cases like this one and would ordinarily have the power to resolve it. However, this is but a general proposition, applicable in the absence of a circumstance — such as a grant of exclusive jurisdiction to a single judge — limiting the court's jurisdiction.

The statement of the law in the previous sentence is consistent with a case relied upon by Respondents with regard to their subject matter jurisdiction contentions. In *State v. Campbell*, the S.C. Supreme Court explained that a court can be divested of its power to hear a particular case upon expiration of a term of court, *even though* subject matter jurisdiction is retained by the court. 376 S.C. 212, 216 (2008). Additionally, the South Carolina Constitution conceives of situations in which courts ordinarily possessing subject matter jurisdiction would lose it if

exclusive jurisdiction were granted to another court. *See* S.C. Const. art. V, § 11 (providing the Circuit Court has "original jurisdiction in civil and criminal cases, *except those cases in which exclusive jurisdiction shall be given to inferior courts*"). This Court should treat the instant case like the exceptions referred to in the South Carolina Constitution.

Perhaps most significantly, the Administrative Order will be rendered meaningless if this Court adopts Respondents' argument. What would "exclusive jurisdiction" mean if the designated judge could assign discrete elements of the case to whomever he or she wished, let alone if *that* judge were permitted to further assign portions to a third judge? As with all documents subject to judicial interpretation, court orders must be interpreted in such a way as to give effect to the intention behind them. *See, e.g.*, *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (explaining that, when interpreting statutes, courts must "always turn first to one, cardinal canon before all others" namely that "a legislature says in a statute what it means and means in a statute what it says there," and that "[w]hen the words of a statute are unambiguous, this first canon is also the last" and courts must end their inquiry there); *Albergotti v. Summers*, 205 S.C. 179, 31 S.E.2d 129, 130 (1944) (observing, in the context of wills, that the "cardinal rule" of interpretation is "to ascertain and give effect to the intention of the testator as expressed in the words he has used"); *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 204 (Ct. App. 2013) (noting with relation to deeds that "one of the first canons of construction . . . is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened"). And, because interpretation of a legal document is a question of law, courts commit reversible error to the extent their interpretation is contrary to this fundamental canon of construction. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242–43, 250 (4th Cir. 2009) (reversing lower

court's statutory interpretation, noting statutory interpretation is a question of law reviewed *de novo*, and that courts should "start with the plain language" in reaching an interpretation).

The intent behind the Administrative Order is crystal clear, and its reference to "exclusive jurisdiction" should be given effect and interpreted to mean just that. Appellant has not been able to find a case reviewing the propriety of a judge sub-assigning a complex case over which he or she had exclusive jurisdiction. Perhaps this is because most judges interpret "exclusive jurisdiction" the same way Appellant does and thus do not attempt to assign or exercise jurisdiction when it has been exclusively vested.

This Court should hold that the default judgment against NFF and the denial of Mt. Hawley's motion are void because, while the Circuit Court has subject matter jurisdiction and its judges *would* have the power to preside over this case were it assigned to them, exclusive jurisdiction was granted to one judge, divesting all others of the authority to hear the case and issue rulings therein.

II. MT. HAWLEY SHOULD BE PERMITTED TO INTERVENE

Even aside from the fact that Judge Harrington lacked jurisdiction to consider and rule on Mt. Hawley's Motion to Intervene and for Relief from Judgment, her denial of Mt. Hawley's request to intervene constitutes reversible error.

A. The Appropriate Standard of Review is *de Novo*

Mt. Hawley submits that *de novo* review is appropriate in this case. While South Carolina law holds that denials of motions to intervene are reviewed for abuse of discretion, South Carolina appellate courts appear never to have had occasion to consider the situation presented here; namely, where a matter was designated complex and assigned to the exclusive jurisdiction of a particular judge, but a different judge heard and denied a motion to intervene in

that case. Thus, Mt. Hawley 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.* However, out of an abundance of caution, Mt. Hawley will request to argue against precedent if this Court feels it is doing so.

