

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

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SC Court of Appeals

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, Miguel 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

..... Defendants,

And Mt. Hawley Insurance Company, Appellant/Intervenor.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant/Intervenor Mt. Hawley Insurance Company (“Mt. Hawley”) respectfully petitions this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein. Mt. Hawley respectfully requests a rehearing of Opinion No. 2018-UP-420 (S.C. Ct. App. filed Nov. 7, 2018) (“the Opinion”) and/or the issuance of a new opinion.

Rehearing should be granted. First, Judge Kristi Harrington lacked jurisdiction to consider Mt. Hawley’s motion to intervene. Additionally, the Court applied the erroneous standard of review. The Court also misapprehended the issue of the timeliness of Mt. Hawley’s motion by failing to consider all of the appropriate factors and by improperly finding that Mt. Hawley had a duty to defend and/or monitor this action. Finally, the Court overlooked or misapprehended that intervention was appropriate under the unique facts of this case. For all of these reasons, the Court should grant rehearing and/or issue a new opinion.

Argument

I. The Opinion overlooks Judge Harrington’s lack of jurisdiction to address Mt. Hawley’s motion to intervene in light of the complex case order.

The Opinion fails to address the threshold question of whether Judge Harrington had jurisdiction to consider and rule on the issues relating to North Florida Framing’s (“NFF”) default and Mt. Hawley’s motion to intervene. The jurisdictional question *must* be examined prior to any determination of the merits of Mt. Hawley’s motion to intervene. Judge Roger Young was the complex case judge assigned exclusive jurisdiction over this matter. Therefore, Mt. Hawley objected to Judge Harrington’s jurisdiction to hear its motion to intervene both at the hearing and in its briefing to this Court. The Court, however, overlooked this argument entirely and proceeded

to examining Mt. Hawley’s motion on the merits.¹ This was improper. The Court should grant rehearing and vacate Judge Harrington’s order for lack of jurisdiction.

The Supreme Court’s July 26, 2006 Administrative Order regarding complex cases provides that the Chief Administrative Judge for a circuit may 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.*” Administrative Order, No. 2006-07-26-01 (S.C. Sup. Ct. dated July 26, 2006) (emphasis added). If the case is designated complex, “all pretrial motions and other matters pertaining to that case will be under the *exclusive jurisdiction of the judge assigned to the case*” including the trial of the case. *Id.* (emphasis added).

Here, in accordance with the complex case order, the Chief Administrative Judge issued an order designating the case as complex and assigning the matter to Judge Young. (Complex Case Order, R. 93.) The Order provides that Judge Young will “hear and handle all pre-trial motions and other matters pertaining to this case.” (*Id.*)

Judge Young, therefore, had jurisdiction over this matter to the exclusion of all other judges. *See* Black’s Law Dictionary (10th ed. 2014) (defining “exclusive jurisdiction” as “[a] court’s power to adjudicate an action or class of actions *to the exclusion of all other courts*” (emphasis added)).² To hold otherwise would defeat the purpose of the complex case designation,

¹ The Opinion also overlooks Respondents’ implied concession of this point. Respondents did not address Mt. Hawley’s exclusive jurisdiction argument. Rather, they only contended that the circuit court had subject matter jurisdiction. Mt. Hawley has not contested the circuit court’s general *subject matter jurisdiction*—rather, it questioned Judge Harrington’s jurisdiction in light of the complex case order assigning *exclusive jurisdiction* to Judge Young.

² On several occasions, South Carolina appellate courts have found that one judge lacked jurisdiction to rule on an issue where another judge had exclusive jurisdiction. *See, e.g., Edward D. v. Baby Girl B.*, No. 2015-MO-021, 2015 WL 1881177, at *1 (S.C. Apr. 23, 2015) (vacating order of the family court judge where the Chief Justice had issued an administrative order vesting exclusive jurisdiction in a different family court judge to “decide all matters pertaining to these cases”); *Williamson v. Middleton*, No. 2005-UP-011, 2005 WL 7082784, at *5 (S.C. Ct. App. Jan.

which is to have one judge oversee a particularly complicated matter who is familiar with all of the facts and legal issues. This ensures the judge is better prepared to deal with the intricacies of the case. The judge's specialized knowledge furthers judicial economy and the interests of justice by avoiding having multiple judges waste judicial resources to learn the details and complexities of a difficult and time-intensive matter each time an issue warranting court attention arises. It would render the term "exclusive jurisdiction" meaningless if the complex case judge can assign some or all of the case to another judge. Likewise, such would thwart these underlying policy concerns.

