

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

JAN 30 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., 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.

REPLY IN SUPPORT OF PETITION FOR REHEARING

Respondents' Return mischaracterizes the issues raised in Mt. Hawley's Petition for Rehearing and asserts irrelevant arguments which fail to overcome the issues raised by Mt. Hawley. The court should grant rehearing because, respectfully, it overlooked and/or misapprehended: the jurisdictional issue, the inappropriateness of considering Mt. Hawley's duty to defend, the timeliness factors, the unique reasons why intervention was warranted here, the proper standard of review, and the inadequacy of an alternative forum.

I. Mt. Hawley's Petition complies with Rule 221(a).

The Court's Opinion does not address any of the grounds raised by Mt. Hawley's Petition, each of which directly relates to the Court's decision on the merits. Therefore, Mt. Hawley's Petition complies with Rule 221(a) and does not merely "rehash" prior arguments as Respondents have suggested.

II. Judge Harrington lacked jurisdiction to hear Mt. Hawley's motion to intervene.

A. Mt. Hawley properly raised and preserved the jurisdictional issue.

Respondents misstate Mt. Hawley's jurisdictional argument. The question on appeal is not whether the Court had jurisdiction to enter the judgment against North Florida Framing ("NFF")—the Court *never reached this issue*. Rather, the question before this Court is whether the lower court had jurisdiction to hear Mt. Hawley's *motion to intervene*. The Court's jurisdiction to enter judgment against NFF would only have become an issue if Mt. Hawley was permitted to intervene and raise this argument.¹ Then, Mt. Hawley could raise its Rule 60(b) challenges to the judgment

¹ The merits of this argument are not at issue at this juncture. See *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) (noting that the proposed intervenor must: "(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties").

against NFF, including the Court's jurisdiction to enter said judgment. Presently, the Court's order denying intervention is the only order which Mt. Hawley has standing to challenge. Intervention is a necessary prerequisite, and neither the lower court nor this Court reached the question.

As was explained in the Petition, although the lower court had general subject matter jurisdiction,² under the complex case order Judge Harrington *did not* have jurisdiction to hear and rule on Mt. Hawley's motion to intervene. Judge Young had exclusive jurisdiction. Mt. Hawley was directly aggrieved by Judge Harrington's order entered without jurisdiction and has challenged it on direct appeal. Therefore, the issue is properly before this Court.

As this Court has explained, “[w]hen 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.” *S.C. Dep’t of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 350, 675 S.E.2d 756, 759 (Ct. App. 2009) (quoting *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961)). Respondents are correct that “whereas a judgment entered without subject matter jurisdiction is void,” the improper exercise of jurisdiction “is merely voidable, and must be attacked on direct appeal.” *Id.* Thus, the proper recourse “to challenge any alleged error” in the “exercise of jurisdiction” is via direct appeal. *Id.* As this Court has explained, “[w]hen 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).

² Subject matter jurisdiction “refers to the court’s power to hear and determine cases of the general class to which the proceedings in question belong.” *Great Games, Inc. v. S.C. Dep’t of Revenue*, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000). As Mt. Hawley acknowledged in its Petition, the Court of Common Pleas had general subject matter jurisdiction to hear this construction defect case.

That is precisely what Mt. Hawley did here. *Holtzclaw* is instructive. In that case, the challenged order reopened a traffic case. 382 S.C. at 346, 675 S.E.2d at 757. This Court explained that the jurisdictional argument relating to this order could have been raised on direct appeal. *Id.* at 351, 675 S.E.2d at 759. However, the appellant improperly sought to collaterally attack the order via appeal of a *different* order of the court, which was improper. *See id.* at 351-52, 675 S.E.2d at 759-60. The Court contrasted the case with *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 634 S.E.2d 59 (Ct. App 2006). *Godwin* had very similar facts to *Holtzclaw*, but a direct appeal *was* taken from the order lacking jurisdiction in that case. *See id.* at 225, 634 S.E.2d at 61. On appeal, the Court vacated that Order. *See id.* Here, like in *Godwin*, Mt. Hawley *did* object at the trial court level and properly raised the issue on direct appeal.

Although it was a criminal matter, *State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008) is also instructive. In *Campbell*, the Supreme Court reversed an order vacating the defendant's sentence for lack of jurisdiction. *Id.* at 217, 656 S.E.2d at 374. The court explained that it was not a "subject matter" jurisdiction question, because the court had the general power to hear the case. *Id.* at 216, 656 S.E.2d at 373. However, the trial court nevertheless lacked jurisdiction because the term of court had ended. *See id.* This meant it "no longer had the power to act in a particular manner," and lacked the authority to enter the order in question. *Id.*

Mt. Hawley properly challenged the jurisdictional issue below and preserved it for consideration by this Court. Respondents' argument wrongly veers into the theoretical question of whether the jurisdictional issue also applies to the judgment against NFF. This is improper and not a valid counter to Mt. Hawley's jurisdictional argument.

