THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
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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., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mikey Mason d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Nava Guzman Construction Company, Inc.,...Defendants,

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

RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondents request the denial of Mt. Hawley Insurance Company's ("Mt. Hawley") Petition for Rehearing seeking reconsideration of this Court's unpublished, *Per Curium* decision entered November 7, 2018, for the reasons set forth herein.

ARGUMENT AND CITATION OF AUTHORITY[1]

I. Mt. Hawley's Petition fails to satisfy Rule 221(a), SCACR.

Rule 221(a), SCACR, requires Mt. Hawley to state with particularity what points this Court overlooked or misapprehended. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."). Mt. Hawley's Petition rehashes its prior arguments without meeting this burden. *Id.* at 532, 564 S.E.2d at 322 (it is not the purpose of a petition for rehearing to have the case tried for a second time in the appellate court).

II. Whether Mt. Hawley has a duty to defend and indemnify NFF or monitor the underlying proceedings after resting on its coverage defenses in 2009 is not before this Court, and it is improper to insert these issues for the first time now.

In Sections IV and V of its Petition, Mt. Hawley attempts to rely upon issues, alleged facts, and arguments that it recognizes are not before this Court for review. For certain, this Court cannot overlook or misapprehend a matter that was never before it. Whether Mt. Hawley owes a duty to defend and indemnify NFF is not now, nor was it ever, an issue in this appeal. Mt. Hawley acknowledges on page 9 of its Petition that its purported grounds for declining to defend NFF in 2009 and in the years that followed are "not before the Court and are beyond the Record[,]" In spite of this admission, Mt. Hawley nevertheless goes on to talk about its coverage defenses and its belief that it owed no duty to NFF. This is improper.

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[1] The underlying factual and procedural background of this appeal is accurately set forth in Respondent's Brief on file with the Court. For brevity, it is not repeated here.

Mt. Hawley cannot use issues that it admits are not before the Court and not within the record as grounds for why rehearing is warranted. Sections IV and V of Mt. Hawley's Petition, and similar references therein, should be stricken. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("a party may not raise an issue for the first time in a petition for rehearing"). "Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin,* 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). As the decision notes, Mt. Hawley can litigate the merits of its coverage defenses in the separately pending Coverage Action, but not here.

Likewise, whether Mt. Hawley had a duty to monitor the proceedings against NFF is not before this Court. After being notified in 2009 of the lawsuit and the allegations against its insured, Mt. Hawley made the conscious decision that it would not defend NFF or otherwise participate in the underlying litigation. Besides, Mt. Hawley overlooks a key point found in authorities it cites on the issue whether an insurer must monitor the underlying proceedings. Only "*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." *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602 (Pa. Super. Ct. 1997) (all emphasis added).

As critical as this issue may be to the separate Coverage Action, whether Mt. Hawley "rightfully" denied a defense to NFF based on the allegations of Respondents' complaint is not before this Court. Unlike the present case, *Scopel* was postured as an appeal from the action to determine the merits of the carrier's denial of coverage. Before announcing the carrier had no duty to monitor the underlying proceedings, the *Scopel* court first specifically found the carrier did, in fact, rightfully deny coverage because the factual allegations in the plaintiff's complaint failed to trigger a duty to defend. Here, that foundational determination is not before this Court. It is

premature, conclusory, and disingenuous for Mt. Hawley to represent its denial was "rightful" when that issue has not been adjudicated.

Review of the procedural posture of *Scopel* is also another reminder that determining whether Mt. Hawley was correct to rely on its coverage defenses is not germane to this action. Procedurally, that issue should be determined in the separate Coverage Action, as seen in authorities cited by Mt. Hawley. *See Upper Deck Co. v. Fed. Ins. Co.*, 358 F.3d 608 (9th Cir. 2004) (appeal involved the merits of the separate declaratory judgment action to determine coverage, not the underlying liability action); *Eastpointe Condo. I Ass'n v. Travelers Cas. & Sur. Co. of Am.*, 664 F. Supp. 2d 1281 (S.D. Fla. 2009) (separate action filed to determine whether the carrier had a duty defend); *Garvis v. Emp'rs Mut. Cas. Co.*, 497 N.W.2d 254 (Minn. 1993) (addressing on certified question whether a carrier had a duty to defend a separate underlying liability action).[2]

III. There was no lack of jurisdiction, and Mt. Hawley cannot collaterally attack the orders complained of in this appeal.