Therefore, Judge Young's Order purporting to reassign the case to Judge Harrington "for a date certain trial to begin on Monday May 9, 2011" was procedurally improper. (Order, R. p. 94.) The complex case Order has never been modified, and Judge Young remains the designated judge with exclusive jurisdiction over this matter. Thus, Judge Harrington's assignment of jurisdiction to Master-in-Equity Mikkel Scarborough for a damages hearing was also improper.

Under the complex case Administrative Order, Judge Harrington (and by extension Judge Scarborough) did not have the authority to handle *any* portion of the case due to Judge Young's exclusive jurisdiction. However, even assuming the assignment of jurisdiction to Judge Harrington was appropriate, she was given authority *solely* to conduct a date certain trial. Mt. Hawley's motion to intervene was well outside of her limited jurisdictional assignment, and should have been heard by the complex case judge. Judge Harrington, quite simply, lacked the authority to consider and rule on Mt. Hawley's motion.

11, 2005) (vacating order of judge on issue of attorney's fees where another judge retained exclusive jurisdiction over the matter). Mt. Hawley is mindful that these opinions are unpublished and do not have any precedential value. They are cited for illustrative purposes and as examples of persuasive reasoning.

In light of the foregoing, the Court should grant rehearing, vacate Judge Harrington’s order, and remand to Judge Young for consideration of Mt. Hawley’s motion to intervene and to set aside the judgment.

II. The court overlooked Mt. Hawley’s argument that a de novo standard of review should apply.

A. The court should have adopted a de novo standard.

In the Opinion, the Court did not explicitly note what standard of review it was applying. However, it implied that abuse of discretion governed by finding that Judge Harrington did not abuse her discretion in denying Mt. Hawley’s motion. The Court overlooked Mt. Hawley’s argument that a de novo standard should have applied.

Although the standard for review of an order granting or denying a motion to intervene is typically abuse of discretion, South Carolina appellate courts have never addressed the present situation. Under the unique facts of this case—where a party seeks intervention to set aside the judgment of a court lacking jurisdiction and/or a void judgment—the Court should apply a de novo standard. This situation is analogous to a Rule 60(b)(4) motion for relief from a void judgment. Although South Carolina appellate courts have not addressed the standard of review relating to this rule, most judicial circuits, including the Fourth Circuit, apply a *de novo* standard of review under Federal Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005); *Cent. Vt. 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.”). A void judgment is a void judgment, and the same standard should apply regardless of whether the party challenging the judgment is a defendant or an intervenor directly impacted by the judgment.

The differences between these two standards are stark and could impact the outcome if the Court applied the proper de novo standard. “An abuse of discretion occurs when the decision is

controlled by some error of law or is based on findings of fact that are *without evidentiary support.*” *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009) (emphasis added). On the other hand, “[d]e novo review *permits appellate court fact-finding*, notwithstanding the presence of evidence supporting the trial court’s findings.” *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011) (emphasis added). Denial of Mt. Hawley’s motion was an error of law. Thus, the lower court should be reversed under either standard. However, under the de novo standard, this Court can make its own factual determinations, which could certainly impact the outcome of the case. Thus, for the reasons set forth in Mt. Hawley’s prior briefing and herein, the court should grant rehearing and review the matter under the de novo standard.