B. The lower court lacked jurisdiction to hear Mt. Hawley’s motion pursuant to the complex case order.

Contrary to Respondents’ contention, the complex case jurisdictional issue *does* make a difference and *does* matter. Simply put, the order has to mean something. Respondents’ argument would defeat the entire purpose of the Supreme Court’s complex case administrative order. As this Court has recognized in the statutory construction context, it must be presumed that the legislature did not “presume a futile act” and that a statute “intends to accomplish something.” *Bruning v. SCDHEC*, 418 S.C. 537, 545-46, 795 S.E.2d 290, 295 (Ct. App. 2016). The same should be presumed with regard to the Supreme Court’s order.

The complex case administrative order provides that the designated complex case judge retains exclusive jurisdiction throughout the course of the life of the case. It would render the complex case administrative order meaningless if the complex case judge can simply reassign portions of the case piecemeal, as Judge Young did here.³ Exclusive jurisdiction must be precisely that—exclusive.⁴ To hold otherwise would totally undermine the purpose and policy rationale behind the complex case designation.

³ Permitting this would also run afoul of the settled premise that “one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.” *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985); *see also Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (reversing the appealed order because it “amounted to a review by [the issuing judge] of the order of another circuit judge”). Here, the Chief Administrative Judge—Judge Dennis—issued the order designating the case as complex and assigning exclusive jurisdiction Judge Young. (Complex Case Order, R. 93.) Judge Young’s order delegating the case to Judge Harrington for a date certain trial was improper as it modified/reversed the order of Judge Dennis.

⁴ Examining a statute which provided for exclusive jurisdiction, the Texas Court of Appeals explained that “when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void.” *In Interest of C.G.*, 495 S.W.3d 40, 44-45 (Tex. Ct. App. 2016); *see also Davis v. Crist Indus., Inc.*, 98 S.W.3d 338, 341 n.9 (Tex. Ct. App. 2003) (explaining that if one judge “had been specifically assigned to preside” over the case, “his assignment would give him *exclusive authority* over the case and

The mere fact that Judge Harrington held the trial of the case should not overcome the policy arguments raised by Mt. Hawley. There is much more to a case than the trial. Pleadings, discovery, dispositive motions, and other pre-trial matters are all significant events in the life of the case. The point of the complex case order is to have the judge handle all phases of a particularly difficult case. What happened here illustrates this point because Judge Young handled the case for over two years as the complex case judge. He then purported to reassign the case to Judge Harrington—who had no familiarity with the case—to handle the trial. Thus, she had to learn the details of the case anew despite Judge Young already having extensive experience with the matter.

The complex case designation does matter and must mean something. The meaning of “exclusive jurisdiction” and the policy goals behind the complex case administrative order would be rendered pointless if the Court finds Judge Harrington had jurisdiction to hear Mt. Hawley’s motion. Because the Court overlooked Mt. Hawley’s jurisdictional argument, it should grant rehearing.

III. Mt. Hawley raised the duty to defend because the Court injected the issue into the matter in the Opinion.

Respondents agree with Mt. Hawley that any duty (or lack of duty) Mt. Hawley may have had to defend its insured, NFF, is not at issue in this matter. This is precisely why Mt. Hawley raised this issue in its Petition. In affirming the denial of Mt. Hawley’s motion to intervene, the Court relied on the finding 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.”

would have to be withdrawn before” another judge could conduct the trial (emphasis added)); *Roberts v. Ernst*, 668 S.W.2d 843, 846 (Tex. App. 1984) (finding that vacatur of a judge’s orders that were issued after he completed the scope of his assignment and “his authority ceased” was proper).

Opinion at 3. The Court's logic appears to have been that Mt. Hawley would have had no need to intervene, or could have intervened sooner, had it simply defended NFF from the outset.

As Mt. Hawley and Respondents both agree, whether Mt. Hawley had a duty to defend is a question properly resolved in a coverage action. It simply has no bearing on whether Mt. Hawley should be allowed to intervene in *this* matter. Mt. Hawley is not asking the Court to resolve this issue. Rather, Mt. Hawley raised this on rehearing because the Court unilaterally injected the issue into the case. Because this is not a proper basis for denying intervention, the Court should grant rehearing.⁵

IV. Mt. Hawley's motion to intervene was not untimely.

Respondents' argument invites the Court to look at the case developments between them and NFF in a vacuum. As Mt. Hawley detailed, however, the length of time that this case proceeded against NFF is irrelevant. The proper question before the Court is whether Mt. Hawley timely sought to intervene once *its* interest arose. Until Respondents brought the collection action against Mt. Hawley seeking to hold it liable for the judgment against NFF, any interest Mt. Hawley had was purely theoretical. Any motion to intervene by Mt. Hawley would almost certainly have been denied on this basis. Mt. Hawley timely sought to intervene as soon as its interest arose and it was placed on notice of said interest.

