THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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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.

---

**APPENDIX**
**VOLUME ONE**

---

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**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

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JAN 10 2017
SC Court of Appeals

CASE NO. 2008-CP-10-0049

Appellate Case No. 2016-000185

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, A South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors,, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

---

**RECORD ON APPEAL**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

---

CASE NO. 2008-CP-10-0049

---

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),..... .....Plaintiff/ Respondent,

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 CONTRACTORWSW GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS T FENWICK PROPERTY OWNERS ASSOCIATION, INC., (FROM AUGUST 6, 2006 TO DECEMBER 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS COMPOS, INC., NORTH FLORIDA FRAMING, INC. BEST MASONRY & TOOL SUPPLY, INC. AS SUCCESSOR IN INTEREST TO MANGA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKLER INDUSTRIES, INC., J.T. INDUSTRIES D/B/A GENERAL ALUMINUM CORPORATION AND GENERAL ALUMINUM COMPANY OF TEXAS, LP, J.R. HOBBS CO. – ATLANTA, LLC F/K/A JRH MERGER CO., LLC, JAMIE HELMAN, INDIVIDUALLY, SCOTT FERGUSON, INDIVIDUALLY AND CHRIS COBBS, INDIVIDUALLY AND FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, D/B/A MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION AND VAVA GUZMAN CONSTRUCTION COMPANY, INC.....Defendants/ Respondents,



AND

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

---

**NOTICE OF APPEAL**

---

Intervenor, Mt. Hawley Insurance Company ("Mt. Hawley") appeals the order of the Honorable Kristi Lea Harrington filed January 19, 2016 (Exhibit A) denying its Motion to Intervene and for Relief from Judgments dated July 28, 2015. Appellants received written notice of entry of Judge Harrington's order denying their motion to intervene on January 20, 2016.

January 29, 2016

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# EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-10-0049

FILED
2016 JAN 19 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT

RECEIVED
FEB 01 2016
SC Court of Appeals

Mark F. Tesenlar and Nan M. Tesenlar, et al,
PLAINTIFF(S)

Fenwick Plantation Tarragon, LLC, et al,
DEFENDANT(S)

| Submitted by: | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Mt. Hawley Insurance Company's Motion to Intervene is Denied.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| N/A | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2151
Judge Code

January 15, 2016
Date

**For Clerk of Court Office Use Only**

STATE OF SOUTH CAROLINA ) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON ) CASE NO.: 2008-CP-10-00049

MARK F. TESENIAR and NAN M. TESENIAR, on behalf of themselves and others similarly situation, and TWELVE OAKS AT FENWICK PROPERTY QWNERS ASSOCIATION, INC., (from December 16, 2008, to present),

PLAINTIFFS,

VS.

PROFESSIONAL PLASTERING & STUCCO, INC.,

DEFENDANTS.

**MOTIONS HEARING**

held before the Honorable Kristi L. Harrington

Mia Perron, Circuit Court Reporter, 9th Judicial Circuit

in the Charleston County Courthouse

Charleston, South Carolina

on Tuesday, January 12, 2016, Commencing at 9:49 a.m.

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By

**SUSAN "MIA" PERRON, CVR-CM-M**
***Circuit Court Reporter - 9th Judicial Circuit***
**Post Office Box 31865**
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EXHIBITS


| | MARKED/ADMITTED |
|---|---|
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PROCEEDINGS

[Whereupon, Defendant's Exhibit Number 1 is marked by the court reporter]

THE COURT: All right. Mr. Kirchner?

MR. KIRCHNER: Jessie Kirchner and Phillip Segui, here for the plaintiffs.

This is in the Teseniar case, which we've affectionally referred to over the past seven years as the Twelve Oaks case. This is case number 2008-CP-10-0049. This is Mt. Hawley's motion to intervene. The case is over and closed, for Your Honor's information.

That is the Mt. Hawley who insured a defendant in the case. Mt. Hawley never participated in defense or otherwise made appearance, and they made this motion to intervene. For what purpose, I'll let Mr. Epting explain it.

That's why we're here.

THE COURT: Mr. Epting?

MR. EPTING: Good morning, Judge.

Judge, the motion is actually styled motion to intervene and relief from judgment.

In June of 2015 -- I'm going to call the plaintiffs Teseniar-Fenwick, because it involved the Fenwick project -- filed a declaratory judgment action as a judgment creditor against Mt. Hawley and they did so on the basis,



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Judge, of having gotten a judgment against a party by the name of North Florida Framing. Okay?

THE COURT: I'm writing and reading. I can --

MR. EPTING: All right.

THE COURT: You just handed me a five-pound binder, so --

MR. EPTING: Yeah. Well, I didn't get a --

THE COURT: -- so I can either look at that --

MR. EPTING: No, no, no, no, no, Judge.

THE COURT: -- look at you, or something else.

MR. EPTING: I was just trying to give you a little background. And so we --

THE COURT: All right. Thank you.

MR. EPTING: -- have put together a binder here to just walk you through what has occurred.

So the judgment was obtained against North Florida Framing and on the basis of that judgment, a declaratory judgment action was filed in June of 2015.

In July of 2015, Mt. Hawley filed this motion to intervene. This case, Judge, was still pending at the time the motion was filed because you were still entertaining motions with regard to All Pro Plastering. So all of that has been resolved, but what is still pending is this motion.

So, Judge, if you will look with me at Tab 1. And



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everything, Judge, that I'm going to refer to, relates to something that is here in this Court's docket in this case.

We believe the intervention should be granted, Judge. It fulfils all the rules of requirements, it's timely, we have an interest in the subject matter, our interest can be impaired, and there's nobody else left in this litigation who can protect our interest.

So what happened, Judge, is this case was referred to you for trial by Judge Dennis.

THE COURT: Everyone, this is Judge Prilou. He is observing court. Please remain seated. Please remain seated.

MR. EPTING: So the case is coming up for trial, Judge, on May 19th. And at Tab 1 you -- on that day, you actually relieved counsel for North Florida Framing.

If we go to Tab 2, Judge, you will see on the next day there is a notice for motion and motion for preliminary approval of a partial settlement of a class action.

And if I could, Judge, I would like for you to look at page 2 of the order of preliminary approvement. It is not the second page, but it is numbered page 2 behind Tab 2. At the bottom of that page, Judge, it is written: on Monday, May 9th, 2011, counsel indicated that the

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plaintiffs had reached a full, final, and complete settlement with the following defendants, North Florida Framing being named. This partial settlement only ends the plaintiffs' claims against the settling defendants. That's through page 3.

On page 4 of that document, you state: this partial settlement only ends the plaintiffs' claims against the settling defendants.

So here we have a preliminary order, Judge, on May 19th, ending the case with prejudice as to the settling defendant, North Florida Framing.

If you will go, Judge, with me now to Tab 4 and look at page 4 -- And this document, Judge, I believe you signed on June 3rd, the preliminary. The final you signed on June 10, but the preliminary you signed on June 3.

But on June 10th you write: with the order preliminary, approving class action, partial settlement, attorneys fees, approving settlement, notice program, and settling final hearing, entered by the Honorable Kristi L. Harrington on June 3rd. So the preliminary was signed on June 3rd.

And then, Judge, in that same tab, if you will go with me to page 7, number 6: upon payment of the proceeds by the settling defendants, North Florida Framing, the class representatives are authorized to execute a general



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release as to the settling defendants and/or settlement agreements on behalf of the class and orders and stipulations ending this case and all class claims with prejudice against the settling defendants.

And that money was paid. And so this case was ended as to North Florida Framing, with prejudice.

Now, if I can ask you to turn to Tab 5 with me. This is dated August the 3rd, 2011. On August the 3rd, 2011, you enter an order of default against North Florida Framing, who had been dismissed with prejudice, and refer the case to Michael Scarborough.

Now, Judge, you've relieved counsel, on I think the day before the hearing, for North Florida Framing. You've dismissed North Florida Framing with prejudice. North Florida Framing got no further notice of any kind of hearing, let alone of a default.

And at Tab 6, Your Honor, you will see North Florida Framing still had all of its pleadings in the record.

Finally, Judge -- and I think this is appropriate here, as well. If you look at Tab 7 with me. Mr. Kirchner has represented to Your Honor that this case was assigned to you as complex. I don't think that really is the way this went. This case was assigned to you by Judge Young in 2010 for a trial on a day certain, May 9, 2011.



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If you look at tab 9, Judge, what you see is Judge Dennis assigned this case to Judge Young. And so I don't doubt, Judge, you had the authority to try this case. But to enter an order of default in August of 2011, and what authority to hear anything after that, I don't see in the record.

Now, I wasn't in this case, Judge, but I've gone through this record pretty carefully. And so I'm just pointing out things that I think are irregular.

So, Judge, let's first go to Tab 11, and I'll come back to 9 and 10.

THE COURT: Hold on one second.

MR. EPTING: Sure.

THE COURT: Ms. Leonard, are the jurors here?

THE CLERK OF COURT: Yes, ma'am.

THE COURT: You indicated to my clerk fifteen minutes, and so we have already gone past your fifteen minutes so I'll -- let me know. Speed it up or we'll have to reschedule. Thank you.

MR. EPTING: I'll be quick, Judge. So on the 14th, a hearing --

THE COURT: Counsel, just approach for a moment.

[Whereupon, an off-the-record bench conference is held]

[MOTION ADJOURNS AT 10:02 A.M.]



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# C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the motions hearing held before the Honorable Kristi L. Harrington, on Tuesday, January 12, 2016.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 26th day of February, 2016.

Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | CASE NO. 2008-CP-00049 |
| | | |
| MARK F. TESENAIR, | ) | |
| | ) | |
| VS. | ) | TRANSCRIPT OF RECORD |
| | ) | |
| | ) | |
| FENWICK PLANTATION | ) | |
| TARRAGON, LLC. | ) | JANUARY 14, 2016 |
| | ) | CHARLESTON, SC |
| | ) | |
| | ) | |

B E F O R E:

THE HONORABLE KRISTI L. HARRINGTON, JUDGE.

A P P E A R A N C E S:

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Amanda Blundy, ESQUIRE
Attorneys for the Plaintiff

Andrew Epting, ESQUIRE
Michelle Endemann, ESQUIRE
Attorneys for the Defendant

Ruth C. Weese, RDR
Official Court Reporter

(The following proceedings were held January 14, 2016, Charleston County, South Carolina, @ 9:05 a.m.)

THE COURT: Counsel, again, my apologies for whatever date the schedule was -- I apologize. Thank you again for accommodating the Court and do we have everybody here?

MR. KIRCHNER: Yes, Your Honor.

THE COURT: There was so many more people here.

MR. KIRCHNER: Right. They have whittled the folks down.

THE COURT: Mr. Kirchner, if you will state your name for the record, the party you represent and the purpose of today's hearing.

MR. KIRCHNER: Yes, Your Honor. Thank you. Jesse Kirchner, K-I-R-C-H-N-E-R. We are here in case number 2008-CP-10-0049. I represent the Plaintiffs Mark and Ann Tesenair along with the Twelve Oaks Homeowners Association.

THE COURT: Thank you.

MR. EPTING: Drew Epting for the intervener, Mt. Hawley. And Michelle Endemann is with me.

THE COURT: I'm sorry?

MR. EPTING: And Michelle Endemann is here with me.