There are compelling arguments why *de novo* review is appropriate in this situation. First, applications for intervention as a matter of right, like Mt. Hawley's, raise only questions of law, and no deference is owed to the lower court's interpretation on questions of law. *See* 7 Wright & Miller, Federal Practice & Procedure § 1902 (2016) ("an application for intervention of right seems to pose only a question of law"); *see also Cook v. Boorstin*, 763 F.2d 1462, 1468 (D.C. Cir. 1985) (noting that, where there are no factual findings with regard to whether intervention would comport with efficiency and due process, the trial court's decision is owed no deference). Second, *de novo* review is in keeping with this State's recognition that courts should "permit liberal intervention particularly when, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected," that "the pragmatic consequences of a decision to permit or deny intervention" must be considered, and that courts must "avoid setting up rigid applications of Rule 24(a)(2)." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189 (1990).

Additionally, a majority of federal appellate courts hold that the denial of a motion to intervene as a matter of right[7] is reviewed *de novo. See In re Marriage of Gonzalez*, 1 P.3d 1074, 1077 n.2 (Utah 2000) ("The majority of federal appeals courts follow a *de novo* standard of review when intervention as of right is involved." (citing cases)); *see also* Appellant's Initial

[7] The South Carolina and federal rules governing intervention as a matter of right, SCRCP 24(a)(2) and FRCP 24(a)(2), are substantively identical.

Brief at 18 n.16 (citing cases). Finally, *de novo* review is especially called for when, as here, no explanation is given for the denial and thus there are no factual findings on which the appellate court can defer to the lower court.

B. Mt. Hawley's Intervention Argument Succeeds Under Either *de Novo* or Abuse of Discretion Review

As stated in pages 40–44 of Mt. Hawley's opening brief, Mt. Hawley satisfies the four *Sagebrush* factors and thus should be allowed to intervene. *See Berkeley Elec.*, 302 S.C. at 189 (adopting the elements set forth in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). That is, the motion was timely, Mt. Hawley has an interest in the property or transaction that forms the basis of the underlying suit, Mt. Hawley has shown it that it cannot protect its interest without intervention, and that its interests were not adequately represented by the existing parties. *Id.* Thus, it was error to deny Mt. Hawley's request for intervention.

The result is the same whether reviewed *de novo* or for abuse of discretion. An abuse of discretion "resulting in an error of law" that "amount[s] to a deprivation of the legal rights of the party" must be set aside by the reviewing court. *Ex parte Gov't Employee's Ins. Co., v. Goethe,* 373 S.C. 132, 135 (2007) (quoting *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 438 (2006) (internal quotation marks omitted)).

Judge Harrington's denial was, based on the *Sagebrush* factors, an error of law. Mt. Hawley's motion was timely under the circumstances. As noted at pages 40–42 of Mt. Hawley's initial brief, the motion was filed without delay once Mt. Hawley learned of the settlement and default judgment and became aware that Respondents sought to execute the default judgment against it.

With regard to Mt. Hawley's interest, Respondents' attempt to bind Mt. Hawley, a non-party to the suit,[8] to a judgment greater than the liability faced by its insured creates such an interest. Indeed, it is irregular for a party seeking to enforce a judgment against Mt. Hawley to contend that Mt. Hawley lacks the requisite interest — i.e., is not a "real party in interest" having a "real, actual, material or substantial interest" as opposed to a "nominal, formal, or technical interest in, or in connection with, the action," *Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 138 (2007) — in the underlying suit from whence that judgment came.[9]

The third and fourth factors are easily dealt with because, as a non-party to the suit, Mt. Hawley's interests were not protected in the underlying case, and its interests cannot be protected unless it is allowed to intervene. There was no reasonable basis on this record to deny intervention, and thus Judge Harrington's denial of Mt. Hawley's motion was an abuse of discretion.

Moreover, this error of law constitutes a deprivation of Mt. Hawley's legal rights in that it deprives Mt. Hawley of the ability to challenge the default judgment that forms the basis of its potential liability. *See Goethe*, 373 S.C. at 135. Therefore, this Court should reverse the Lower

---

[8] Though the issue is not before this Court, Mt. Hawley had valid grounds for non-defense of this suit. *See infra* Parts III.B.2, III.B.3.