B. The Opinion misapprehends the proper standard even assuming abuse of discretion applies.

At a minimum, the Court overlooked critical pieces of the standard of review. The Court referenced the lower court’s exercise of discretion. Existing South Carolina precedent cautions, however, that although the standard of review of a Rule 24(a)(2) motion is abuse of discretion, “each case is viewed in the context of its *unique facts and circumstances.*” *Ex Parte Gov’t Employee’s Ins. Co.*, 373 S.C. 132, 143, 644 S.E.2d 699, 705 (2007) (emphasis added). The court must also consider if judicial economy will be promoted by intervention along with “the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of [the rule].” *Id.* (quoting *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712 (1990)).

Here, the Court did not address whether it considered the unique facts and circumstances in this case. As detailed below, this is a significant issue since the circumstances of this case are highly unusual. Here, the following events occurred without *any* notice to Mt. Hawley:

1. Prior to trial, Respondents entered into a preliminary settlement agreement via email whereby NFF agreed to assign its rights to Respondents in exchange for a covenant not to execute. (Email, R. p. 7.)
2. On the morning of trial, Respondents' counsel represented to the court that they had settled with NFF, and—without the presence of NFF's counsel—presented an order relieving counsel for NFF to the Court. (*See* Consent Order, R. 186; Trial Tr., R. 112:21-22). It was implicit that Respondents were attempting to exercise NFF's rights purportedly assigned to them.
3. Immediately after presenting the Order, Respondents' counsel asked the Court to place NFF in default since they were unrepresented. (Trial Tr., R. 113:12-20.) The remaining defendant objected to this in light of the settlement, contending it appeared the Respondents were attempting to manufacture joint and several liability. (Trial Tr., R. 113:21-114:6, 114: 16-20.) Respondents' counsel, however, asserted that Respondents no longer had an interest against NFF, and that its liability was fully and finally settled. (Trial Tr., R. 115:13-20, 116:7-13.)
4. The matter proceeded to trial, and Respondents obtained a substantial judgment against Professional Plastering, which was the sole remaining defendant.
5. After the trial, Respondents filed a motion and proposed order asking that the trial court approve their settlement with NFF and other settled co-defendants. The proposed order, which the court signed, stated that Respondents had entered into a “full, final and complete settlement” with NFF and the other settling defendants, and provided that it “ends the claims” against those defendants. (Proposed Order, R. pp. 194-95.) The court later entered a final order approving the settlement, which reiterated that Respondents reached a “full, final and complete settlement” with NFF and the other settling defendants, and directed the Respondents to enter stipulation(s) ending the case and all claims with prejudice against the settling defendants. (Final Order, R. 207.)
6. Respondents then proceeded to present an Order of Default as to NFF to the court *ex parte*, which the court granted. (Order of Default, R. 233.) Nearly two years later, the Court held a damages hearing and entered a default judgment against NFF. (Order Granting Default Judgment, R. 242)

7. Finally, two years after obtaining the default judgment, Respondents brought a collection against Mt. Hawley seeking satisfaction of the judgment against NFF. (Decl. J. Compl., R. 245-279.) *It was only upon being served with this lawsuit that Mt. Hawley learned of this series of events.*

This is an exceedingly rare set of circumstances, which the Court overlooked in finding that Mt. Hawley's motion was untimely. Mt. Hawley could never have conceived that this set of events would occur. Furthermore, although the Opinion indirectly acknowledges judicial economy concerns, it overlooks that the result of the decision was a rigid application of the rules. The Opinion focuses too intently on the length of time that passed between events, much of which was within Respondents' control with regard to the default, *rather than when Mt. Hawley learned of them*. The Court should grant rehearing, at a minimum, to address these additional considerations in the standard of review.

III. The Court misapprehended the timeliness analysis and failed to consider all relevant timeliness factors.

As the Opinion notes, in examining the timeliness of a motion to intervene, courts look to: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). Here, the Opinion solely focused on when Mt. Hawley knew or should have known of its interests. The Court found that because Mt. Hawley knew of its interest as the insurer of defendant NFF in 2009, the motion was untimely. Regardless of the merit of this finding—which, as detailed herein, was flawed—the Court failed to examine this finding in light of the other factors.