THE COURT: Thank you. We are here on your motion to intervene; is that correct?

MR. EPTING: Yes.

THE COURT: We started a little bit of this and then I said that we just did not have time. You had presented a lovely binder to me. So I have had some opportunity to review that. So let's just start fresh today if we could.

MR. EPTING: Judge, what I will do is I'll just quickly review what we talked about before.

Mt. Hawley has been sued I think in July 20, 2015, and the DJ is predicated upon a judgment that was entered by Judge Scarborough in 2013. And there are several orders that you entered which I went over when we were previously here. The first order was an order of dismissal of the party North Florida Framing. And the dismissal was entered in June of 2011. It was entered with prejudice.

Subsequently, you entered another order putting North Florida Framing who had been dismissed by you in June, you entered a subsequent

order placing North Florida Framing in default. North Florida Framing had on file pleadings, filed a pretrial brief. His counsel was relieved. And the default went forward without notice to North Florida Framing. And subsequently in this same order you referred it to Judge Scarborough.

Judge Scarborough conducted a hearing and entered a default judgment in the amount of about $15 million. If you would turn with me, Judge, to Tab 11, this is the hearing in front of Judge Scarborough. And on page 2, and I am just going to quickly elaborate, Your Honor, on page 2, you will see that there was no service process on North Florida Framing because -- no valid service of process because the certified letter was returned.

And the dialogue about what happened and what Judge Scarborough based his finding that service was proper is all before you. We think that his rule was in error, but more importantly, Judge, that the case would not validly be in front of him because the order that was entered by you, we don't think this Court was given jurisdiction except by Judge Young to try the original case that was tried I think on May 9th, 2011.

You'll also see, Judge, at page 3 and 4 of the transcript behind Tab 11 that Judge Scarborough --

THE COURT: Let me inquire. So you believe that I do not -- did not have jurisdiction to enter any order in this case?

MR. EPTING: The case was referred to you, Judge, and we went over that tab by Judge Young to try the case. It was a complex case. Judge Young was appointed as the judge to handle all matters related to the case except the trial.

THE COURT: So did you give me that?

MR. EPTING: I did. It's in the binder, Judge, and I think it is tab -- if you will look at Tab 8, you will see the complex designation and the designation to Judge Young. If you look at Tab 7, you'll see Judge Young's order assigning you to try the case.

THE COURT: So it is your opinion that I have no other authority or jurisdiction other than to just try the case?

MR. EPTING: That would be my opinion, yes, Judge.

THE COURT: So then you believe that it should have gone back to Judge Young for all of

these matters?

MR. EPTING: What I would say, Judge, is that when you entered the order of dismissal, everything that occurred thereafter you would not have had jurisdiction over. But at that point, Judge, we wouldn't be sitting here because it would be no order of default. It would be no hearing in front of Judge Scarborough and North Florida Framing who had no more interest in this case after settling out, it would just be ended. And so there would have been nothing to go back to Judge Young for.

THE COURT: Do you believe that you should be in front of Judge Young then on this part?

MR. EPTING: Judge, I think that's probably right. But Mr. Kirchner said that the case had been designated complex and that you were assigned to hear it. And so I just accepted that. I wasn't sure of it, but that was his representation, but when I saw the order which Ms. Endemann gave me Monday, Friday, something like that, yes, it occurs to me that perhaps this Court wouldn't have jurisdiction, yes.

THE COURT: So I think that needs to be

the first matter that we address. If you're indicating that I don't have -- didn't have jurisdiction to do what I did, then I don't know that -- I think we need to address that so that first of all, are we in the appropriate place, then we will address whether or not I had jurisdiction. Because if I didn't have jurisdiction to do what I do then this is really a moot argument, correct?

MR. EPTING: I think that's right, Judge.

THE COURT: All right. So Mr. Kirchner, I'm perplexed.

MR. EPTING: Should I sit down, Judge?

THE COURT: Sure, that will be fine.

MR. EPTING: Judge, you know, I could -- I have got two minutes to sort of finish up with my whole argument and then I'll sit down completely.

THE COURT: Okay.

MR. EPTING: So it was told to Judge Scarborough that there was joint and several liability. And on that basis he entered a judgment for 15 million. But if you look at Tabs 9 and 10, 12 and 13, I think what you find, Judge, is that the Plaintiffs went to trial before you and

contended that of the 15 million, eight million 700,000 was exclusively default of the stucco applicator. And what you have in these tabs is that testimony. And not only that, Judge, you have the Court of Appeals opinion from the verdict that was rendered in your courtroom which states that the Plaintiffs tried the case against All Pro Plastering contending that 8.7 of the 15 million was purely default of All Pro Plastering. That occurred two years before the trial in front of Judge Scarborough.

Secondly, Judge, nothing was said to Judge Scarborough about any setoff of all the settlements and the like that had been entered into, and contained in the binder are the amounts of the setoff. So for all those reasons, Judge, we think that the judgment that exists is not valid. With that I'll sit down, Judge.

THE COURT: All right. So let me ask you this, Mr. Epting. Tell me what it is, first of all, that you want me to do.

MR. EPTING: I think, Judge, you should rule that we can intervene for the sole purpose of contesting the validity of the judgment. I think, Judge, if you upon reflection decide that indeed

Judge Young referred this matter to you just for the purpose of trying the case, I think what your order would be is that any further actions that were undertaken were outside the scope of the designation of Judge Young and that such actions would be rescinded.

THE COURT: In my mind I'm trying to determine how that would even make sense. If I am assigned a case just to try it, there's -- that to me indicates that I have jurisdiction and authority over everything that flows from that case. How would we then distinguish what I am able to do? So is it your position that I only had the jurisdiction to have the Twelve come in and then receive the verdict and I couldn't make any other rulings pretrial or post-trial?

MR. EPTING: No, Judge. First of all, I don't pretend to have all the answers, but I would offer this thought. Yes, I think if you were asked to try the case that you tried the case. There were Rule 59 motions and you were asked to decide them, that it would be part of your jurisdiction to take that to final judgment as to the Defendants that went to trial.

But let's just imagine, Judge, that the

cases were bifurcated. And there was a set of Defendants X, Y and Z and a set of Defendants A, B and C and only A, B and C are going to trial. And the designation to you is that the case that is set for a date certain May 9th, 2011, against A, B and C is assigned to you for trial, I think that would be what you were trying, not the rest of the case that was still pending against Y, X, Z in my example.

THE COURT: But if I were making decisions that would impact X, Y and Z would I not have authority then to make those decisions as well?

MR. EPTING: In my example, Judge, if the designation gave you that authority you would have that authority. If the designation was to try the case on a certain date against A, B and C, no, I wouldn't think you would have any jurisdiction with regard to X, Y and Z.

THE COURT: So it's your opinion that Judge Young should have indicated that he transferred entire jurisdiction of this case to me?

MR. EPTING: If that's what he intended, Judge, that's what he should have put in the order. Then there is the further question,

Judge, of so without his input the case is then referred to the master in equity whereas he has the exclusive jurisdiction because it's been designated complex.

THE COURT: Thank you.

MR. EPTING: You bet. Thank you, ma'am.

THE COURT: Mr. Kirchner, I have never had this issue arise and so tell me what you believe --

MR. KIRCHNER: Yes, thank you, Your Honor.

THE COURT: -- the law is and/or what my jurisdiction is and what you're asking me to do specifically.

MR. KIRCHNER: Absolutely. Judge, as a practical matter I think it strains credibility to suggest that you don't have the authority to place somebody in default. In fact, under the rules, the clerk can put somebody in default, Ms. Armstrong can, so it blows my mind that I even just heard that. But the reality of how this happened, you were assigned the case for the trial. And let me start by saying it makes sense that Mt. Hawley is mistaken and doesn't understand what actually

happened because Mt. Hawley never participated in the underlying cases. They hung their shirt out to dry. They never defended it, they never indemnified it. And because of that we have a case against Mt. Hawley and now all of a sudden we have their attention and they're here complaining about what happened when they sat on the sidelines the whole time in the underlying trial.

But I have got an excerpt from the trial transcript that I emailed to Your Honor, I am happy to hand up if you would like. And as Mr. Epting indicated, you were assigned the case for trial. The case was called for trial. And North Florida Framing was a Defendant in your trial and North Florida Framing did not appear for trial.

I don't know how at that point you do anything other than what you did and which is to place them in default. I don't know where else you would have sent a Defendant who didn't show for trial to be placed in default. If you read the record it's very clear what happened before the start of the trial. We placed on the record that we reached a settlement with the two insurance carriers that were participating on behalf of North Florida Framing and they have given North Florida

Framing the entity certain covenants. North Florida Framing had agreed to allow its trial counsel to be relieved because the carriers who were participating were no longer in the case and paying their bills and we consented to that. And so Barnwell Whaley was relieved and called the case. North Florida Framing was not there. And they were placed into default and referred to Judge Scarborough for a damages hearing.

THE COURT: They had already been referred. At that point there had been a portion already referred to Judge Scarborough?

MR. KIRCHNER: Correct. But not North Florida Framing. In fact, they participated in the pretrial conference. They were there ready to go to trial with Professional Plastering and some other Defendants and before we struck the jury we settled with everyone except for Professional Plastering. And so this was at a call of the case, I believe we had actually struck the jury. We were waiting for them to come back and we put the settlements on the record, one of which was with the two carriers for North Florida Framing.

Interestingly, if you flip a couple pages over to page 65 we also put a settlement on

the record for Nava Guzman. And the reason why I think that's important is because at each of these stages in this case we settled with various parties along the way, we got court approval for the settlements, and notice of the class, and after the settlements were finalized the Court actually issued an order of dismissal as to those settling Defendants. And I have got two examples if I can hand these up to the Court.

THE COURT: So if they had already been referred to the master, then I mean even if I go along with Mr. Epting's argument, that has already been a decision made by Judge Young, correct?

MR. KIRCHNER: No, Your Honor. Those were your decisions.

THE COURT: To refer to the master?

MR. KIRCHNER: Correct. Just for a damages hearing which is not uncommon to have the master in equity have the damages hearing after.

THE COURT: We had already done that pretrial?

MR. KIRCHNER: For another Defendant who was in default. There was a Tarragon entity. And so at the call of the case when North Florida Framing didn't show up you placed them in default

and referred the damages hearing to Judge Scarborough at the very beginning of the trial.

THE COURT: To go along with the other Defendants that I already referred to --

MR. KIRCHNER: Correct.

THE COURT: -- Judge Scarborough? And we had done that -- at what procedural hearing had we done that?

MR. KIRCHNER: With respect to the Tarragon entity, I'm not certain, Your Honor. But with respect to North Florida Framing, it was done at the call of the case.

THE COURT: Thank you.

MR. KIRCHNER: With respect to the order of dismissal, if you will look at the two exemplars I handed to the Court, the first is June 10th, 2011, and it identified some settling parties there, H2L, DCI, Neo Corporation, and the case is dismissed as to those folks with prejudice. If you look at the second one I handed up, it was entered August 8th, 2011. This is the order that was entered identifying some of the settlements that we placed on the record at the trial. That's why I mentioned Nava Guzman because he is contained in this order as a settling Defendant, Best

Masonry, Magna Wall, Nava Guzman, Aps Enterprises which was also in the trial record, General Aluminum which is also in the trial record. Nowhere in the order of dismissal with prejudice appears North Florida Framing.