Mt. Hawley's jurisdictional argument has been thoroughly briefed before this Court and is noted in the introductory paragraph of this Court's November 7, 2018 Decision. Nothing was overlooked or misapprehended. NFF admitted in its Third-Party Complaint, "The parties, matters, and all things hereinafter alleged are within the jurisdiction of this Court." (R. p. 82). Mt. Hawley admits in footnote 1 of its Petition that the circuit court had subject matter jurisdiction over the case. At the first hearing on its motion, Mt. Hawley conceded, "I don't doubt judge, that you had the authority to try this case." (R. p. 13:2-3).

[2] Mt. Hawley also cites an unpublished decision from California that likewise stemmed from the coverage action, not the separate liability action. *Cerritos Stephanie Corp. v. Fireman's Fund Ins. Co.*, B164412, 2003 Cal. App. Unpub. LEXIS 12199 (Dec. 30, 2003).

Mt. Hawley's only contention is that Judge Young's assignment of the case to Judge Harrington for trial as "procedurally improper." (Petition, p. 4). This argument fails because Mt. Hawley continues to conflate a lack of subject matter jurisdiction with alleged irregularities not involving subject matter jurisdiction, the latter of which does not render a judgment void but may render it voidable by a proper party.

"The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961) (quoting from 21 C. J. S., Courts, § 26) (Emphasis added). "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all,[3] and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal." *Thomas & Howard Co. v. T. W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (emphasis added). A voidable order, as opposed to a void order, "is equally as binding as a right one" until it is set aside on direct appeal by the party against whom it is entered. *Piana*, 239 S.C. at 371-72, 123 S.E.2d at 299 (emphasis added). Such an order "cannot be attacked collaterally[,] and [t]he only way its binding force can be escaped or avoided is by appeal or writ of error." *Id.*

If there are any "irregularities" related to the assignments of the trial and various matters to Judges Harrington and Scarborough, these irregulates do not implicate subject matter jurisdiction and not render the judgment void. At best, any such irregularities might make the order

[3] *See McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) ("The definition of 'void' under [Rule 60(b)(4)] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.").

voidable through a direct appeal by a party aggrieved. "When a court acts with proper subject matter jurisdiction, but takes action outside of its authority, the party against whom the act is done must object and directly appeal." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (citing *Coon v. Coon*, 356 S.C. 342, 347-48, 588 S.E.2d 624, 627 (Ct. App. 2003), *aff'd as modified*, 364 S.C. 563, 614 S.E.2d 616 (2005) (emphasis added). NFF is the party against whom the judgment was entered, and it did not object and it did not appeal. Mt. Hawley is not permitted to collaterally attack a merely voidable judgment.

Mt. Hawley improperly relies upon unpublished decisions attempting to bolster its jurisdictional argument. If these cases have any persuasive value, they reinforce Respondents' points above. In *Williams v. Middleton*, No. 2005-UP-011, 2005 WL 7082784 (S.C. Ct. App. Jan. 11, 2005), the party "against whom the act was done" was the party that objected and appealed the award of attorney's fees by a judge that was not the trial judge who retained jurisdiction. This irregularity rendered that judgment voidable by the party affected (who brought the appeal) but did not render the judgment void. There was no belated collateral attack in *Williams* by a non-party seeking to intervene, as Mt. Hawley attempts here. The same is true of *Edward D. v Baby Girl B.*, No. 2015-MO-021, 2015 WL 1881177 (S.C. Apr. 23, 2015), where the appellant was a party to the action seeking direct review of a voidable judgment.

At page 4 of its Petition, Mt. Hawley touts the importance of having a knowledgeable judge informed of the complexities of the case decide all matters, yet it complains that Judge Harrington, who was the most knowledgeable having conducted the underlying trial, was the wrong judge to hear its motion to intervene. Judge Sanders fittingly stated, "Appellate courts recognize – or at least they should recognize – an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App.

1987); *see also* Rule 61, SCRCP. This Court correctly found Mt. Hawley's motion to intervene was untimely when it was filed. It would not matter which judge heard it because it was defective to begin with. Thus, Mt. Hawley is not prejudiced regardless of who heard its motion.[4]

IV. A *de novo* Standard of Review does not apply and should not be adopted.

Mt. Hawley concedes, "the standard of review of an order granting or denying a motion to intervene is typically an abuse of discretion[.]" Our Supreme Court settled the question, holding "[t]he decision to grant or deny a motion to . . . intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); *citing Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); *and Hunnicutt v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Goethe*, 373 S.C. at 135; 644 S.E.2d at 701 (citing *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006)) (emphasis added). Applying this precedent ends the inquiry.