[9] Respondents cite *Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132 (2007) for the proposition that an insurer may lack standing to intervene in an action solely because its indemnity obligations may be implicated in that action. Respondents' Brief at 27–29. That case is easily distinguishable from the instant case. There, GEICO sought to intervene in family court to argue that a claimant's common law marriage to the insured was invalid. *Goethe*, 373 S.C. at 134. The court found GEICO's involvement was unnecessary to that determination and denied intervention, which the S.C. Supreme Court subsequently affirmed. *Id.* at 139.

That is markedly different from the instant case, where Mt. Hawley seeks to challenge *the very judgment that Respondents seek to enforce against it*, rather than some collateral issue that is capable of resolution by the court and the existing parties. This is especially the case given that NFF dismissed its counsel and allowed itself to be put in default without notice to Mt. Hawley.

Court, allow Mt. Hawley to intervene, and consider the merits of Mt. Hawley's challenge to the default judgment entered against NFF.

III. <u>MT. HAWLEY SHOULD BE GRANTED RELIEF FROM JUDGMENT</u>

This Court has the authority to rule on the merits of Mt. Hawley's Rule 60 argument if it grants Mt. Hawley intervention. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam) (explaining that, if the Supreme Court reversed the lower court's denial of the motion to intervene, the Court "could address the merits of the question on which [it] . . . granted certiorari"); *Doe v. Pub. Citizen*, 749 F.3d 246, 257 (4th Cir. 2014) ("[I]f we conclude the district court erred in its decision to deny intervention, then [movant's] newfound intervenor status in light of our holding would supply an ongoing, adversarial case or controversy, thereby allowing us to review [movant's] challenges to the district court's sealing and pseudonymity rulings."); *Ross v. Marshall*, 426 F.3d 745, 761 & n. 68 (5th Cir. 2005) (reversing denial of intervention motion and ruling on the merits of intervenors' claims on appeal). This Court should do so and rule for Mt. Hawley.

A. Argument Properly Preserved for Appeal

Mt. Hawley submitted one motion, the denial of which it now appeals. That motion, styled "Motion to Intervene & for Relief from Judgments," sought two forms of relief — the right to intervene in the underlying matter, and protection from Respondents pursuing their claim against Mt. Hawley based on the default judgment entered against NFF.

Mt. Hawley's motion was denied in its entirety via a form order that gave no reasoning for the denial. No part of the motion was granted, compelling the conclusion that the motion was denied in full. Moreover, Judge Harrington requested that Mt. Hawley submit an outline of its arguments for vacating the judgment. Mt. Hawley presented its arguments in the requested

outline and also in open court, *see* (Hearing Transcripts (June 12, 2016 & June 14, 2016), R. pp. 5–36; *see also* Argument Outline, R. p. 41), and so Judge Harrington was fully aware of the substance of Mt. Hawley's motion when she denied it in its entirety.

B. This Court Should Review the Circuit Court's Denial of Mt. Hawley's Motion *de Novo* and Reverse; but Even Under an Abuse of Discretion Standard, Mt. Hawley Prevails

Federal courts review *de novo* denials of motions to vacate a judgment because trial courts have "no discretion [in ruling on a 60(b)(4) motion], the judgment is either void or it is not." *Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986). When, as here, there are no underlying factual disputes, the questions of whether a judgment is void for lack of jurisdiction is a question of law, *see In re Physicians Reliance Ass'n, Inc.*, 415 F. App'x 140, 141 (11th Cir. 2011), and questions of law are reviewed *de novo*. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110 (2008) ("[T]his Court reviews questions of law de novo."). To the extent these principles of law are contrary to South Carolina precedent regarding motions under Rule 60(b)(4), Mt. Hawley will request to argue against precedent.