And the reason for that is because at the trial when Your Honor had already referred it to Judge Scarborough. And, again, I think the confusion lies with the fact that Mt. Hawley wasn't there. Mt. Hawley doesn't know what happened. Mt. Hawley is trying to come in behind everybody and play Monday morning quarterback. Certainly Your Honor had the authority to place North Florida Framing in default.

And that sort of leads into a nice segue for the next argument in the discussion. This is a general liability carrier trying to intervene in an underlying liability case. It's really inappropriate. It shouldn't be done, it's never been done in any cases that I have been involved in where it's been tried. In fact, in the trial transcript you will find where Mr. McCants and I believe it was National Fire tried to do the same thing or something similar for Professional Plastering. Your Honor denied it. Mr. McCants

appealed that ruling. The Court of Appeals actually dismissed his appeal summarily with no argument and we received sanctions. We got attorneys fees and costs as a result of that. So I think that a --

THE COURT: So it would be your position had Mr. Epting on behalf of Mt. Hawley been present that the Court's ruling based upon similar rulings would not have allowed Mt. Hawley to intervene?

MR. KIRCHNER: Absolutely. And the other question as we stand here today now in January of 2016 is intervening into what? The case is over. It's been over for a very long time. There is a separate case pending against Mt. Hawley by its insured North Florida Framing and these types of matters can certainly be dealt with there. If they want to try to collaterally attack the judgment or argue they are entitled to a setoff, all those issues can be decided in that case. This case is closed. This is an insurance company trying to intervene in an underlying liability case.

And, again, the reason why they are trying to intervene is because they sat on the

sidelines and didn't participate and now they're upset with what happened. I think they should be estopped from that, from even trying to intervene in the case.

THE COURT: All right. And what are you asking me to do?

MR. KIRCHNER: I am simply asking you to deny their motion to intervene. I don't think any of these other matters about whether the default was proper -- or they actually -- they are not a party to the case. They are not in the case. This is like a stranger walking in off the street and saying, Judge, I have got some concerns about what you did to North Florida Framing. They are not a party to the case. So before they can even discuss with you or Judge Young or Judge Scarborough whether or not this judgment needs to be overturned or whether or not the default was proper, they have to be a party to the case. And in order to be a party to the case you have to grant their intervention. So I'm suggesting you deny their motion to intervene and then all this goes away.

THE COURT: All right. Thank you, Mr. Kirchner. Mr. Epting.

MR. EPTING: Judge, just one last thing. Mr. Kirchner just said on the record that there was a settlement with North Florida Framing. No matter what the settlement was, North Florida Framing wound up with no further liability itself. Any proceedings going forward against North Florida Framing wouldn't be valid.

THE COURT: Are you representing North Florida Framing?

MR. EPTING: Judge, I'm representing Mt. Hawley contending that the judgment that was entered for the reasons stated is not valid.

THE COURT: Any further argument, Mr. Epting; anything else I need to know?

MR. EPTING: Nothing, Judge.

MR. KIRCHNER: Judge, for clarification, the settlement that was entered with North Florida Framing was very specific. It did not release North Florida Framing. Those terms are in the trial transcript. Those terms are in the settlement agreement that we signed with North Florida Framing. So I take exception to the statement that we settled with North Florida Framing. We did not. We settled with the two carriers who were participating on behalf of North

Florida Framing, of which Mt. Hawley was not part.

THE COURT: Anything based upon that? I don't want a whole lot of going back and forth, but Mr. Epting, I will allow you the final argument.

MR. EPTING: No. The only thing I would like to do, Judge is, I'm not -- I don't start as early as Mr. Kirchner and I hadn't looked at the transcript. I'd just ask that I be given the morning to look to see if there is anything.

THE COURT: I will do this. I will take the matter under advisement. If there's any additional argument or I don't want any more argument.

MR. EPTING: There won't be.

THE COURT: If you want to submit a proposed order and do so and highlighting anything that you think that I need, you have provided me an abundance of material that I have now had the opportunity to review. But if there is anything additional, again, I will be happy to accommodate because I caused you some inconvenience.

MR. EPTING: Judge, no problem. If I provide anything, Judge, it will be additional pages out of the transcript that Mr. Kirchner

referenced. And I will likely do so without comment.

THE COURT: And I will have -- I will issue a ruling, so I will give you until 5:00 today. Would that be sufficient time?

MR. EPTING: That's fine.

THE COURT: Then I will issue my ruling tomorrow. Typically I will try to do that before I leave because I will be out of circuit for the next four weeks.

MR. EPTING: Thank you, Judge.

(These proceedings were concluded at 9:24 a.m., January 14, 2016, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Ruth C. Weese, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the matter of the above-captioned case, relative to appeal, in the Court of Common Pleas for the Ninth Judicial Circuit Court for Charleston County, South Carolina, on the 14th day of January, 2016.

I do further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Ruth C. Weese, RDR

Registered Diplomate Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2008-CP-10-0049

FILED
2015 JUL 28 PM 4:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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, 2088 to present),

Plaintiffs,

vs.

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 CONTRACTORWSW GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS T FENWICK PROPERTY OWNERS ASSOCIATION, INC., (FROM AUGUST 6, 2006 TO DECEMBER 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS COMPOS, INC., NORTH FLORIDA FRAMING, INC. BEST MASONRY & TOOL SUPPLY, INC. AS SUCCESSOR IN INTEREST TO MANGA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKLER INDUSTRIES, INC., J.T. INDUSTRIES D/B/A GENERAL

MT. HAWLEY INSURANCE COMPANY'S MOTION TO INTERVENE & FOR RELIEF FROM JUDGMENTS

ALUMINUM CORPORATION AND GENERAL ALUMINUM COMPANY OF TEXAS, LP, J.R. HOBBS CO. – ATLANTA, LLC F/K/A JRH MERGER CO., LLC, JAMIE HELMAN, INDIVIDUALLY, SCOTT FERGUSON, INDIVIDUALLY AND CHRIS COBBS, INDIVIDUALLY AND FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, D/B/A MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION AND VAVA GUZMAN CONSTRUCTION COMPANY, INC.,

Defendants.

TO: COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for Mt. Hawley Insurance Company ("Mt. Hawley"), hereby moves this Honorable Court, pursuant to SCRCP 24(a) and 24(b), for an Order allowing Mt. Hawley to intervene in the above captioned action for the limited purpose stated below.

Mt. Hawley has standing to intervene as Mt. Hawley claims a direct, substantial, and legally protectable interest in the one aspect of this proceeding and is so situated that the disposition of the issues may, as a practical matter, impair or impede its ability to protect its interest. Mt. Hawley is one of the insurance carriers for a "Settling Defendant" in this action, North Florida Framing, Inc. ("North Florida"). On August 9, 2011, a settlement was approved by this Court, and thereafter a default and judgment entered against North Florida. On May 26, 2015, Plaintiffs, in their capacity as judgment creditors of North Florida, sued Mt. Hawley in a case styled, *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,*

*2088 to present) vs. MT. HAWLEY INSURANCE COMPANY*; Case No. 2015-CP-10-2994 (the "Creditors' Action"). As Plaintiffs are using the judgment against North Florida in the Creditors' Action as the basis for their claims, Mt. Hawley is entitled to intervene for the purpose of challenging the judgements entered against North Florida. Accordingly, Mt. Hawley must be allowed to intervene to protect its interest.

Mt. Hawley's interest is not adequately represented by the existing parties, and Mt. Hawley's application is timely as the suit filed by Plaintiffs in this action as judgment creditors against Mt. Hawley was only recently filed, on May 26, 2015. There is no prejudice to existing parties.

Alternately, Mt. Hawley requests to intervene pursuant to SCRCP 24(b).

Plaintiffs' reliance on judgements entered against North Florida is misplaced and this Court should so hold as well as restrain Plaintiffs from pursuing its claim against Mt. Hawley in which it relies on its status as a judgment creditor.

This motion will be heard at a time and place to be set by the Court.

PLEASE BE PRESENT IF SO MINDED.

Respectfully Submitted By:

**ANDREW K. EPTING, JR., LLC**

Andrew K. Epting

Andrew K. Epting, Jr., Esq.
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ATTORNEYS FOR MT. HAWLEY

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 24 day of July, 2015 at Charleston, South Carolina

On this 24 day of July, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

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, 2088 to present),

Plaintiffs,

vs.

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 CONTRACTORWSW GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS T FENWICK PROPERTY OWNERS ASSOCIATION, INC., (FROM AUGUST 6, 2006 TO DECEMBER 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS COMPOS, INC., NORTH FLORIDA FRAMING, INC. BEST MASONRY & TOOL SUPPLY, INC. AS SUCCESSOR IN INTEREST TO MANGA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKLER INDUSTRIES, INC., J.T. INDUSTRIES D/B/A GENERAL

CASE NO. 2008-CP-10-0049

MT. HAWLEY'S ARGUMENT OUTLINE IN FURTHER SUPPORT OF ITS MOTION TO INTERVENE AND FOR RELIEF FROM JUDGMENTS

ALUMINUM CORPORATION AND GENERAL ALUMINUM COMPANY OF TEXAS, LP, J.R. HOBBS CO. – ATLANTA, LLC F/K/A JRH MERGER CO., LLC, JAMIE HELMAN, INDIVIDUALLY, SCOTT FERGUSON, INDIVIDUALLY AND CHRIS COBBS, INDIVIDUALLY AND FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, D/B/A MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION AND VAVA GUZMAN CONSTRUCTION COMPANY, INC.,

Defendants.

As requested by the Court, Mt. Hawley submits the following outline of its argument made and to be made and the record contained in in Exhibit A in the Court's possession and filed as materials in support of Mt. Hawley's motion:

1. Mt. Hawley has standing to intervene as Mt. Hawley claims a direct, substantial, and legally protectable interest in the proceedings and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest.
2. On September 10, 2010, The Honorable R. Markley Dennis designated the above captioned case as "complex" and assigned the case to the Honorable Roger M. Young, Sr. (See tab 8).
3. On November 22, 2010, Judge Young assigned the case to the Honorable Kristi Lea Harrington "for a date certain trial to begin on Monday, May 9, 2011." (See tab 7).

4. North Florida was represented by counsel, answered Plaintiffs' complaints, filed counterclaims, a third-party complaint, and a pre-trial brief in the action. (Tab 6).
5. This Court relieved North Florida's counsel on May 9, 2011. (Tab 1).
6. An order approving the settlement was entered on June 6, 2011. The June 6, 2011 order defines North Florida as a "Settling Defendant," refers to the settlement as "full, final, and complete," and authorizes "general releases" "ending this case and all class claims with prejudice against the Settling Defendants." (Tab 4).
7. On August 9, 2011 an order was entered by this Court putting North Florida in default and referring the case to the Master in Equity. (Tab 5).
8. A default damages hearing was held before the Master on May 14, 2013. Notice to North Florida was not proper as service was not made on an authorized agent and is so noted in the transcript. (Tab 11).
9. On May 14, 2013, a $15,748,225.56 default judgment was entered against North Florida based upon representations to the Master in Equity. (Tab 13).
10. On May 26, 2015, Plaintiffs, in their capacity as judgment creditors of North Florida, sued Mt. Hawley in a case styled, *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, 2088 to present) vs. MT. HAWLEY INSURANCE COMPANY*; Case No. 2015-CP-10-2994 (the "Creditors' Action").
11. Mt. Hawley served the instant motion on July 28, 2015.
12. The order of default and the subsequent default judgment against Mt. Hawley's insured, North Florida is not valid for reasons argued and to be argued.