Critically, the court misapprehends Mt. Hawley's *reasons* for the delay. The time that had elapsed and the stage of the litigation are only two of the four factors. As the *Davis* court acknowledged, this is a four prong test and the "*why*" behind intervention is a "necessary" question. 304 S.C. at 505, 405 S.E.2d at 603 (quoting *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988)). Here, the case had been dismissed as to NFF, but Respondents nevertheless pursued a default judgment against it. Respondents were seeking to collect on the resulting, *void* default judgment from Mt. Hawley, which never received any notice of the default-related issues and could not protect itself against the judgment. The opinion was silent on these necessary and appropriate reasons behind the timing of Mt. Hawley's motion. This warrants rehearing.

IV. The Opinion misapprehends the timeliness issue through an assumption that Mt. Hawley had a duty to defend NFF despite the issue of duty to defend not being before the Court.

The Court in its Opinion finds that Mt. Hawley's motion to intervene was untimely because Mt. Hawley received notice of filing of the action and issued a reservation of rights in 2009. The Opinion concludes that "[i]f Mt. Hawley had defended NFF at the inception of the case, like NFF's other insurers, Mt. Hawley could have readily asserted all defenses to the case." Opinion at 3. This finding was, respectfully, improper.

Mt. Hawley had a number of valid grounds for not defending NFF including, but not limited to, the expiration of several policies before the work on the project began, NFF's failure to respond to Mt. Hawley's requests for information, and the lack of claimed coverage provided by the policies. These issues, however, were not before the Court and are beyond the Record. The Mt. Hawley policies were not submitted to the Court, and no party presented any evidence regarding the terms of the Mt. Hawley policies and/or any insurance coverage issues.

In examining whether there is a duty to defend under South Carolina law, courts look to whether the “the facts alleged in a complaint against an insured . . . bring a claim within policy coverage.” *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009); *see also Episcopal Church in S.C. v. Church Ins. Co. of Vt.*, 993 F. Supp. 2d 581, 589 (D.S.C. 2014) (“Under South Carolina law, ‘an insurer’s duty to defend is based on the allegations of the underlying complaint’ and the terms of the policy” (quoting *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999))). Therefore, to make a determination about Mt. Hawley’s duty to defend, the Court must have the terms of the policy before it. Here, there was no such evidence. Hence, the Court’s assumption that Mt. Hawley had a duty to defend is erroneous.

Furthermore, it was erroneous for the Court to suggest that Mt. Hawley should have defended NFF because other insurers provided a defense. As previously noted, the Court did not have the terms of any of the relevant policies before it (either for Mt. Hawley or any of the other insurers). There are a myriad of reasons why coverage could be triggered under one insurer’s policy but not another’s. For example, covered damages may not have occurred during the term of the disclaiming insurer’s policy, the disclaiming insurer’s policy could have exclusions not found in the other policies, and the insured may cooperate with one insurer but refuse to assist the disclaiming insurer. These are only a few of the possible explanations. Thus, one insurer’s provision of a defense simply has no bearing on whether a different insurer has a duty to defend under the terms of its different policy. The Court should therefore grant rehearing.

V. The Court overlooks that Mt. Hawley had no duty to monitor the proceedings against NFF after disclaiming coverage.

The Opinion suggests, at a minimum, that Mt. Hawley should have continued to monitor the case against its insured, NFF, even after disclaiming coverage. A number of courts have rejected a post-disclaimer “duty to monitor.”