Even cases relied upon by Mt. Hawley correctly apply the abuse of discretion standard. *Accord Williams v. Lee*, No. B264386, 2016 WL 193479 (Cal. Ct. App. Jan. 14, 2016); *Reliance Ins. Co. v. Superior Court*, 84 Cal. App. 4th 383, 100 Cal. Rptr. 2d 807 (Cal. Ct. App. 2000); *Truck*

[4] Mt. Hawley makes the surprise assertion in footnote 1 of its Petition that Respondents have implicitly conceded its jurisdictional argument. With much due respect, Respondents disagree and incorporate all the arguments raised before and herein demonstrating that Mt. Hawley's collateral attack on jurisdictional grounds is simply wrong.

Ins. Exchange v. Superior Court, 60 Cal. App. 4th 342, 70 Cal. Rptr. 2d 255 (Cal. Ct. App. 1997) (all reviewing the denial of a motion to intervene under an abuse of discretion standard).

That Mt. Hawley sought intervention to obtain relief from a judgment entered against its insured does not invite a different standard. In *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), this Court confronted the exact issue of an insurer simultaneously moving to intervene and moving to set aside a default judgment entered against an employee of its insured under Rule 60(b)(1) and 60(b)(3). Intervention was allowed,[5] and the denial of the carrier's motion to set aside the judgment was reviewed for abuse of discretion.

Mt. Hawley's incorrect argument that the judgment against NFF is "void" does not invite a different standard. *McDaniel.*, 324 S.C. 639, 478 S.E.2d 868, contradicts the claim that no South Carolina appellate court has addressed the standard of review relating to motion to set aside a void judgment. There, McDaniel moved to set aside the judgment claiming it was void under Rule 60(b)(4). This Court held, "Whether or not McDaniel made his Rule 60 motion within a reasonable time is a matter addressed to the trial judge's sound discretion." *Id.* at 644, 478 S.E.2d at 871 (emphasis added). Mt. Hawley overlooks this holding. It also overlooks *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion.") (citation omitted) (emphasis added).

[5] In *McClurg*, it mattered that the carrier had no knowledge that a lawsuit had ever been filed against its insured's employee. The insured moved to intervene as well, because it, too, had no knowledge of the suit. The facts here are opposite. Mt. Hawley concedes it knew of the lawsuit against NFF in 2009 when NFF requested Mt. Hawley to defend it.

Beyond incorrectly arguing the judgment against NFF is void, Mt. Hawley offers no explanation in its Petition for how "judicial economy" is served by allowing an insurance carrier to refuse to participate in the defense of its insured for the better part of decade, only to later ask for a do-over when it does not like the outcome. Such an outcome would encourage carriers to decline to defend their insureds, knowing that they could intervene after the fact, while its coverage obligations remain the subject of a separate lawsuit, and upset years of underlying litigation against the insured. Final judgments would become the exception to the rule. Certainly, this should not to become the policy embraced by the Courts. The Coverage Action is the proper place for Mt. Hawley to litigate its coverage obligations.

Respondents are compelled to respond to Mt. Hawley's inaccurate account the events noted on page 7 of its Petition, which it offers for purposes of a *de novo* review that does not exist. The transcript reveals that everyone was clear that NFF was not dismissed by Respondents' settlement with it and its Participating Carriers, and Respondents specifically reserved their claims against NFF to the extent of any proceeds available from any non-participating carriers, specifically including Mt. Hawley. (R. pp. 112:15 – 116:21). The Record speaks for itself on these matters. Respondents incorporate the additional points on this issue more fully discussed in Section VI of this Response, demonstrating NFF was not dismissed, and the judgment against it is not void.

What is noticeably absent in Mt. Hawley's recitation of events is the lengthy gap between its notice of the lawsuit 2009 and the first of the pretrial matters referenced on page 7 of its Petition. Mt. Hawley has not offered any explanation for its lengthy delay during that highly relevant period, beyond its self-serving determination that it owed no duty to defend or indemnify NFF, which is not before this Court for review. There is no assertion, nor can there be, that Mt. Hawley was not in complete control of its decision making when chose for years to stand on its coverage defenses.