Respectfully Submitted By:

**ANDREW K. EPTING, JR., LLC**

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ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR DEFENDANT

On this 13 day of January, 2016
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

THE UNDERSIGNED HEREBY CERTIFIES that true
[illegible] or paper to which
[illegible] served upon the party(s)
[illegible] applicable Court Rules
[illegible] by hand delivery or by
regular U.S. [illegible] paid, properly addressed
to the attorney(s), [illegible] such party(s).

[illegible] this 13 day of JANUARY, 20[illegible]
Charleston, South Carolina

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | 2008-CP-10-49 |
| MARK F. TESENIAR AND NAN M. TESENIAR, on behalf of themselves and others similarly situated, | |
| Plaintiffs, | |
| vs. | |
| 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, AND TARRAGON DEVELOPMENT CORPORATION, A NEVADA CORPORATION, | |
| Defendants. | |

FILED
2008 JAN -4 PM 2:22
JULIE ARMSTRONG
CLERK OF COURT
BY

**CLASS ACTION COMPLAINT**
**(JURY TRIAL DEMANDED)**

The Plaintiffs, Mark F. Teseniar and Nan M. Teseniar, by and through their undersigned counsel, bring this class action on behalf of themselves and all others similarly situated, as a voluntary class action derivative class action under Rule 23 (a) and (b) (1) of the South Carolina Rules of Civil Procedure and allege:

**PARTIES, CAPACITY, AND JURISDICTION**

1. The Plaintiffs, Mark F. Teseniar and Nan M. Teseniar, are owners of Unit Number 224 in the Twelve Oaks at Fenwick Plantation Horizontal Property Regime (hereinafter "Regime"), Johns Island, Charleston County, South Carolina.

Moreover, by virtue of the Teseniars' ownership interest in their unit and the Regime, under the Master Deed of the Twelve Oaks of Fenwick Plantation Horizontal Property Regime (hereinafter referred to as "Master Deed") and the By-Laws for the Twelve Oaks at Fenwick Horizontal Property Regime (hereinafter referred to as "By-Laws"), they are a member or shareholder of the incorporated association of owners known as Twelve Oaks at Fenwick Plantation Property Owners Association, Inc.

2. Defendant Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, is a limited liability company organized under the laws of the State of South Carolina and is the developer of and performed repairs and modifications to the property commonly known as Twelve Oaks at Fenwick Plantation and purchased the property consisting of 216 apartment units in December of 2001 and converted the apartments to condominiums in August of 2006. Defendant, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, is the agent and/or alter ego of Defendants, Charleston Tarragon Manager, LLC and Tarragon Development Corporation. Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation are in control of and are the alter ego of The Board of Directors of Twelve Oaks at Fenwick Plantation Property

Owners Association, Inc. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

3. Defendant Charleston Tarragon Manager, LLC, is a limited liability company organized under the laws of the State of Delaware and is the developer of and performed repairs and modifications to the property commonly known as Twelve Oaks at Fenwick Plantation and purchased the property in December of 2001 consisting of 216 apartment units and converted the apartments to condominiums in August of 2006. Defendant, Charleston Tarragon Manager, LLC is the manager and/or member and/or agent and/or alter ego of Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, and Tarragon Development Corporation. Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Construction are in control of and are the alter ego of The Board of Directors of Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

4. Defendant Tarragon Development Corporation, upon information and belief, is a Nevada corporation and is the developer of and performed repairs and modifications to the property commonly known as Twelve Oaks at Fenwick Plantation and

purchased the property consisting of 216 apartment units and converted the apartments to condominiums in August of 2006. Defendant, Tarragon Development Corporation is the manager and/or member and/or agent and/or alter ego of Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC and Charleston Tarragon Manager, LLC. Defendants, Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation are in control of and are the alter ego of The Board of Directors of Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

5. That the Plaintiffs have made requests to the developer, Board and management company of Twelve Oaks at Fenwick Property Owners Association, Inc. to investigate concerns of water intrusion and mold growth in the walls of the Plaintiffs unit and other common areas and to conduct a regime wide inspection to include cutting into the buildings to determine the conditions of the Plaintiffs unit and the other buildings as evidenced by the letter dated September 22, 2007, sent to Twelve Oaks at Fenwick Plantation Owners Association attached hereto as Exhibit A and allegations in Paragraphs 5-10 of this Complaint. Prior thereto the Plaintiffs have contacted

Tarragon regarding possible mold problems and Tarragon customer care wrote the Plaintiffs on May 31, 2007 indicating that the situation would be reviewed. The Plaintiffs also provided Tarragon with a report from Environmental Services and Testing regarding mold problems that were investigated in 2003. The Plaintiffs emailed Julie Sanchez at Jsanchez@tarragon.com seeking further assistance on June 1, 2007. On June 29, 2007, a representative from Tarragon and Skye-Tec, an inspection company hired by the Defendants, came to Plaintiffs unit for a visual inspection and stated that they would be back within one week to perform intrusive observations into the wall cavity and perform mold testing. On July 9, 2007, the Plaintiffs contacted the representative from Tarragon (Quentin) regarding the inspection and testing of the wall cavity and was told that he would check with his supervisor and get back with the Plaintiffs. The Plaintiff called Tarragon customer care to express frustration and was told by Desiree at the Risk Management Division that the management team was in the process of sending the Plaintiffs a letter. Desiree provided the Plaintiffs with the name and phone number of Apryl Matthews who is a Tarragon Risk Management Analyst. Apryl Matthews indicated that she had seen the Plaintiffs file and that the Plaintiffs unit had been previously remediated and that the development team makes the decisions and that they would be meeting in the next few days. The Plaintiff

called Quentin at Tarragon again who indicated at the pre-closing inspection and the visual inspection from Skye Tec just the week before showed no problems. On July 10, 2007, the Plaintiffs contacted Randy Still, P.E. of H2L who was involved in 2003 repairs prior to the Plaintiffs' purchase of Unit 224, and Mr. Still refused to provide the Plaintiffs with the engineering report. The Plaintiffs thereafter contacted Diane Wilson to inquire about the homeowners association performing an investigation and was informed that the homeowners association had yet to be formed and that Community Management Group was serving in that capacity. On August 13, 2007, the Plaintiffs received a letter from Jerry Watson of Community Management Group for Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. indicating that Skye Tec had inspected the Plaintiffs' unit and the unit above and adjacent to the Plaintiffs and found only a very faint odor, if actually any at all, and that no destructive or invasive inspections or testing is authorized by the developer.

6. Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. which is controlled by the developer, 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, and Tarragon

Development Corporation, A Nevada Corporation has refused to investigate or take further action as evidenced by the response from Community Management Group on behalf of Twelve Oaks at Fenwick Plantation Property Owners Association dated October 1, 2007 and attached hereto as Exhibit B.

7. The Plaintiff thereafter sent Twelve Oaks at Fenwick Plantation Property Owners Association a letter dated November 17, 2007 attached hereto as Exhibit C informing them that an engineer has identified construction deficiencies and that claims exist against the developer and contractors who built these buildings and demanded that the association file suit against the developer and contractors.

8. The Plaintiffs got no response to the November 17, 2007 letter, and on December 11, 2007 telephoned Jerry Watson at Community Management Group to inquire as to why there was no response and when the Property Owners Association was going to file suit against the developer and contractor who built the buildings.

9. The Plaintiff was informed by Jerry Watson in her December 11, 2007 telephone conversation that the developer was in control of the Board of the Property Owners Association and that the developer was not going to sue itself and that the developer and/or board had done everything it was going to do to investigate and pursue any claims.

10. The Plaintiff sent a letter dated December 12, 2007 to the Twelve Oaks at Fenwick Plantation Property Owners Association confirming his conversation with Jerry Watson and confirming that the homeowners association was not going to file suit against the developer and contractors. A copy of the December 13, 2007 letter from the Plaintiff to the Twelve Oaks at Fenwick Plantation Property Owners Association is attached hereto as Exhibit D.

11. The class of Plaintiffs consists of all persons, corporations, partnerships, unincorporated associations or other entities that own in whole or in part any unit in the Regime.

12. The Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises from the board's failure to enforce rights and remedies and involve the development, construction, repair and sale of units and management and maintenance of the buildings at issue in the County of Charleston, State of South Carolina.

**CLASS ACTION ALLEGATIONS**

13. The class action is brought by Plaintiffs as a derivative class action pursuant to Rule 23(b)(1) of the South Carolina Rules of Civil Procedure on behalf of the Board of Directors of Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. since the board is controlled by the

Defendants, and the board refuses to investigate and/or maintain an action against itself and as representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, to recover monetary damages from the Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation for breaches of fiduciary duties, negligence, gross negligence, recklessness, wantonness, willfulness, bad faith, mismanagement, breach of express and implied warranties, negligent misrepresentation, fraud, unfair trade practices, unconscionable conduct and waste with respect to their duties as a developer in the development, sale of administration, care, and maintenance and/or repair of the buildings and units at issue.

14. As described in Paragraph 11 above, the class of Plaintiffs consists of individuals, corporations, partnerships, unincorporated associates or other entities that currently or in the future will own, in whole or in part, any unit in the buildings (hereinafter "Class").

15. The Class does not include any former owner of a unit in the Regime.

16. The Class is sufficiently numerous that joinder of all members is impractical.

17. Plaintiffs, Mark F. Teseniar and Nan M. Teseniar, will fairly and adequately protect the interests of the Class as Class representatives. The interests of the Class representative are coincident with, and not antagonistic to those of the other Class members and Plaintiffs are represented by experienced and able counsel.

18. There are questions of law and fact common to the Class. Common questions of law include the liability of Defendants for, among other things as more particularly described below, negligence, gross negligence, recklessness, willfulness, bad faith, breach of warranties, negligent misrepresentations, unfair trade practices and whether these wrongful acts or omissions of all of the Defendants caused or will cause the Class to suffer damages.

19. Plaintiffs', derivative claim is brought by the Plaintiffs, a shareholder in Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. as of the time the Plantiffs purchased their unit because of the Twelve Oaks at Fenwick Plantation Property Owners Association, Inc. being controlled by the Defendants for their failure to enforce rights which would be against the Defendants themselves and for claims of all other unit owners that are similarly situated.

20. Plaintiffs' claims are typical of the Class members' claims and derive from a common nucleus of operative

facts in that the Defendants, at all times relevant, are or were either charged with duties as a developer and/or in the sale and disclosure of conditions and/or repair of the buildings and units at issue. Each Class member has been or will be similarly injured by the Defendants' wrongful acts or omissions in the development, sale, and/or repair of the buildings and units at issue and the interests and rights of the members, such that the interest of the Plaintiffs, as Class representatives, are consistent with those of the members of the Class.

21. For the reasons described above and further explained below, a class action is especially appropriate in this case to promote judicial efficiency and to protect Class members' interests and rights as common questions of law and fact clearly predominate over individual issues.

22. Moreover, class treatment is a superior method for the fair and efficient adjudication of the issues in dispute because it permits a large number of injured parties, a joinder of who is impracticable, to prosecute their common claims in a single forum simultaneously. Moreover, the class action provides an efficient method whereby the relative rights of the Class Members and Defendants can be fairly managed without unnecessary expense or duplication.