In any event, "if the underlying judgment is void, it is *per se* an 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). As discussed in Appellant's opening brief and in this Reply, the default judgment against NFF *is* void because Judge Scarborough lacked jurisdiction to enter such a judgment. Therefore, the denial of Mt. Hawley's Rule 60 motion was *per se* an abuse of discretion and must be reversed.

1. The Default Judgment Order Is Void, not Voidable

A judgment is void and subject to collateral attack if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record. *Yarbrough v. Collins*, 293 S.C. 290, 292 (1987). For the reasons discussed herein, the default judgment against NFF is void.

a) Judge Scarborough Lacked Jurisdiction to Enter the Default Judgment

As discussed at length above, *see* Part I.B, the only judge with jurisdiction over this matter was Judge Young, who was given exclusive jurisdiction over the case by Judge Dennis. Thus, Judges Harrington and Scarborough both lacked jurisdiction to hear the case, a conclusion that is evident on the face of the record. *Id.*

After *Yarbrough*, more recent South Carolina cases have stated that a judgment is void where the court lacks subject matter jurisdiction or personal jurisdiction. *See, e.g.*, *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644 (Ct. App. 1996). Respondents would have this Court give the narrowest effect possible to these words and hold that because Circuit Court judges have subject matter jurisdiction over contract disputes and because there is no issue of personal jurisdiction in this case, the default judgment cannot be void.

This misses the point and leads to an absurd result where a grant of exclusive jurisdiction pursuant to a Supreme Court Administrative Order is rendered meaningless. Indeed, South Carolina law recognizes that a court may lack authority to rule in a particular case, even where the court has general subject matter jurisdiction over the matter and personal jurisdiction over the parties. *See State v. Campbell*, 376 S.C. 212, 216 (2008) ("When we used the 'lack of jurisdiction' language, we meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended. . . . A circuit court judge's power to hear criminal cases is not eliminated once a term of court ends; *the power is lost only as to the*

particular criminal case that the judge heard within a particular term of court."). Moreover, Respondents' argument that the default judgment in question was not void, but was merely voidable, concedes that *something* is wrong with Judge Harrington's orders. It could similarly be inferred from the inclusion of jurisdiction-retention language in all of the proposed orders Respondents submitted to Judge Harrington that Respondents realized Judge Harrington lacked jurisdiction. *See, e.g.*, (Final Order Approving Class Action Partial Settlement and Attorneys' Fees at 8, June 10, 2011, R. p. 214).

In any event, a judgment that is entered without authority, "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 (1995). As such, the default entered by Judge Harrington and the default judgment entered by Judge Scarborough are *void* for lack of jurisdiction, not merely voidable as Respondents contend.

b) At the Time the Default Judgment was Entered, There Was No Case or Controversy as to NFF

Moreover, "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *Holden v. Cribb*, 349 S.C. 132, 137 (Ct. App. 2002) (quoting *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415 (Ct. App. 1998)). At the time the Default Order was issued, and long before the Default Judgment was entered, there was no case or controversy as to NFF.

Once NFF settled and received a covenant not to execute, an actual case or controversy ceased to exist as to NFF. *See, e.g.*, *First State Ins. Co. v. W. Inv. & Dev. Corp.*, 895 F.2d 1576, 1576 (9th Cir. 1990) ("In light of the parties' settlement of the underlying action, the court concludes . . . that the appeal should be dismissed for want of a case or controversy."); *Bryan v. All Out Die Cutting, Inc.*, 32 F. App'x 651, 652 (3d Cir. 2002) ("Once the parties entered into a

full release and settlement of all claims against the individual and corporate Defendants and the agreements were approved by the Bankruptcy Court, an actual case or controversy ceased to exist, and the District Court could not properly exercise jurisdiction over the matter."). Because no justiciable controversy regarding NFF remained after it settled, the default judgment against it is void.

Despite Respondents' attempts to argue to the contrary, this position is borne out by Respondents' counsel's statements before the trial court. While Respondents' brief states "Respondents never expressed or implied they had no further interests against NFF," Respondents' Brief at 44, Respondents expressly stated before the trial court that "North Florida Framing no longer has any interest in this proceeding, *nor do we have any interest against them in this proceeding*." (Jury Trial Tr., Vol. 1, R. p. 116, lines 8–10) (emphasis added).