Respondents' argument focuses on the lengthy litigation between them and NFF and Mt. Hawley's purported knowledge about the status of this litigation. As Mt. Hawley has repeatedly explained, however, this has no bearing on Mt. Hawley's interest in the case, which only arose

⁵ In addition to being an improper basis for denying intervention, the Court's finding that this would have adequately protected Mt. Hawley is inaccurate. Even if Mt. Hawley had provided NFF with a defense, it would have not had any right or ability to interfere with NFF's counsel's defense of the case. Mt. Hawley would still have been forced to seek to intervene in order to be able to challenge the judgment.

upon the filing of the collection action. Thus, Mt. Hawley's purported notice is irrelevant. Furthermore, the purported notice solely consisted of Mt. Hawley being informed that this action was filed against NFF. Mt. Hawley properly disclaimed coverage and had no duty to continue monitoring this litigation, particularly for the extraordinary set of circumstances that arose here.

Finally, Respondents fail to address Mt. Hawley's argument regarding the importance of *McClurg v. Deaton*, 380 S.C. 563, 570-71, 671 S.E.2d 87, 91 (Ct. App. 2008), which recognized the appropriateness of post-judgment intervention where the proposed intervenor was vulnerable to being responsible for the entire judgment. *Id.* This exact concern is present here, and supports that Mt. Hawley should be permitted to intervene.

V. The unique facts of this case warrant intervention.

The unusual facts here *do* support intervention. Respondents repeatedly refer to the fact that no order of dismissal was entered as to NFF. However, they fail to address, or even attempt to explain, why the class settlement orders state that they represent a "full, final and complete" settlement between respondents, NFF, and the other settling defendants. (*See* Proposed Order, R. 94; Final Order, R. 209.) Likewise, they do not explain the Proposed Order's statement that it "ends" the claims against them. (*See* Proposed Order, R. 195.) Respondents instead assert that the orders do not actually mean what they say because there was no subsequent order of dismissal of NFF. "Full, final and complete," however, means precisely what the Order states—that the claims were ended as to NFF.

Therefore, this case presents a highly unusual set of circumstances. Respondents and NFF entered into a settlement agreement which purported to represent a final settlement of the claims against NFF. Nevertheless, Respondents subsequently pursued a default judgment against NFF, which it then sought to hold Mt. Hawley liable for as an insurer of NFF. Mt. Hawley did not

receive notice of any of these developments until it was served with the collection action. Under these extraordinary facts, intervention is warranted to provide Mt. Hawley a mechanism to challenge a default judgment which should never have been entered. The court should grant rehearing and permit Mt. Hawley to intervene.

VI. The Court should adopt a de novo standard.

Mt. Hawley is permitted to argue that the Court should reconsider its prior stance on the standard of review where a party seeks to intervene to set aside a void judgment. Mt. Hawley candidly acknowledged to the Court that prior South Carolina cases applied an abuse of discretion standard in reviewing an order granting or denying intervention. While acknowledging this authority, Mt. Hawley cited to cases from a number of other jurisdictions that apply a de novo standard where a party seeks to intervene to obtain relief from a void judgment, and urged the Court to adopt this rule. To the extent this conflicted with South Carolina precedent, Mt. Hawley was not required to obtain permission of the court to argue this point. *See* Rule 217, SCACR.

The Court did not specify a standard in its Opinion. Therefore, Mt. Hawley raised the issue because the Court appears to have overlooked its argument. The Court should grant rehearing and apply a de novo standard.

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

Respondents contend that Mt. Hawley has no personal stake in the present action. To the contrary, Mt. Hawley has a direct and substantial interest in this action because Respondents are seeking to hold them liable for the judgment entered against NFF. The Opinion noted that Mt. Hawley may collaterally attack the judgment and Respondents have acknowledged that Mt. Hawley may assert its coverage defenses in a separate action. However, as set forth in its Petition,

Mt. Hawley is prejudiced by the denial of the intervention in any event and thus is aggrieved and has standing to complain. The Court should grant rehearing.

Conclusion

For the reasons stated herein and in Mt. Hawley's Petition for Rehearing, the 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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January 30, 2019.

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Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others
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..... Respondents,

v.

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Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance
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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):

Pleadings:

Reply in Support of Petition for Rehearing

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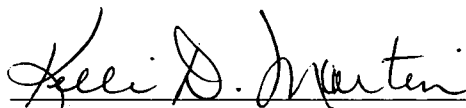
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January 30th, 2019.



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January 30, 2019

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SC Court of Appeals

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

Dear Ms. Allen:

Enclosed are the original and seven (7) copies of a *Reply in Support of Petition for Rehearing* in the above-referenced matter. We would appreciate it if you would file the original and return a clocked copy to us via our office's courier.

By copy of this letter to all counsel, we are hereby serving them with a copy of the above referenced pleading.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown
by
Blake T. Williams w/ permission
C. Mitchell Brown

CMB:kdm

Enclosures

cc: Phillip W. Segui, Jr.
W. Jefferson Leath Jr.
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The Honorable V. Claire Allen
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