23. If Class members were to pursue individual litigation, it would be unduly burdensome to the South Carolina

courts within which the individual litigation would proceed. Individual litigation would magnify the delay and expense to all parties in the court system of resolving the controversy engendered by Defendants' course of conduct with respect to the development, sale of units, and/or repair of the buildings and units at issue and in safeguarding the rights of the Class. By contrast, the class action devise presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court. Concentrating this litigation in one forum will aid judicial economy and efficiency, promote parity among the claims of the individual Class members, and result in judicial consistency. Notice for the pendency and any resolution of this action can be provided to all Class members by first class mail.

24. The expense and burden of individual litigation of a case of this magnitude makes it impractical for individual Class members to seek redress for the wrongs done to them and, therefore, requires consolidation of all such claims in one action.

25. Given the scope of harm inflicted by Defendants and the egregiousness of their misconduct, the prosecution of separate actions by individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of

the interests of the other members who are not parties to the adjudication or substantially impair or impede their ability to protect their interests.

26. Prosecution of this matter as a class action will most likely eliminate the possibility of repetitious litigation and provide redress for Class members who would not or could not prosecute this complex litigation on an individual basis.

27. Plaintiffs, Mark F. Teseniar and Nan M. Teseniar, both for the derivative claim pursuant to Rule 23(b)(1) and the class claim pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure as Class members envision no unusual difficulty in the management of this action as a class action.

28. Certification of this action as a class action under Rule 23 of the South Carolina Rules of Civil Procedure is appropriate.

**FACTUAL ALLEGATIONS**

29. The Defendants are under a duty of to develop, sell and disclose the condition of the buildings and units and to make full, fair and accurate disclosures to prospective purchasers regarding the condition of the property and the useful life of its common elements and the cost to remedy and code violations.

30. The Defendants, Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon

Manager, LLC and Tarragon Development Corporation purchased the buildings in December of 2001, and units and converted the rental units to condominiums in August of 2006.

31. The buildings contained construction defects that resulted in water intrusions and conditions conducive to mold growth and the Defendants made repairs prior to converting the apartments to condominiums and such repairs were ineffective and known to or should have known to be ineffective to Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation. These Defendants, Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation have committed breaches of fiduciary duties, negligence, gross negligence, recklessness, wantonness, willfulness, breach of warranties, fraud, misrepresentation, bad faith, mismanagement, unconscionable conduct and waste with respect to their developing, repair, and selling of the buildings and units at issue. These wrongful acts and omissions by all Defendants have caused and will cause the Plaintiffs and the Class members to incur and continue to incur substantial money damages.

32. The Plaintiffs have repeatedly attempted to have the Board and management company of Twelve Oaks at Fenwick Plantation Owners Association, Inc. investigate and address

deficiencies but since the Defendants control the Board, the Defendants will not investigate or bring claims against themselves thereby failing to protect, assert and/or enforce rights which belong to the Property Owners Association.

**FOR A FIRST CAUSE OF ACTION**
**(DECLARATORY JUDGMENT)**
**AS TO FENWICK PLANTATION TARRAGON, LLC F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION**

33. Plaintiffs repeat and re-allege Paragraphs 1 through 32 above as if fully set forth verbatim.

34. The Defendants in converting the apartments to condominiums filed the Master Deed and By-laws of Twelve Oaks at Fenwick Plantation Horizontal Property Regime in the Charleston County RMC office in Book E 594 page 684.

35. The Master Deed contains an arbitration provision, restrictions on a unit owners right to a jury trial, limitations on the Associations ability to file lawsuits, prohibitions and/or limitations of lawsuits brought by unit owners, the Defendants having the sole right to appoint directors and the Alternative Dispute Resolution Procedures attached as Exhibit G to the Master Deed and by-laws, none of these terms of which were contained in the contract for the sale of the unit and therefore not bargained for and lack consideration and are unconscionable and void.

36. The contract of sale for Unit 224 between the Plaintiffs and Defendants contains an "as-is" provision as well as a disclaimer of all warranties both "express and implied including but not limited to warranties of merchant ability, fitness for a particular purpose, habitability, design or condition or quality of the unit" and that the buyer "releases seller from any liability or consequential damages to any person, the unit or any other property resulting from a defect and (c) waives all other claims relating to the matters set forth above." The disclaimer of warranties and release language are unconscionable, were not conspicuous being contained on pages eight and nine of the contract, were not known to the buyer and were not specifically bargained for and therefore are unenforceable and void.

37. Plaintiffs believe that the unconscionable, oppressive, unknown and not bargained for terms and conditions of the Master Deed and by-laws including those terms set forth in Paragraphs 34 and 35 of this Complaint as set forth above should be declared unenforceable and/or void.

**FOR A SECOND CAUSE OF ACTION**
**(Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness and Wantonness)**
**AS TO FENWICK PLANTATION TARRAGON, LLC F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION**

38. Plaintiffs repeat and re-allege Paragraphs 1 through 37 above as if fully set forth verbatim.

39. The Defendants, Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation, by and through their agents, servants and employees undertook and were under a duty to develop, design, repair and sell the buildings and units that should have been constructed and /or repaired in accordance with the building code, construction industry standards and practices and in accordance with all requirements imposed by the laws and statutes of the State of South Carolina.

40. The Defendants, Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation, were negligent, grossly negligent, careless, reckless, willful and wanton, in developing, repairing and selling the buildings and units at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in development, repair and sale of the buildings and units at issue;
b. In designing, developing and implementing a scope and repair in which it was inevitable that water would intrude into the buildings and units at issue causing damage to the wall system;
c. In improperly installing and repairing the stucco and exterior wall system including related flashings and weather proofing;
d. In designing, developing and implementing repairs which failed to provide an adequate water management system;

e. In designing, developing, repairing and selling the buildings and units at issue which fail to provide sufficient barriers against the intrusion of water into the wall system and an adequate avenue for exit of water that gets into the system resulting in water damage to the units;

f. In designing, developing and selling units and buildings constructed and/or repaired in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices; and

g. In failing to disclose conditions conducive to water intrusion and/or the existence of prior water intrusion conditions prior to the sale of the units.

h. In violating SC Code Section 27-31-430.

i. In violating SC Code Section 33-31-830.

j. Other deficiencies or failures as will be proven at trial.

41. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, wantonness of the Defendants, Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC and Tarragon Development Corporation, the Plaintiffs and similarly situated unit owners have suffered actual, incidental, consequential, and special damages including but not limited to the expense of having to hire experts to investigate the causes of the water intrusion and conditions conducive to mold growth, construction , repair and remediation defects and failures set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units at issue to make it safe and habitable. Additionally, the Plaintiffs and the Class have been

injured and otherwise damaged in that water and moisture have repeatedly and/or continuously intruded and continues to intrude into the building and units at issue causing damage and deterioration to the finish and structural elements of the buildings and units at issue, all of which will be required to corrected and repaired and result in the loss of use of the units during said repairs.

**FOR A THIRD CAUSE OF ACTION**
**(Breach of Contract)**
**(AS TO FENWICK PLANTATION TARRAGON, LLC F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION)**

42. Each and every allegation contained in Paragraphs 1 through 41 above are incorporated herein by express reference as though fully set forth.

43. That at all times herein, the Plaintiffs, entered into a contract with the Defendants for the purchase of their condominium known as Unit 224 at Twelve Oaks at Fenwick Plantation located in Johns Island, South Carolina.

44. That at all relevant times herein, the Defendants, by and through their agents, servants and employees had an obligation and duty to sell, design, develop and/or repair the buildings and to provide materials and services in accordance with the applicable building codes, in conformance with accepted construction and industry standards, in conformity with component product manufacturer installation instructions and

specifications and in complying with the disclosures laws and statues of the State of South Carolina.

45. That the Defendants breached the contract with the Plaintiffs by failing to develop, sell and repair said buildings and units in accordance with the applicable building codes, in conformance with accepted construction and industry standards, in conformity with component product manufacturer installation instructions and specifications, and in compliance with the disclosure laws and statutes of this State all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contracts. Such breaches includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in development, repair and sale of the buildings and units at issue;
b. In designing, developing and implementing a scope and repair in which it was inevitable that water would intrude into the buildings and units at issue causing damage to the wall system;
c. In improperly installing and repairing the stucco and exterior wall system including related flashings and weather proofing;
d. In designing, developing and implementing repairs which failed to provide an adequate water management system;
e. In designing, developing, preparing, repairing and selling the buildings and units at issue which fail to provide sufficient barriers against the intrusion of water into the wall system and an adequate avenue for exit of

water that gets into the system resulting in water damage to the units;

f. In designing, developing and selling units and buildings constructed and/or repaired in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices; and

g. In failing to disclose conditions conducive to water intrusion and/or the existence of prior water intrusion conditions prior to the sale of the units.

h. In violating SC Code Section 27-31-430.

i. In violating SC Code Section 33-31-830.

j. Other deficiencies or failures as will be proven at trial.

46. That as a direct and proximate result of the Defendants' breach of contracts with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject buildings and units causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their

properties as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A FOURTH CAUSE OF ACTION**
**(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose and Breach of Warranty of Merchantability and Serviceability)**
**(AS TO FENWICK PLANTATION TARRAGON, LLC. F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION)**

47. Each and every allegation contained in Paragraphs 1 through 46 above are incorporated herein by express reference as though fully set forth.

48. That the Defendants implicitly and/or expressly warranted that the subject units, buildings and common areas would be habitable and fit for its intended uses as condominiums, and that said units would be designed, developed, constructed, repaired and remodeled in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted building component manufacturing standards and specifications and accepted construction industry standards applicable thereto and that the subject buildings and units would be merchantable, free from latent defects and fit for the particular purpose for which it was developed, built and sold.

49. That Defendants breached said warranties by designing, selling, supervising and/or failing to supervise, remodeling or repairing the subject residences in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards, not in conformity with component product manufacturer installation instructions, and not in conformity with the laws and statutes of this State.

50. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject buildings and units causing rot, deterioration and other damages to the finish and structural elements. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their properties as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A FIFTH CAUSE OF ACTION**
**(Negligent Misrepresentation)**
**(AS TO FENWICK PLANTATION TARRAGON, LLC. F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION)**

51. Each and every allegation contained in Paragraphs 1 through 50 above are incorporated herein by express reference as though fully set forth.

52. The Defendants, through their agents and/or employers, advertisements, literature and other written materials, made representations and non-disclosures to the Plaintiffs and the public, including the Plaintiffs about the quality of the construction of the subject buildings and units suitability for habitation and low maintenance.

53. As set forth above, the above-described representations and non-disclosures made by the Defendants and their agents to Plaintiffs were untrue and were misrepresentations or non-disclosures of material facts and were made in such a manner that, by the exercise of reasonable and ordinary care, the Defendants knew or should have known that they were false and that the Plaintiffs could and would reasonably and justifiably rely on such representations and/or non-disclosures in purchasing, making and/or authorizing payment and accepting the subject residences.