For example, the Southern District of Florida held that after an insurer denied coverage based on the allegations in the plaintiff’s initial complaint against its insured, “it had no continuing duty to monitor the litigation.” *Eastpointe Condo. I Ass’n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 664 F. Supp. 2d 1281, 1286-87 (S.D. Fla. 2009), *aff’d*, 379 F. App’x 906 (11th Cir. 2010). The *Eastpointe* court rejected the argument that the insurer had a duty to monitor the action for any amendments to the complaint that could potentially bring the plaintiff’s claims within the scope of coverage. *Id.* at 1287. Instead, the insured was obligated to notify the insurer under the notice of claim requirement if it sought coverage related to new allegations outside the prior denial. *Id.*

The Minnesota Supreme Court reached the same conclusion in *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). As the court explained, the insurer denied coverage because none of the facts alleged in the complaint put the insurer on notice of a claim within the policy coverage. The insured contended that if the insurer had participated in discovery it would have learned that the claims fell within the scope of the policy’s coverage. *See id.* The court rejected this argument, however, noting that the insurer, “having initially denied coverage on the basis of the pleadings, was under no obligation to participate in subsequent discovery proceedings.” *Id.*

Courts applying California law have held similarly. As the California Court of Appeals explained, the decision of whether to accept a tender of coverage is based on the lawsuit itself and

the facts available to the insurer at that time. *Cerritos Stephanie Corp. v. Fireman's Fund Ins. Co.*, No. B164412, 2003 WL 23025585, at *4 (Cal. Ct. App. Dec. 30, 2003). However, once the insurer makes this determination, "it [does] not have a continuing duty to investigate or monitor the lawsuit to see if the third party later made some new claim, not found in the original lawsuit." *Id.* If the insured becomes aware of new information raising the potential for coverage, it can bring this to the insurer's attention, but the insurer has "no obligation to seek it out for itself." *Id.* Likewise, as the Ninth Circuit has noted, the insurer does not have a continuing duty to monitor the lawsuit after denying coverage and "[i]n the absence of a new tender, ***the insurer is not charged with knowledge of new extrinsic facts; nor is it under an independent obligation to investigate the potential for coverage.***" *The Upper Deck Co., LLC v. Fed. Ins. Co.*, 358 F.3d 608, 612-13 (9th Cir. 2004) (emphasis added).

To hold otherwise would contradict with the law governing an insurer's duty to defend. As the Pennsylvania Superior Court has explained, the duty is triggered, "if at all, by the factual averments contained in the complaint itself." *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 606 (Pa. Super. Ct. 1997). "Were this not the case, an insurer would be required to monitor the pre-trial developments of a case in which coverage was denied to insure that no discovery sheds light upon a possible claim for which a defense is mandated." *Id.* This result is "unworkable and unacceptable," as the "rightful denial of coverage based upon a filed complaint should relieve an insurer of the duty and burden of tracking the developments of a case in which the insurer has no legal interest." *Id.*

This is a critical factor in this matter. After making a proper disclaimer of coverage, Mt. Hawley was under no affirmative duty to monitor the proceedings for the offhand chance that

subsequent developments could implicate coverage. Here, there is no evidence whatsoever suggesting Mt. Hawley's disclaimer of coverage was inappropriate.

It is undisputed that Mt. Hawley first received notice of the default and subsequent judgment against NFF when it was served with the collection action. Moreover, it is undisputed that Mt. Hawley promptly moved to intervene upon receiving this notice. Mt. Hawley should not be penalized for this lack of notice where it was under no obligation to affirmatively monitor the litigation.

Additionally, the Opinion's logic is fundamentally flawed. The Opinion states that if Mt. Hawley monitored the litigation against NFF, it would have been aware of the default issue sooner. This premise, however, has a critical gap because the action was dismissed with prejudice as to NFF prior to Plaintiffs' pursuit of a default judgment. Thus, even if Mt. Hawley had a duty to monitor (which it did not) it would have had *no reason* to continue to do so upon the settlement and dismissal of the action as to NFF. Mt. Hawley was on notice in 2009 that a judgment could be entered against its insured. It was *not* on notice that a *void* judgment could be entered *after the action was dismissed as to NFF*. Even if it had been monitoring the litigation, these unusual circumstances and corresponding lack of notice would still have prevented Mt. Hawley from seeking intervening earlier. The Opinion, respectfully, relies on an erroneous proposition for denying intervention and thus rehearing should be granted.