Moreover, the June 10, 2011 Order approving the class action settlement illustrates the lack of any interest against NFF as a result of the settlement. *See* (Final Order Approving Class Action Partial Settlement (June 10, 2011) ("June 10 Order"), R. p. 207, n.1 (listing NFF among the "Settling Defendants"), p. 209 (stating that, "[a]s a result of a lengthy, arms-length negotiations, Plaintiffs have reached a full, final and complete settlement with the Settling Defendants"), and at pp. 213–14 (directing 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")). Given this posture, there was no case or controversy as to NFF from that point forward.

Respondents seek to rely on the absence of any mention of NFF in a later order, dated August 8, 2011, dismissing certain parties with prejudice. Respondents' Brief at 8–9. But even if this Court agrees with Respondents that the June 10 Order did not act to formally dismiss NFF

from the case, that would not negate the effect of the Order, which establishes that there remained no case or controversy as to NFF that could expose NFF to any subsequent judgment or liability. *See* (June 10 Order, R. p. 209 ("As a result of a lengthy, arms-length negotiations, Plaintiffs have reached a *full, final and complete settlement* with the Settling Defendants . . . ." (emphasis added)).

Respondents next seem to contend that they did not settle with *NFF*, they settled with the *insurance carriers* and thus were permitted to pursue a default judgment against NFF. Respondents' Brief at 43 ("we reached a settlement *with those carriers*" (citing Jury Trial Tr., Vol. 1, R. p. 60, line 21–p.61, line 1) (emphasis in Respondents' Brief)). But, of course, the insurance carriers were not parties to the case, and thus could not be settled with. The settlement was with *NFF*, and it ended NFF's exposure in the case. Respondents' argument, though, perfectly illustrates their intent in this case —let a defendant out of the case cheaply in exchange for a covenant not to execute and then pursue an insurer who was not a party to the litigation.

Because courts only have jurisdiction over justiciable cases and controversies, the Circuit Court had no jurisdiction to enter a judgment against NFF after NFF had settled. Therefore, the default order entered against NFF is void for lack of jurisdiction and should be reversed for the reasons stated below.

2. Mt. Hawley's Motion was Timely

As discussed at pages 22–24 of Appellant's Opening Brief, Mt. Hawley's Rule 60(b) motion was timely because it was filed within a reasonable time of receiving notice of the default judgment via the collection action brought by Respondents. *See Sijon v. Green*, 289 S.C. 126, 128 n. 2 (1986); *but see Gatling v. Beach Palace, Inc.*, 294 S.C. 464 (Ct. App. 1988) (per curiam) (holding that a void judgment is a nullity and thus can be attacked at *any* time).

Appellant's motion was filed on July 28, 2015, approximately two months after the complaint was filed in the collection action. Mt. Hawley could not have filed sooner, because Mt. Hawley received no notice of either Respondents' settlement with NFF or the default judgment entered against NFF.

The lack of notice to Mt. Hawley is not cured by Respondents' repeated assertions that Mt. Hawley should have defended NFF at trial. Though the issue is not before this Court, NFF had valid grounds not to defend NFF relating to, e.g., the expiration of several policies before the work began, NFF's failure to respond to Mt. Hawley's requests for information, and the lack of claimed coverage provided by the policies. Thus, in sum, Mt. Hawley received no notice of the settlement with NFF, received no notice of the default judgment against NFF until the collection action was filed against it, and had and has valid defenses with regard to defending/indemnifying NFF. Given these circumstances, Mt. Hawley moved within a reasonable time to set aside the void judgment.

And, were this Court to find that Mt. Hawley's motion was somehow *not* timely, it should revert to the majority view that "a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception." *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 642, 643 n.1 (Ct. App. 1996). Any rule placing a timeliness restriction on challenging void judgments would be contrary to this Court's holding that "issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of" by courts *sua sponte*. *Bunkum v. Maor Props.*, 321 S.C. 95, 99 (Ct. App. 1996). An order entered by a court or judge without jurisdiction should not gain effect merely as a function of the passage of time.