54. As a direct, foreseeable and proximate result of Defendants' negligent misrepresentations and non-disclosures, and failing to disclose that the residences were not constructed in accordance with applicable building codes, not in conformance with accepted construction and industry standards, not in conformity with component product manufacturer installation instructions, and that the buildings and units leaked and had conditions conducive to the growth of mold, the Plaintiffs have relied on such representations and nondisclosures and have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded and continues to intrude into the subject buildings and units causing rot, deterioration and other damages to the finish and structural elements. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their properties as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR AN SIXTH CAUSE OF ACTION**
**(Fraud)**
**(AS TO FENWICK PLANTATION TARRAGON, LLC, F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION)**

55. Each and every allegation contained in Paragraphs 1 through 54 above are incorporated herein by express reference as though fully set forth.

56. The Defendant(s), Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC, and Tarragon Development Corporation and/or their agents or employees made material and false representations and nondisclosures, including the concealment and nondisclosure of latent and hidden damages and defective conditions to the Plaintiffs regarding the condition of the buildings and units, quality of construction, the compliance with building codes, the compliance with manufacturers recommendations and specification and compliance with industry standards and the Defendant(s), Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC, and Tarragon Development Corporation and their agents and/or employees knew of the falsity of such representations and nondisclosures or these representations and nondisclosures were made with reckless disregard for the truth.

57. The Defendant(s), Fenwick Plantation Tarragon, LLC f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon

Manager, LLC, and Tarragon Development Corporation failed to disclose and/or concealed defective conditions that were known or should have been known, and induced the Plaintiffs to purchase the unit by concealing and/or failing to disclose latent defects and/or hidden conditions and damages to the buildings and units that were not apparent to a reasonable person.

58. These representations and nondisclosures made by the Defendant(s), Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC, and Tarragon Development Corporation, and/or their agents or employees were made with the intention that the Plaintiffs act upon them and the Plaintiffs did not know these representations and nondisclosures were false.

59. The Plaintiffs relied on these representations and nondisclosures and had the right to rely thereon.

60. As a direct and proximate result of the Defendant(s), Fenwick Plantation Tarragon, LLC, f/k/a Fenwick Tarragon Apartments, LLC, Charleston Tarragon Manager, LLC, and Tarragon Development Corporation's, misrepresentations, nondisclosures, concealment, fraud and/or constructive fraud, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to

investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that excessive water and moisture exists and has intruded and continues to intrude into the building and unit at issue causing damage and deterioration and to the finish and structural elements of the buildings and units, all of which will be required to be corrected and repaired and result in the loss of use of the unit during said repairs.

**FOR A SEVENTH CAUSE OF ACTION**
**(Unfair Trade Practices)**
**(AS TO FENWICK PLANTATION TARRAGON, LLC F/K/A FENWICK TARRAGON APARTMENTS, LLC, CHARLESTON TARRAGON MANAGER, LLC, AND TARRAGON DEVELOPMENT CORPORATION)**

61. Each and every allegation contained in Paragraphs 1 through 60 above are incorporated herein by express reference as though fully set forth.

62. The Defendants are "persons" within the meaning of South Carolina Code § 39-5-10(a).

63. The Defendants, by their actions in developing, designing, selling, repairing, supervising and overseeing construction and/or repair activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

64. The Defendants, by their action(s) described hereinabove, including representations to the Plaintiffs that induced them to purchase units at issue in this case, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

65. The Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

66. The Defendants' conduct affects the public interest of the people of South Carolina.

67. The Defendants knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

68. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the buildings and units to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the building and units causing rot, deterioration and other damages to the finish and

structural elements. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their properties as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**RELIEF REQUESTED**

**WHEREFORE**, the Plaintiffs and the Class respectfully pray that this Court certify this action as a Class Action under Rule 23 (a) and (b)(1) of the South Carolina Rules of Civil Procedure, hold the Defendants liable for the conduct complained of herein, enter a judgment against the Defendants and in favor of the Plaintiffs and the Class for the relief as requested in this Complaint, and award the Plaintiffs and the Class their costs and attorneys fees, and for such other and further relief as may be deemed appropriate.

Plaintiffs and the Class further demand a jury trial with respect to all issues so triable.

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AND

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Attorneys for Plaintiffs
jl@leathbouchlaw.com

Charleston, South Carolina

Dated: 1/3, 2008

Exhibit A

September 22, 2007

Twelve Oaks at Fenwick Plantation
Property Owners Association
C/O Community Management Group, Inc.
349 Folly Road
Charleston, SC 29412

Dear Sirs:

I am the owner of unit 224, Twelve Oaks at Fenwick, and I am writing you, as I understand that the HOA Board has the ultimate responsibility under the Master Deed to investigate and repair problems with areas of the property which are common to the development.

I am concerned about what may be a significant mold condition in my walls, and other common areas of my property, and I also have concerns that these problems may be caused by water coming in behind the building exteriors. I think these problems are probably more extensive than just my unit, and feel that the Board should have a regime-wide inspection performed by a qualified independent inspector with authority to cut into the buildings if necessary to determine the condition of my unit and the buildings.

I have previously attempted to get this situation fully investigated and remedied through Tarragon Corporation Customer Care, but in spite of my repeated attempts, nothing significant has been done. I understand that the developer may still be in control of the overall property, and if indeed this is the situation, then this inspection is all the more critical in order to give the property owners a baseline assessment of the property condition prior to turnover to the homeowners.

I am asking for a written response to this letter within two weeks outlining the name of an inspector, background qualifications, and a date for commencement of the inspection of the property at Twelve Oaks at Fenwick. Please send response to Mark Teseniar, 1662 Back Creek Rd., Charleston, SC 29412.

Sincerely,

Mark Teseniar
Owner of Unit 224
Twelve Oaks at Fenwick Plantation

Exhibit B

CMG
Community Management Group

October 1, 2007

Mark Teseniar
1662 Back Creek Rd.
Charleston. SC 29412

Mr. Teseniar:

In response to your letter dated September 22, 2007, previous inspections have been conducted on your property, the unit above yours and the unit adjacent. Based upon those inspections conducted by SkyTec and overseen by Tarragon Development, no further testing will be done at this time. There was no evidence that there was any issue behind the walls and the Developer is not authorizing any invasive inspections or testing behind the walls.

The previous offer by Tarragon to provide a de-ionization of your unit still stands. Please let us know if you have any further questions.

Respectfully,

Jerry P. Watson
Management Director for
Twelve Oaks at Fenwick Plantation

COMMUNITY MANAGEMENT GROUP
349 Folly Road, Suite 2B • Charleston, SC 29412
Telephone 843-795-8484 • Fax 843-795-8482 • www.cmgcharleston.com

Exhibit C

November 17, 2007

Twelve Oaks at Fenwick Plantation
Property Owners Associations
C/O Community Management Group
349 Folly Road
Charleston, Sc 29412

Dear Sirs:

I am the owner of Unit 224, Twelve Oaks at Fenwick, and I have written you before about problems that exist. I have hired an engineer to come and inspect my unit and have been informed that there are stucco installation problems, flashing problems, and other problems that are contributing to water intrusion and probable mold problems with my unit. Upon speaking with the engineer, I believe that these problems exist at other buildings as well. The Association is responsible for the upkeep of the exterior of my building and all other buildings at Twelve Oaks, therefore is also responsible for pursuing this claim. The claim exists against the developer that has previously refused to investigate my concerns regarding mine and the other buildings. I request that you immediately file suit against the developer of the condominiums and contractors that built the property. Please notify me within ten days that you will be doing this. Please send the lawsuit papers to 1662 Back Creek Rd., Charleston, SC 29412.

Sincerely,

Mark Teseniar
Owner of Unit 224
Twelve Oaks at Fenwick Plantation

Exhibit D

December 13, 2007

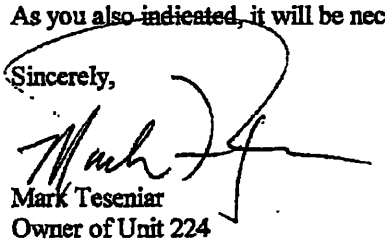
Twelve Oaks at Fenwick Plantation
Property Owners Association, Inc.
Attn: Jeri Watson
c/o Community Management Group, Inc.
349 Folly Road
Charleston, SC 29412

Dear Ms. Watson,

I appreciate your speaking with me on Tuesday, December 11, 2007 about my prior correspondence to the Property Owners Association dated November 17, 2007. As you know, I contacted you because I did not receive a response from you or the Property Owners Association regarding my November 17 letter. When I asked you on the phone about the homeowners association filing suit against the developer, you indicted that the developer was in control of the homeowners association and essentially was not going to sue itself. You also indicated that the developer had already told you that it (as a corporate entity) had already done all that it intended to do with regard to my complaints. When I asked you who on the Board I should speak to regarding this, you indicated that there was no one else for me to speak to because everything comes back to you anyway.

As you also indicated, it will be necessary for me to proceed with an attorney.

Sincerely,



Mark Teseniar
Owner of Unit 224
Twelve Oaks at Fenwick Plantation

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON<br><br>MARK F. TESENIAR AND NAN M. TESENIAR, on behalf of themselves and others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>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, AND TARRAGON DEVELOPMENT CORPORATION, A NEVADA CORPORATION,<br><br>Defendants. | IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT<br>2007-CP-10-49<br><br>VERIFICATION OF COMPLAINT |

FILED
2008 JAN -4 PM 2:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I HEREBY CERTIFY that the foregoing is a true and correct Verification of the Complaint in ~~connection~~ with this lawsuit.

BY: Mark F. Tesenir
MARK F. TESENIR

BY: Nan M. Tesenir
NAN M. TESENIAR

SWORN to before me this
27 day of December, 2007.

Notary Public For South Carolina
My Commission Expires: 11-15-2014

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FEWICK PROPERPTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P., as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA 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, CHRIS COBBS, Individually, FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON d/b/a MASON CONTRACTORS, KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2008-CP-10-49

**NORTH FLORIDA FRAMING, INC.'S THIRD PARTY COMPLAINT**
**(Jury Trial Demanded)**

FILED
2010 AUG -5 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

NORTH FLORIDA FRAMING, INC.,

Third-Party Plaintiff,

vs.

NAVA GUZMAN CONSTRUCTION, INC.,

Third-Party Defendant.

COMES NOW, Defendant/Third-Party Plaintiff, North Florida Framing, Inc. (hereinafter, "North Florida"), through its undersigned counsel, by way of a Third-Party Complaint, alleges and states that:

1. North Florida is a corporation organized and existing under the laws of the State of Florida.
2. Upon information and belief, Third-Party Defendant, Nava Guzman Construction, Inc. ("Nava Guzman"), was during the time pertinent to this action conducting business in Charleston County, South Carolina.
3. North Florida is a Defendant in the action Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and other similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., regarding the property, Twelve Oaks at Fenwick Plantation ("The Property").
4. Defendant Summit Contractors Inc./Summit Contractors Group, Inc. ("Summit"), and Defendant Federal Insurance Company ("Federal") have asserted cross-claims against North Florida.
5. Summit contracted with North Florida to provide work on The Property at issue in this case.

6. Upon information and belief, North Florida entered into an agreement with Nava Guzman to perform as a subcontractor with respect to work on The Property.

7. The parties, matters, and all things hereinafter alleged are within the jurisdiction of this Court.

**FOR A FIRST CAUSE OF ACTION AGAINST THIRD-PARTY DEFENDANT NAVA GUZMAN CONSTRUCTION, INC.**
**(Negligence)**

8. The above paragraphs are incorporated herein as if repeated verbatim.

9. Third-Party Defendant Nava Guzman Construction, Inc. performed work on The Property at issue in this case under agreement with North Florida.