V. Mt. Hawley's Motion to Intervene was Untimely.[6]

This Court correctly determined that Mt. Hawley's motion to intervene was untimely. Mt. Hawley admits, "[It] was on notice in 2009 that a judgment could be entered against its insured." (Petition for Rehearing, p. 13). The "interest" Mt. Hawley now claims in this action is as "an insurer of a defendant in this case," was present from day one. Having admitted knowledge of the risk of an adverse judgment as far back as 2009, that is starting point for measuring Mt. Hawley's delay. Mt. Hawley chose not to participate, relying instead on its coverage defenses. The record is devoid of any other reason offered by Mt. Hawley for why it waited so many years to act. The absence of evidence demonstrating a valid reason for the delay measured from 2009, alone, is grounds to affirm the circuit court. *Berkeley*, 302 S.C. at 189-90, 394 S.E.2d at 714 (a denial of a motion to intervene is reviewed for abuse of discretion). If the reason is simply that Mt. Hawley believes it had no duty to defend or indemnify NFF against Respondents' lawsuit, that question is not before this Court and remains pending for adjudication in the separate Coverage Action. If Mt. Hawley prevails on that issue, then it must also be true that Mt. Hawley has no interest in the outcome of this action. This further supports denial of its motion to intervene.

This Court found, and Mt. Hawley admits, the litigation had progressed to a "relatively late stage" when it moved to intervene. (Br. p. 40). This also supports denying its motion as untimely, and failure to satisfy any of the four requirements for intervention is fatal. *Ex parte Reichlyn*, 310 S.C.at 500, 427 S.E.2d at 664.

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

Complaining that it was unaware of what was happening at trial does nothing to explain the reason behind Mt. Hawley's decision not participate in the years before the litigation reached that late stage. Mt. Hawley cannot rely on cases where the insurer was wholly unaware of the underlying litigation. Mt. Hawley admits that it was, thus its claim of prejudice rings hollow. Any alleged prejudice is the result of its own long-standing decision to rest on its coverage defenses rather than participate in the lawsuit. Moreover, any claimed prejudice is relieved by the fact that Mt. Hawley is free to assert whatever coverage defenses it relied upon back in 2009 in the separately pending Coverage Action. By continuing to deny that it owes any duty to defend or indemnify NFF against Respondents' claims, Mt. Hawley is effectively denying that it has any "interest" this action against its insured. Without such an interest, intervention is not allowed.

VI. There are no unique facts warranting intervention.

Again, Mt. Hawley fails to raise any point overlooked or misapprehended by this Court, and its Petition should be denied.

A. Mt. Hawley's efforts do not promote finality of judgments.

The myth that NFF was dismissed from the action is debunked by the Record and was thoroughly briefed before this Court. Mt. Hawley continues to conflate the Partial Settlement Approval Order with an order of dismissal with prejudice. They are not the same, and the settlement terms placed on the record crystalize this point. Mt. Hawley noticeably fails to draw attention to the Court's August 8, 2011 Order of Dismissal as to Certain Defendants (with prejudice) (R. p. 230-232), which must be read in conjunction with the Motion and Order Preliminarily Approving Partial Class Action Settlement to which Mt. Hawley gives much attention. (R. p. 190; p. 207, respectively). The Order of Dismissal does not dismiss NFF from the action. (R. p. 230-232). Mt. Hawley ignores this important Order, and it is the only one that

matters. There is no confusion about whether NFF was dismissed—it was not. The next day the circuit court entered the formal Order placing NFF in default. (R. p. 233-234).

Under the terms of the settlement agreement with NFF, Respondents were not required to dismiss NFF until "completion of [Respondents'] collection of funds from non-settling parties and carriers, to whatever extent they may collect any funds." (R. pp. 107-109; R. pp. 218-222). Once the other settling defendants (who had no special stipulations) tendered their respective settlement proceeds, they were dismissed by the Order of Dismissal as to Certain Defendants. Notably, NFF is not included in this Order, or any other order of dismissal for that matter, and NFF was never dismissed from the case. This is because, unlike other settling parties, Respondents are still pursuing recovery for claims associated with NFF, which was the obvious intent from the terms of the May 6 Settlement Email and the Covenant not to Execute. (R. pp. 107-109, pp. 218-222).