VI. The Court misapprehends and overlooks the unique facts of this case which warrant intervention.

A. Mt. Hawley's motion was designed to promote finality, not impede it.

The Opinion characterizes Mt. Hawley's interest as "an insurer of a defendant in this case," and notes that Mt. Hawley's interest remained unchanged from the time it first received notice of the action in 2009 and issued a reservation of rights. The Opinion explains that Mt. Hawley's

motion to intervene was untimely because the action “had all but concluded” at that time. This misapprehends the very purpose of Mt. Hawley’s motion, which was to promote finality with regard to the dismissal of NFF.

Contrary to the Opinion’s suggestion, Mt. Hawley did not file this motion merely to “challenge the judgment.” Rather, Mt. Hawley intervened to highlight to the court that the case had already been dismissed with prejudice as to NFF. In other words, *the judgment should have never existed*. Once the court entered its order of dismissal, there was no further controversy and it was improper for a judge to enter an order to the contrary. *See Green v. Green*, 327 S.C. 577, 491 S.E.2d 260 (Ct. App. 1997) (finding judge was without authority to issue a “final order” modifying a previously issued order approving a settlement agreement, where the agreement stated it was a “complete and final settlement of all claims” between the parties). Upon becoming aware that Respondents obtained a default judgment against NFF despite the dismissal and would seek to enforce that judgment, Mt. Hawley promptly moved to intervene.

Contrary to the Court’s suggestion, Mt. Hawley was not trying to interfere with the finality of the underlying action. Instead, Mt. Hawley’s motion was concerned with *promoting finality* by upholding the dismissal of the action as to NFF. By failing to adhere to that dismissal, default proceedings and an entirely separate lawsuit (the collection action) resulted. *This result* has failed to promote the State’s policy favoring finality. *See Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (acknowledging the policy interest of finality).

B Intervention has been allowed under analogous circumstances.

As the Opinion notes, intervention should be “liberally granted.” *In re Horry Cnty. State Bank*, 361 S.C. 503, 513, 604 S.E.2d 723, 728 (Ct. App. 2004). Extraordinary circumstances are not required to show timeliness, even where the motion to intervene comes after the judgment has

been entered. See *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991) (quoting *Mokhiber v. Davis*, 537 A.2d 1100, 1105 (D.C. Ct. App. 1988)). Moreover, a void judgment “can be attacked at any time” and “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, 643 n.1, 478 S.E.2d 868, 870 n.1 (Ct. App. 1996); see also, e.g., *Ryerson v. Riverside Cement Co.*, 266 Cal. App. 2d 789, 795 (Ct. App. 1968) (noting that aggrieved party may move to intervene after entry of judgment where the trial court exceeded its jurisdiction in granting the relief, noting that “[a] judgment void on its face may be set aside on motion without any time limitation”).

This Court has previously recognized the propriety of intervention after entry of a default judgment where the intervenor would be “vulnerable to being responsible for the entire judgment.” See *McClurg v. Deaton*, 380 S.C. 563, 570-71, 671 S.E.2d 87, 91 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011). In *McClurg*, the court granted intervention in light of the intervenor’s “large financial interest in the action and possible responsibility for paying the judgment,” and permitted the intervenor to attempt to set aside the default judgment. *Id.*; see also, e.g., *Hill v. Alfalfa Seed & Lumber Co.*, 297 P. 868, 870 (Ariz. 1931) (“[I]f the party seeking to intervene shows by his pleadings that he is primarily or ultimately the person liable for any judgment between the other litigants, he should be allowed to intervene.”).

Likewise, other courts have found that intervention should be permitted where an insurer remains liable for any default judgment against the insured and has no other means to litigate liability or damages issues relating to the insured. For example, in *Vincent v. Classic Party Rentals, Inc.*, No. CV0900028RGKAGR, 2009 WL 10675572 (C.D. Cal. Oct. 7, 2009), the court granted the insurer’s motion to intervene where the insured failed to cooperate and a default judgment was entered against him. See *id.* at *1. The court noted that the insurer did not intend

to conduct discovery or add any further claims or defenses to the action. *See id.* It emphasized that because the default judgment was enforceable directly against the insurer, the insurer's interest was significant and would be impaired if it was not permitted to intervene. *See id.*