10. A suit has been filed against North Florida by Plaintiffs in which Plaintiffs assert that North Florida's improper construction of The Property caused damage to Plaintiffs' property. North Florida has denied any liability for damages alleged.

11. Defendants Summit and Federal have asserted cross-claims against North Florida. North Florida has denied any liability for damages alleged.

12. If the allegations, which North Florida denies, are proven true, then Nava Guzman was careless, negligent, and grossly negligent in the work they performed, and in other respects as may become known through the course of discovery.

13. As a result of the alleged negligence of Nava Guzman, North Florida has been sued and has incurred costs and expenses and may incur damages as a result of the alleged negligence of Nava Guzman.

14. As a result of the alleged negligence of Nava Guzman, it is liable to North Florida for all damages, costs, and expenses North Florida incurs or may incur as a result of the allegations asserted.

**FOR A SECOND CAUSE OF ACTION AGAINST THIRD-PARTY DEFENDANT NAVA GUZMAN CONSTRUCTION, INC.**
**(Breach of Contract)**

15. The above paragraphs, not inconsistent herewith, are incorporated herein as if repeated verbatim.

16. The agreement with Third-Party Defendant Nava Guzman Construction, Inc. required Nava Guzman to provide construction services that would produce a quality product, free from defects, and otherwise in conformance with construction industry customs, practices, and standards. All work was to be performed in a proper workmanlike manner.

17. If the Plaintiffs' allegations regarding the damage to The Property and/or the cross-claims are true, as alleged, then Nava Guzman breached its contract with North Florida.

18. In the event that North Florida is liable to Plaintiffs and/or Cross-Claimants, which is denied, then such liability arose from the acts of Nava Guzman and breach of contract with North Florida, and therefore North Florida is entitled to indemnity, in whole or in part, from Nava Guzman, and all attorney fees, expenses, and costs incurred in defending Plaintiffs' claims and Cross-Claimants' claims and other damages.

**FOR A THIRD CAUSE OF ACTION AGAINST THIRD-PARTY DEFENDANT NAVA GUZMAN CONSTRUCTION, INC.**
**(Breach of Express and Implied Warranties)**

19. The above paragraphs, not inconsistent herewith, are incorporated herein as if repeated verbatim.

20. Upon information and belief, pursuant to the agreement, implied and express warranties were provided by Third-Party Defendant Nava Guzman Construction, Inc. to North Florida that the work and/or products supplied would be free of defects, merchantable, and fit for its particular purpose. At the time of the agreement, Nava Guzman had reason

to know the particular purpose that its work and/or product required and that North Florida was relying on Nava Guzman for its skill and judgment in applying and doing its work within code, industry standards, and manufacturers' specifications.

21. Nava Guzman expressly and/or impliedly warranted its work and/or products supplied to be free of defects in order to provide a soundly constructed project.

22. In the event Plaintiffs and/or Cross-Claimants establish liability for damages alleged, such liability will establish breach of these warranties to North Florida. As a result of Nava Guzman's alleged breach of their express warranties, implied warranties of proper workmanship, merchantability, and fitness for its particular purpose, North Florida has incurred costs and expenses and may incur damages.

23. As a results of Nava Guzman's alleged breach of its warranties, North Florida is entitled to recover from Nava Guzman all of its costs, expenses, and damages as a result of Plaintiffs' allegations and Cross-Claimants' allegations.

**FOR A FOURTH CAUSE OF ACTION AGAINST THIRD-PARTY DEFENDANT NAVA GUZMAN CONSTRUCTION, INC.**
**(Indemnity)**

24. The above paragraphs, not inconsistent herewith, are incorporated herein as if repeated verbatim.

25. If the Plaintiffs' allegations regarding the damage to The Property or the cross-claims are true, and if North Florida is found liable for any such damage, which is specifically denied, the damages were caused by the sole acts or omissions of the Third-Party Defendant Nava Guzman Construction, Inc.

26. The damages alleged were due to the primary or active fault of Nava Guzman and/or authorized agents, servants, or employees. To the extent liability or damages are imposed

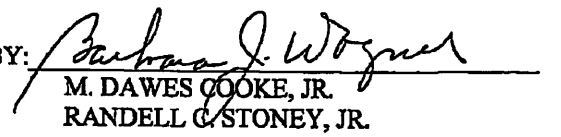
against North Florida, North Florida alleges its liability to Plaintiffs and Cross-Claimants, if any at all, is only secondary or passive based on Nava Guzman's conduct in its duties in the construction of The Property and the Plaintiffs' and Cross-Claimants' alleged damages were solely and proximately caused by the primary or active fault of Nava Guzman.

27. North Florida pleads that the right of full legal and equitable indemnity exists in its favor against Nava Guzman because North Florida is exposed to liability in this case, if at all, due to the primary wrongful acts and/or omissions of Nava Guzman, in which North Florida did not join; that to the extent Plaintiffs and/or Cross-Claimants recover against North Florida, North Florida alleges that Nava Guzman is liable to North Florida as to all or part of Plaintiffs' claims and Cross-Claimants' claims, and Nava Guzman must indemnify North Florida, including all attorney fees and costs incurred in defending Plaintiffs' and Cross-Claimants' claims, including all damages incurred or which may be incurred.

WHEREFORE Defendant/Third-Party Plaintiff North Florida Framing, Inc. having asserted these claims, prays for a trial by jury and for judgment against Third-Party Defendant Nava Guzman Construction, Inc. for costs of this action, and for such other and further relief as this Court deems just and appropriate in this matter.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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bwagner@barnwell-whaley.com

ATTORNEYS FOR NORTH FLORIDA FRAMING, INC.

August 4, 2010
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

I certify that on **August 5, 2010,** I mailed or delivered a true copy of the foregoing pleading to counsel of record.

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FILED
2010 AUG -5 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT

{Client Matter\000059\0003\DIS\00225186.DOC}

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Barnwell Whaley Patterson & Helms, LLC

Tracey L. Giglio, Legal Secretary

{Client Matter\000059\0003\DIS\00225186.DOC}

BARNWELL WHALEY
PATTERSON & HELMS LLC

Attorneys for businesses & professionals since 1938

**Randell C. Stoney, Jr.**
**rstoney@barnwell-whaley.com**

August 5, 2010

59.003
The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: *Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated v. Fenwick Plantation Tarragon, LLC, et al.*
Civil Action No.: 2008-CP-10-49
Our File No.: 59.003

Dear Madam Clerk:

Enclosed herewith please find an original and two copies of Defendant/Third-Party Plaintiff North Florida Faming, Inc.'s Third-Party Complaint, Summons and Civil Action Coversheet in the above-captioned matter. I would appreciate you filing the originals and returning the file-stamped copies to me with our firm courier, Mitchell.

Thanking you in advance for your kindness, I remain

Sincerely,

Randell C. Stoney, Jr.

RCSjr/sh
Enclosure (as stated)

cc: James D. Smith, Jr., Esquire
Phillip W. Segui, Jr., Esquire
John T. Chakeris, Esquire
W. Jefferson Leath, Jr., Esquire
Jesse A. Kirchner, Esquire
Andrew S. Halio, Esquire
Justin O'Toole Lucey, Esquire

William C. Helms, III | Phillip S. Ferderigos | Todd M. Musheff | John A. Jones
M. Dawes Cooke, Jr. | K. Michael Barfield | Craig E. Burgess | Alissa DeCarlo
B.C. Killough* | Ernest B. Lipscomb, III* | Lucinda Gardner Wichmann | Barbara J. Wagner, Ph.D.
Randell C. Stoney, Jr. | J. Gail Rahn | John W. Fletcher | Jeremy E. Bowers

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David S. Cobb, Esquire
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J. Geoff Osburn, Jr., Esquire
Dunn D. Hollingsworth, Esquire
James A. Bruorton, IV, Esquire
Kelley Shull Cannon, Esquire



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885 Island Park Drive, Charleston, SC 29492 Mail: P.O. Drawer H, Charleston, SC 29402 P 843.577.7700 F 843.577.7708 www.barnwell-whaley.com

* Registered patent attorney

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON )

MARK F. TESENIAR, ET AL. ) CASE NO.
☐ Plaintiff ) 2008-CP-10-0049

v. ) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Fenwick Plantation Tarragon, Llc, Et Al. )
☒ Defendant. )

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| John T. Chakeris, Esquire, Bar No. 7060 | Barbara J. Wagner., Esquire, Bar No. 76307 |
| Address: | Address: |
| P.O. Box 397, Charleston, SC 29402 | 885 Island Park Drive, Charleston, SC 29492 |
| phone: (843) 853-5678 fax: (843) 853-5677 | phone: (843) 577-5700 fax: (843) 577-7708 |
| e-mail: john@chakerislawfirm.com other: | e-mail: rstoney@barnwell-whaley.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion to Bifurcate Trial
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Barbara J. Wagner — May 2, 2011
Signature of Attorney for ☐ Plaintiff / ☒ Defendant — Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

**CLERK'S VERIFICATION**

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON ) | CASE NO. 08-CP-10-0049 |
| Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and other similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. (from Dec. 16, 2008 to present), ) | |
| Plaintiffs, ) | |
| 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 Corp., A Nevada Corporation, Summit Contractors Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association Inc., (from August 8, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Campos, 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 ) | Complex Case Designation Order |

FILED
2010 SEP 10 PM 4:07
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Arias, Miquel Rosales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs,Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., and NEO Corporation,

Defendants.

IT IS ORDERED that this case be designated as complex and that the trial of the case take place at a time to be determined.

IT IS FUTHER ORDERED that this case be assigned to the Honorable Roger Young to hear and handle all pre-trial motions and other matters pertaining to this case.

Chief Judge for Administrative Purposes

9th day of September 2010.

FORM 4

**STATE OF SOUTH CAROLINA** **JUDGMENT IN A CIVIL CASE**

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS Case No.: **2008-CP-10-49**

**Mark F Teseniar, et al etc** versus **Fenwick Plantation Tarragon LLC**

PLAINTIFF(S) DEFENDANT(S)

**CHECK ONE:**

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.

[ ] **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[] **ACTION DISMISSED (CHECK REASON):** [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. nonsuit) [] Rule 43(k), SCRCP(Settled); [ ] Other - _____

[ ] **ACTION STRICKEN (CHECK REASON):** [ ] Rule 40(j),SCRCP; [ ] Bankruptcy; [ ] Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other_____

[ ] **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
[ ] Affirmed; [ ] Reversed; [ ] Remanded; [ ] Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2010 NOV 22 AM 11:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**IT IS ORDERED AND ADJUDGED:** [ ] See attached order. (Formal order to follow)
[X ] Statement of Judgment by the Court:

**This case is Ordered assigned to Judge Kristi Lea Harrington for a date certain trial to begin on Monday May 9, 2011.**

Dated at Charleston, South Carolina, this day of 11/18, 2010.

**PRESIDING JUDGE**

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____ Day of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

**ATTORNEY(S) FOR THE PLAINTIFF(S)** **ATTORNEY(S) FOR THE DEFENDANT(S)**

SCCA SCRP Form 4Revised 6/2008

_____
Clerk of Court

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FEWICK PROPERPTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P., as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA 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, CHRIS COBBS, Individually, FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON d/b/a MASON CONTRACTORS, KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2008-CP-10-49

FILED
2011 APR 29 PM 4:43
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

[redacted]

PROFESSIONAL PLASTERING & STUCCO, INC.,

Third-Party Plaintiff,

vs.