A covenant not to execute is treated differently than a settlement agreement that is a release. *Cobb v. Benjamin*, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). "To determine whether an instrument is a covenant not to execute or a release, we look to the intention of the parties." *Id.* (holding an agreement not to execute a judgment against a defendant, but specifically reserving the right to proceed against any available UIM coverage, was a covenant not to execute, rather than a release). *Accord Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). There is no plausible argument that Respondents dismissed NFF.

B. Mt. Hawley cites no analogous authorities supporting intervention.

Mt. Hawley cites *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991) because the motion to intervene in that case came after the judgment was entered and was still found timely. Mt. Hawley misses the point of *Davis*. In *Davis*, a newspaper moved to intervene seeking only to unseal settlement records for public access. The newspaper's motion was timely because it "had

no reason to seek intervention prior to the sealing of the records." The newspaper's interest in the action therefore did not arise until the end of the case when the records were sealed. Significantly, there was no effort by the newspaper to undo the underlying result—it merely sought public access to the records. Important to the *Davis* Court's decision was its observation that, "It is necessary to ask *why* a would be intervenor seeks to participate, for if the desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties." *Id.* at 505, 405 S.E.2d at 603 (italics in original, underline emphasis added). Here, the entire purpose of Mt. Hawley's untimely intervention was to disrupt and set aside the underlying judgment against NFF. (R. p. 22:22-24). It also admits knowledge that its insured faced the threat of a judgment as far back as 2009, yet it did not participate. *Davis* lends no help to Mt. Hawley. In fact, it supports this Court's decision.

The same is true of *McDaniel*, 324 S.C. 639, 478 S.E.2d 868, which reiterates the difference between a void judgment and one that is at best merely voidable. "The definition of 'void' under [Rule 60(b)(4)] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id.* at 644, 478 S.E.2d at 871. NFF conceded both personal jurisdiction and subject matter jurisdiction existed, and Mt. Hawley concedes "Mt. Hawley has not contested the circuit court's general subject matter jurisdiction." (Petition for Rehearing, p. 3 fn 1).

In *Hill v. Alfalfa Seed & Lumber*, 297 P. 868 (Ariz. 1931), the party seeking intervention acknowledged in its pleadings that it was the principal on the bond being sued upon, making it ultimately and primarily liable for any judgment obtained. "[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." *Id.* at 870. Mt. Hawley takes the

opposite position—beginning in 2009 and even still in its Petition for Rehearing, Mt. Hawley contends it owes no duty to provide coverage or a defense to NFF. What justified the right to intervene in *Hill* is admittedly lacking here, and as Mt. Hawley correctly observes, whether it had a duty to provide coverage in the first place is not even before this Court.

Case after case cited by Mt. Hawley is easily and materially distinguished. In *Vincent v. Classic Party Rentals, Inc.*, No. CV-09-00028-RGK (AGRx), 2009 U.S. Dist. LEXIS 135158 (C.D. Cal. Oct. 7, 2009), the alleged at-fault driver "failed to cooperate with counsel from the outset of this litigation," and that the carrier's request to intervene occurred early in the proceedings. *Id.* Mt. Hawley concedes that neither of those material facts is present here. The carrier in *Reliance Ins. Co. v. Superior Court*, 84 Cal. App. 4th 383, 100 Cal. Rptr. 2d 807 (Cal. Ct. App. 2000) also moved to intervene early in the proceedings, whereas Mt. Hawley did not.

Unlike Mt. Hawley, the insurer in *Truck Ins. Exchange v. Superior Court*, 60 Cal. App. 4th 342, 70 Cal. Rptr. 2d 255 (Cal. Ct. App. 1997) accepted defense of the liability claims against its insured. Truck sought to intervene into an action brought by two other insurers seeking to rescind their respective policies covering the same insured, leaving Truck as the sole insurer of the risk in question and precluding it from seeking contribution from the other two carriers. These facts lend no help to Mt. Hawley, which has denied having any duty to defend or indemnify NFF.

In *Williams v. Lee*, No. B264386, 2016 WL 193479 (Cal. Ct. App. Jan. 14, 2016), it was undisputed the insurer had no knowledge the underlying lawsuit had been filed. *Williams* adheres to the rule that "the intervenor must not be guilty of an unreasonable delay after knowledge of the suit." Mt. Hawley knew of Respondents' lawsuit against NFF and still chose not to participate.