Vincent relied on *Reliance Ins. Co. v. Superior Court*, 84 Cal. App. 4th 383, 385, 100 Cal. Rptr. 2d 807, 809 (Ct. App. 2000). The *Reliance* court found that intervention was appropriate because the insurer would be required to satisfy any default judgment entered against the insured. *See id.* at 387. Where the insured defaults, the insurer's presence would not enlarge the issues as it will almost certainly assert the same defenses as the insured would. *See id.* The court reasoned that prohibiting intervention by the insurer would be unfair because the plaintiff would be able to obtain an unopposed default judgment and bring suit against the insurer for payment. *See id.* at 388. This would punish the insurer for something it did not do, and "could also result in an unjustified windfall" to the plaintiff. *Id.*; *see also Williams v. Lee*, No. B264386, 2016 WL 193479, at *2 (Cal. Ct. App. Jan. 14, 2016) (explaining that insurer's interest in litigating the insured's liability and causation outweighs the plaintiffs' interest in obtaining a default judgment); *Truck Ins. Exchange v. Superior Court*, 60 Cal. App. 4th 342, 346 (Cal. Ct. App. 1997) (noting that timeliness is not a reason to bar intervention where the plaintiffs have not shown "any prejudice other than being required to prove their case").

Courts have also found that intervention is appropriate where questionable circumstances surrounded the judgment. *Bond v. Giebel*, 101 A.D.3d 1340, 1343, 956 N.Y.S.2d 267, 269-70 (Sup. Ct. App. Div. 2012) is instructive. In *Bond*, the insurer sought intervention a substantial time after a default judgment was entered against its insured. Nevertheless, the court found that the motion to intervene was timely. *See id.* The court noted the "strong preference for deciding cases on the merits," and found that the insurer's motion was timely in light of its assertion that it

had no reason to question the propriety of the judgment. *Id.* The insurer moved to intervene upon learning the insureds entered into an assignment of rights that could have resulted in them recovering a significant sum of money from the insurer in the event that the plaintiff was successful in its action against the insurer. *See id.*

Finally, courts have permitted post-judgment intervention by uninsured motorist carriers in liability actions brought by their insureds against uninsured motorists who default, even where the insurer is aware of the action. For example in *Erickson v. Bennett*, 409 N.W.2d 884, 885 (Minn. Ct. App. 1987), the court explained that although the insurer knew of the pending suit against the uninsured motorist, it was not informed of the case's progress until it received a phone call from the insured's counsel informing it of the impending default judgment hearing. *See id.* The court reversed the trial court's denial of the insurer's motion to intervene, finding that it was timely even though it was made after the default hearing and entry of judgment. *See id.* The court noted that Rule 24 is designed to protect non-parties from having their interests adversely affected by litigation conducted without their participation, and that the insurer "should have the right to dispute the questions which make it liable on its contract." *Id.* at 887. Likewise, it should not be penalized "when it was put on notice of the default hearing in an untimely manner." *Id.* The court also acknowledged the significant prejudice that would result to the insurer where it may be bound by a judgment where "material issues of liability and damages were not litigated" due to a "complete absence" of an adversarial relationship. *Id.* at 888.

Burge v. Mid-Continent Cas. Co., 933 P.2d 210, 211 (N.M. 1997) is in accord. *Burge* also involved a suit by an insured against an uninsured motorist where the uninsured carrier was not given notice of the default hearing or a copy of the default motion until nearly a month later. *See id.* at 212. Relying on *Erickson*, the Court found that even though the carrier was aware of the

action against the insured motorist, its interest in intervening did not arise until the uninsured motorist defaulted. *See id.* at 215. The court reasoned that timeliness “does not depend on when the insurer first became aware of the action,” but rather turns on how quickly the insurer acted “once it learned its interest were not protected by existing parties.” *Id.* at 216. The court determined that the insurer did not delay in taking the necessary steps to protect its rights, as it moved to intervene promptly after receiving the motion for default. *See id.* Prior to this time, although the insurer was aware of the ongoing action, it “had no knowledge of the suit’s progress until it received the default motion,” and was not aware of the default. *Id.*

VII. The availability of an alternative forum is an insufficient reason to deny Mt. Hawley’s motion to intervene.

The Court’s ruling that Mt. Hawley could collaterally attack the judgment, while correct, is not a proper basis for denying Mt. Hawley’s motion to intervene.