3. Respondents Attempt to Bind Mt. Hawley to a Default Judgment That Resulted from an Improper Settlement

Looking at the broader picture, parties must not be allowed to do what Respondents seek to do. The Eleventh Circuit recently held:

> The practical effect of [a rule that an insurer's failure to object to an insured's settlement binds the insurer to that settlement] would be that once an insurer is given prior[10] notice of and fails to object to a settlement agreement between its insured and an injured party, it will be deemed to have waived all objections despite underlying fraud and collusion of which it had no knowledge. There is no such rule in Florida law.

Sidman v. Travelers Cas. & Sur., 841 F.3d 1197, 1203 (11th Cir. 2016). Similarly, Appellant is aware of no rule in South Carolina that non-defense constitutes waiver of the right to object to a void judgment of which the non-participating insurer had no notice. Such a rule offends notions of justice and fair play.

Consider the following: On one hand, Respondents' brief states that Mt. Hawley was untimely in its motion to intervene because the case concluded as to NFF prior to Mt. Hawley's motion.[11] On the other, it states that Respondents "never said they had no further claim against NFF"[12] and that NFF remains in the case until there has been a recovery from Mt. Hawley per the covenant not to execute.[13] Both cannot be true.

---

[10] In the instant case, Mt. Hawley knew nothing of its insured's settlement until it was sued four years later.

[11] Respondents' Brief at 25 ("In fact, as far as NFF is concerned . . ., the action had ended two years before Mt. Hawley sought to intervene.").

[12] *Id.* at 19. This strikes at the heart of the matter of this case, and is wrong. At trial, Respondents stated "North Florida Framing no longer has any interest in this proceeding, *nor do we have any interest against them in this proceeding*." (Jury Trial Tr., Vol. 1, R. p. 116, lines 8–10) (emphasis added). Respondents should be judicially estopped from asserting this position.

[13] Respondents' Brief at 18 ("The Partial Settlement Approval Order is not an order of dismissal, which is why there was a subsequent Order of Dismissal, *which leaves NFF in the case.*" (emphasis added)).

Next, Respondents' brief argues that NFF could have objected to being placed in default, and the absence of such an objection somehow validates the propriety of the default.[14] But *of course* NFF did not object, as it had received a covenant that its assets would not be executed upon. In NFF's eyes, the case was over; they were released from facing further liability, and no recovery could be sought from them above what they agreed to pay. This is, of course, what Respondents intended when they provided NFF with the covenant (terminating NFF's exposure) and had NFF's counsel relieved.

Respondents' current assertion is that the judgment is merely voidable and can be challenged in the collection action. However, thinking forward to the pending collection action, it is more than likely that Respondents will argue that the judgment being voidable will mean that Mt. Hawley cannot attack the judgment in that proceeding.

Respondents' brief repeatedly — no fewer than *thirty* (30) times — contends directly or indirectly that the current situation is entirely of Mt. Hawley's making due to its failure to participate in NFF's defense. Mt. Hawley has and had substantial defenses to coverage and reserved them. The default judgment is the result of an improper agreement between the parties, *see Sidman*, 841 F.3d at 1203. This Court should reverse.

IV. CONCLUSION

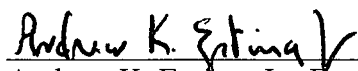
For the foregoing reasons, Mt. Hawley requests this Court reverse the lower Court's denial of its Motion to Intervene and for Relief from Judgment.

[signature on following page]

[14] *Id.* at 16 ("NFF, who is undoubtedly 'the party against whom the act is done,' did not object [to the default judgment] and did not appeal.").

Respectfully submitted,

January 27, 2017



Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ATTORNEYS FOR APPELLANT

RECEIVED
JAN 31 2017
SC Court of Appeals

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 Reply Brief of Appellant complies with Rule

211(b) SCRAP.

ANDREW K. EPTING, JR., LLC

By ______________________
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401

Attorneys for Appellant/Intervenor

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