Finally, Mt. Hawley draws from UM and UIM cases where intervention by insurers is common because the underinsured and uninsured motorist carrier is bound by the outcome of

litigation against the at fault driver. Tellingly, Mt. Hawley fails to discuss the cascade of cases that hold an insurer will not be allowed to intervene or set aside the judgment when it has notice of the underlying litigation and chooses not to intervene. *See, generally, Pickens v. Allstate Ins. Co.*, 843 P.2d 273 (Kan. Ct. App. 1992) (public policy would be undermined if insurer is allowed to attack judgment entered after it declined to intervene in underlying action after having notice of it); *Gillian v. Watts*, 822 P.2d 582 (Kan. 1991) ("Once the insured has notified his insurer and the insurer elects not to intervene and become a party to the action, the insurer is bound by the judgment, whether the judgment is by trial or based on a proper settlement agreement between the parties to the action and approved by the court."); *Champion Ins. Co. v. Denney*, 555 So. 2d 137 (Al. 1989) (insurer bound because it had notice of the underlying lawsuit and did not seek to intervene); *Wells v. Hartford Acci. & Indem. Co.*, 459 S.W.2d 253 (Mo. 1970) (carrier bound by judgment entered because it had notice of the pendency of the underlying action and chose not to participate); *Heisner v. Jones*, 169 N.W.2d 606 (Neb. 1969) (insurer bound where it had notice of the underlying lawsuit and chose to rely on insurance policy provisions rather than move to intervene). *See also Briggs v. American Family Mut. Ins. Co.*, 833 P.2d 859 (Co. Ct. App. 1992) (where uninsured motorist carrier has notice of the lawsuit and an opportunity to intervene, but fails to seek intervention, it is bound by the resolution of the underlying action).

VII. Because Mt. Hawley's motion to intervene was untimely, the availability of an alternative forum to litigate its coverage position is merely an additional sustaining ground proving Mt. Hawley's alleged interests are not impeded by the denial.

This Court was correct to conclude that the separately pending Coverage Action is the proper forum for Mt. Hawley to assert its coverage defenses. This makes sense, considering Mt. Hawley concedes those matters are not before this Court and therefore not subject to review here. Viewed in this light, the separately pending Coverage Action is *the* forum to litigate Mt. Hawley's

coverage defenses, as opposed to being an *alternative* forum. Mt. Hawley has not sought to litigate any of those defenses in this proceeding.

Moreover, Mt. Hawley has no personal stake in the subject matter of this construction defect action sufficient to give it standing to intervene. To intervene, a party must have "'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007).

In *Goethe*, our Supreme Court affirmed the denial of an insurer's request to intervene in a family court action to determine the existence of a common law marriage, even though the outcome of that action would impact the insurer's coverage obligations. The Court held intervention was not proper because the insurer failed to demonstrate it had a real interest in the outcome of whether the couple was married. "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court." *Id.* at 138-39, 644 S.E.2d at 702. "[W]e find that the subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits. Accordingly, GEICO does not have standing to intervene in the family court action because it does not have an interest sufficiently related to the subject matter of the action." *Id.*

Goethe underscores why Mt. Hawley has no legitimate interest in this action and why it must litigate the coverage defenses on which it relied so many years ago in the separately pending Coverage Action. That Mt. Hawley denies it owes any duty to defend or indemnify NFF for the claims asserted by Respondents further supports this conclusion, because its interest in the underlying action is peripheral, deriving only from its financial interest in whether it must satisfy the judgment obtained against NFF. Logic demands that the interest an intervenor claims in the

action must be the same interest that is not protected if intervention is denied. The outcome of Respondents' action against NFF does not impair Mt. Hawley's ability to protect or litigate its coverage defenses in the Coverage Action. Thus, intervention is not permitted here.

VIII. Mt. Hawley's conclusory argument in Section VII of its Petition for Rehearing fails to demonstrate that rehearing is warranted.

To the extent Mt. Hawley simply relies upon its prior briefing to summarily raise additional points in support of its Petition for Rehearing, it has failed to satisfy the requirements of Rule 221(a), SCACR. These conclusory points do not explain any material points overlooked or misapprehended and should not be considered. In fair response to this broad-based argument section, Respondents likewise incorporate their prior briefs and all arguments therein as well.