As a number of courts have explained, “where a proposed intervenor’s interest will be prejudiced if it does not participate in the main action, *the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene.*” *Commodity Futures Trading Comm’n v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 387 (7th Cir. 1984) (emphasis added); *see also W. Energy All. v. Zinke*, 877 F.3d 1157, 1167-68 (10th Cir. 2017) (same).

This principle holds true even where the underlying judgment would not necessarily be binding on the intervenor. *See JMA Energy Co. v. BJ Servs. Co., U.S.A.*, No. CIV-08-738-M, 2009 WL 1856216, at *3 (W.D. Okla. June 26, 2009). The *JMA Energy* court explained that disposition of the action would as “a practical matter impair or impede Plaintiff-Intervenors’ ability to protect their interests.” *Id.* The court explained that although the judgment in the present action would not be binding on the intervenors, it would, as a practical matter, “be unrealistic to assume that such judgment would have no influence whatsoever” in any subsequent litigation. *Id.*

Because Mt. Hawley has established that it has an interest in the present action and would suffer prejudice if not permitted to intervene, the ability to attack the judgment in another forum—here, the collection action—is not a basis for denying intervention.

VII. The meritorious arguments for the remaining intervention factors and for setting aside the default judgment detailed in Mt. Hawley’s briefing warrant intervention.

The Court overlooked or misapprehended that the other intervention factors also weigh in favor of permitting intervention. Mt. Hawley incorporates and reasserts those arguments herein. Mt. Hawley had a critical interest in the underlying litigation because Respondents seek satisfaction of the entire judgment from Mt. Hawley. The existing parties are certainly not adequately protecting Mt. Hawley’s interests. Respondents’ interests directly conflict with Mt. Hawley’s due to their judgment creditor status, and NFF is default. All of these factors weigh in favor of rehearing.

Additionally, there are numerous meritorious grounds for setting aside the void default judgment. The judgment should be set aside due to, *inter alia*, the trial court’s lack of jurisdiction, NFF’s previous dismissal, the applicability of judicial estoppel, and the award of damages improperly resulting in a double recovery. Mt. Hawley also reasserts and incorporates these arguments herein. The Court overlooked that refusal to permit intervention under the unique facts of this case would be fundamentally unfair, as it would result in the enforcement of a void judgment. This is contrary to the public policy of this state and the fundamental principles of our adversarial system of justice. These considerations also support rehearing.

Conclusion

For the reasons set forth herein, and for the reasons and arguments set forth in Mt. Hawley’s appellate briefs, all of which are incorporated herein, this Court should grant rehearing and issue a new Opinion reversing the lower court. Failing that, the Court should grant rehearing and issue

a new Opinion vacating the lower court's decision and remanding the matter to Judge Young for consideration of Mt. Hawley's motion.

Respectfully submitted,

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December 11, 2018

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

RECEIVED

DEC 11 2018

SC Court of Appeals

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, Miguel 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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant/Intervenor, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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December 11, 2018

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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DEC 11 2018

SC Court of Appeals

RE: Mark Teseniar v. Fenwick Plantation
Appellate Case No. 2016-000185
Our File No. 01882/01508

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and 7 copies of a Petition for Rehearing. Please return a clocked-in copy of same via the courier.

By copy of this letter to opposing counsel, we are hereby serving them with a copy of this filing.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

by
Blake T. Ullis w/permission

C. Mitchell Brown

CMB:eh

cc: Phillip W. Segui, Jr.
W. Jefferson Leath Jr.
Jesse A. Kirchner
Justin O. Lucey

December 11, 2018

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