CONCLUSION

Because Mt. Hawley failed to demonstrate with particularity any preserved argument, material fact, or matter of law that was overlooked or misapprehended by this Court, Respondents respectfully requests that Mt. Hawley's Petition for Rehearing be denied.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
JAN 17 2019
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., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mikey Mason d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Nava Guzman Construction Company, Inc.,...Defendants,

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

PROOF OF SERVICE

I, as counsel for Respondents, do hereby certify that I have on this date, served a copy of Respondents' Return to Appellant's Petition for Rehearing upon all counsel of record by mailing a copy of the same via U.S. Mail, postage prepaid, to the following:

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January 16, 2019

VIA UPS OVERNIGHT DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
JAN 17 2019
SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of Respondents' Return to Appellant's Petition for Rehearing, along with an original and one (1) copy of our Proof of Service. After filing, please return a clocked-in copy of the same to me using the self-addressed and postage prepaid envelope enclosed for your convenience.

By copy of this letter to counsel for the Appellant, we are hereby serving them with a copy of these filings.

Very truly yours,

THURMOND KIRCHNER & TIMBES, PA

Michel A. Timbes
Micheal@tktlawyers.com

MAT/bmh
cc: C. Mitchell Brown, Esq.
Andrew K. Epting, Esq.
Michelle N. Endemann, Esq.

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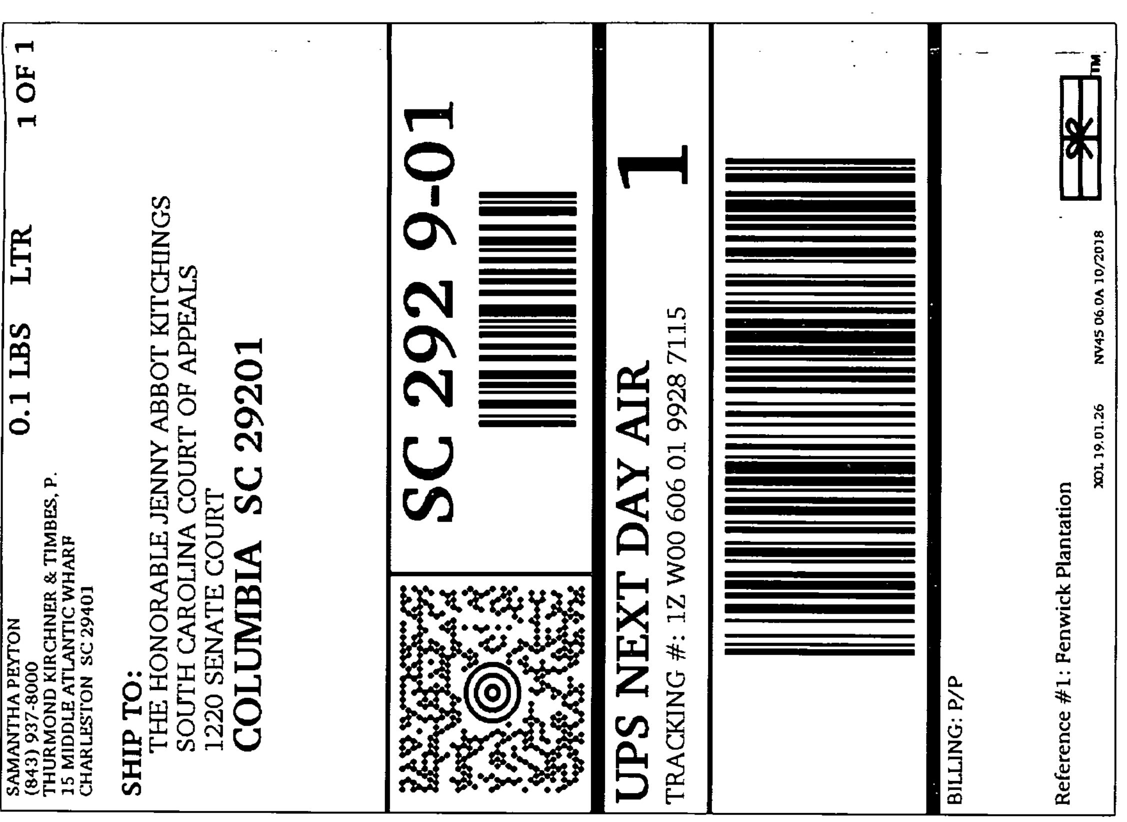

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