MARIA ARIAS, MIQUEL ROSALES, LUIS MARTINEZ, VILLAGOMEZ PAINTING, INC., D.M. PAINTING, and APS ENTERPRISES UNLIMITED, INC.,

Third-Party Defendants.

---

APS ENTERPRISES UNLIMITED, INC.,

Third-Party Plaintiff,

vs.

C&N STUCCO AND PLASTERING, INC.,

Third-Party Defendant.

---

NORTH FLORIDA FRAMING, INC.,

Third-Party Plaintiff,

vs.

NAVA GUZMAN CONSTRUCTION, INC.,

Third-Party Defendant.

---

The Defendants, North Florida Framing, Inc. and Marquez Construction, Inc., hereinafter, "NFF", by and through its attorneys, hereby submits this Trial Brief pursuant to Rule 16 (c) of the South Carolina Rules of Civil Procedure:

**(1) STATEMENT OF THE FACTS OF THE CASE**

This is an action by a class of homeowner represented by Mark F. Teseniar and Nan M. Teseniar and a homeowners' association, Twelve Oaks at Fenwick Property Owners Association,

Inc. (from December 16, 2008 to present), for money damages due to, among other things, alleged defective design and construction of an apartment complex that was later converted to condominiums. Plaintiffs allege that, among other deficiencies in design and construction, the flashing, secondary weather barrier, windows, doors, and siding were installed improperly. Plaintiffs brought this action against various entities involved in the original construction, repair and conversion to condominiums of the buildings:

- Developer: Fenwick Plantation Tarragon, LLC, Charleston Tarragon Manager, LLC, and Tarragon Development corp. (collectively "Tarragon")
- General Contractor: Summit Contractors Group, Inc. ("Summit")
- Architect: Fugleberg Koch Architects, Inc. ("FKA")
- Inspector of the buildings in conjunction with the conversion: Development, Compliance & Inspections, Inc.
- Engineering firm that inspected and directed some repairs: H2L consulting Engineers
- Homeowners' association as it was composed from August 8, 2006 to December 15, 2006: Twelve Oaks at Fenwick Property Owners Association, Inc.
- Subcontractors that installed the stucco: Professional Plastering & Stucco, Inc. ("PP&S")
- Sub-subcontractors to the stucco subcontractor who provided labor: Maria Arias, individually, and Miguel Rosales, individually, and APS Enterprises Unlimited, Inc.
- Subcontractor that installed the roof: Johnson Companies, Inc.
- Subcontractor that installed and provided HVAC system: J.R. Hobbs Co. – Atlanta, LLC
- Subcontractor that installed handrails: All South Vinyl Products, Inc.

- Subcontractor that installed the exterior paint, caulk and sealants: Los Campos, Inc.
- Subcontractor that framed the buildings and installed the secondary weather barrier, windows and siding: North Florida Framing, Inc. and Marquez Construction, Inc. (collectively, "NFF")
- Window manufacturer: General Aluminum Company of Texas, LP
- Stucco manufacturer: Best Masonry & Tool Supply, L.P., as successor in interest to Magna Wall, Inc.
- Various other subcontractors and manufacturers, and the member of the board of the homeowners' association from August 8, 2006 to December 15, 2008 as individuals.

Plaintiffs pled the following causes of action against NFF: negligence, gross negligence, carelessness, recklessness, willfulness, wantonness (second cause of action in Second Amended Complaint), breach of warranty of habitability, breach of warranty against latent defects, breach of warranty of workmanlike services, breach of warranty for fitness for a particular purpose, breach of warranty of merchantability and serviceability (fourth cause of action), and unfair trade practices (eighth cause of action).

Summit filed cross claims against PP&S, Johnson Companies, Inc., Los Campos, NFF, All South Vinyl Products, Inc., General Aluminum, and J.R. Hobbs, Co. for negligence, breach of contract, breach of express and implied warranties, and indemnity.

**(2) EXHIBITS**

The Defense may use the following exhibits at trial in this matter:

a. Affidavits of Myles I. Glick, AIA

b. Deposition transcript of Donnie King, January 20, 2011

c. Deposition transcripts of Tacy McGinty, March 11, 2010, and September 21 - 22, 2011

d. Deposition transcript of Deryl Parnell, January 21, 2011

e. Deposition transcript of Clyde "Buddy" Reeves, October 20, 2010

f. Deposition transcript of Timothy Burns, April 15, 2011

g. Deposition transcript of Claude McNabb, March 24, 2011

h. Deposition transcript of Edmund Willis, April 13, 2011

i. Deposition transcript of Robert Burridge, April 4, 2011

j. Deposition transcript of Steven Watkins, April 26, 2011

k. Deposition transcript of Patrick Fitch, February 10 -11, 2011

l. Deposition transcripts of Myles Glick, February 12, 2010, April 2, 2010, and June 30, 2010

m. All exhibits identified in the depositions taken in this case, including, but not limited to:

n. Exhibits 52, 69, 85, 102, 106 113, 114, 121, 122, and 123 to Tacy McGinty's deposition

o. Exhibits 1 and 3 to Edmund Willis' deposition

p. Exhibits 4 and 16 to Claude McNabb's deposition

q. Summit 26958 through Summit 26974

r. FKA 4316 through 4342

s. Exhibit 5 to Donnie King's deposition

t. Exhibit 5 to Myles Glick's February 12, 2010 deposition

u. Exhibits 1 to Steven Watkins' deposition

v. Exhibits 2, 3, 4, 5, 7, 8, 31, 32, 33, 34, 35, 36, 37, 42, 43, 44, 45, 46, 50, 57, 58, 60, 61, 62, and 63 to Patrick Fitch's deposition

(3) **WITNESSES**

At this time, NFF anticipates calling the following witnesses:

a. David Anderson (NFF)

b. Timothy Rickborn (NFF expert)

c. Myles I. Glick (Plaintiffs' expert, appearing by deposition)

d. Donnie King (Professional Plastering & Stucco, appearing by deposition)

e. Tacy McGinty (Summit, appearing by deposition)

f. Deryl Parnell (Summit, appearing by deposition)

g. Clyde Reeves (Summit, appearing by deposition)

h. Timothy Burns (Tarragon, appearing by deposition)

i. Claude McNabb (Tarragon, appearing by deposition)

j. Edmund Willis (Summit, appearing by deposition)

k. Robert Burridge (Tarragon, appearing by deposition)

l. Steven Watkins (Plaintiffs' and Summit's expert, appearing by deposition)

m. Patrick Fitch (Fugleberg Koch Architect, Inc., appearing by deposition)

(4) **UNUSUAL PROBLEMS RELATING TO EVIDENCE**

None.

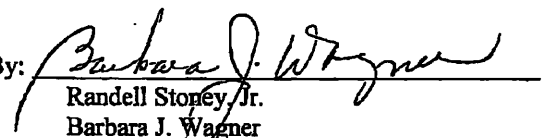
(5) **UNUSUAL QUESTIONS OR MATTERS WHICH SHOULD BE BROUGHT TO THE ATTENTION OF THE COURT**

None.

**(6) SETTLEMENT NEGOTIATIONS**

This case was mediated twice: July 19-20, 2010, and January 25-26, 2011. Plaintiffs demanded $4,000,000.00 at the July 2010 mediation. NFF did not make a counteroffer. NFF offered $50,000.00 at the January 2011 mediation. Settlement negotiations continued following the second mediation. NFF desires to negotiate a reasonable settlement, but has been unsuccessful to date.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

Randell Stoney, Jr.
Barbara J. Wagner
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700
Fax: (843) 577-7708

ATTORNEYS FOR DEFENDANTS NORTH FLORIDA FRAMING, INC. AND MARQUEZ CONSTRUCTION, INC.

April 29, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FEWICK PROPERPTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P., as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA 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, CHRIS COBBS, Individually, FEDERAL INSURANCE COMPANY, MARIA ARIAS, MIQUEL ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON d/b/a MASON CONTRACTORS, KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2008-CP-10-49

**DEFENDANTS NORTH FLORIDA FRAMING, INC.'S AND MARQUEZ CONSTRUCTION, INC.'S MOTION TO BIFURCATE TRIAL AS TO LIABILITY AND DAMAGES**

FILED
2011 MAY -2 PM 3:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLEASE TAKE NOTICE that counsel for the Defendants North Florida Framing, Inc. and Marquez Construction, Inc. (collectively "NFF"), by and through their undersigned counsel, shall move before the Court of Common Please, Ninth Judicial Circuit, for an Order Bifurcating the trial of Plaintiffs' claims for liability and damages into separate trial phases. Defendants ask that the case be tried in two phases to avoid prejudice to the Defendants and jury confusion on the threshold issue of liability threatened by the introduction of evidence relevant only to Plaintiffs' claims for compensatory damages, as well as promote judicial economy. Phase I would consist of a trial as to liability on all claims against NFF, and any other defendants at trial. Phase II would consist of a trial on Plaintiffs' claim for damages, including liability for punitive damages and the amount of punitive damages, if any. Evidence relevant only to Plaintiffs' damages claim, including damages estimate(s) and testimony and/or evidence from damages expert(s), should be excluded until Phase II. As discussed more fully below, bifurcating the trial into two phases will avoid prejudice to NFF and jury confusion, while saving judicial resources.

**ARGUMENT**

"Trial judges have discretion as to whether to bifurcate a trial." See Durham v. Vinson, 360 S.C. 639, 644 n.2, 602 S.E.2d 760 (2004). This includes wide-ranging discretion to separate issues of liability and damages to prevent prejudice and jury confusion, and to promote judicial expediency and economy. South Carolina Rule of Civil Procedure 42(b) provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim,...or of any separate issue...always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

The Durham Court further encouraged trial courts to bifurcate complex cases, "particularly when bifurcation helps to clarify and simplify the issues. Durham, 360 S.C. at 644 n.2.

Bifurcation is appropriate here because the evidence on Plaintiffs' claims for damages will include substantial evidence and testimony related to the substantial damages estimate, $15,748,225.56 (Pls' Pre-Trial Br. 7 (April 29, 2011)), which is alleged to be due to Defendants' alleged conduct. The mixing of evidence of liability and damages would create a substantial risk of prejudice and jury confusion under South Carolina Rule of Evidence 403. In this case, Plaintiffs' claims for liability will center on whether these Defendants, and any non-settling Defendants, were negligent and grossly negligent in failing to design, construct, and/or repair the buildings in a workman like fashion and in accordance with the building code, industry standards and accepted construction industry standards and practices, whether those remaining Defendants breached warranties, and whether those remaining Defendants engaged in action(s) constituting unfair and deceptive practice within the meaning of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-20(a). (Pls' 4th Amended Class Action Complaint ¶¶ 85-101, 107-110, 137-141 (March 15, 2010)). The evidence will also center on whether any such alleged negligence proximately caused Plaintiffs' claimed damages. NFF expects Plaintiffs will attempt to introduce wide-ranging evidence in support of their claim for damages. NFF anticipates Plaintiffs will want to taint the jury during the liability phase with evidence of their *total* repair estimate, which totals eight figures. This evidence, however, bears no relation to the specific liability issues related to NFF – whether NFF performed its work in a negligent manner.

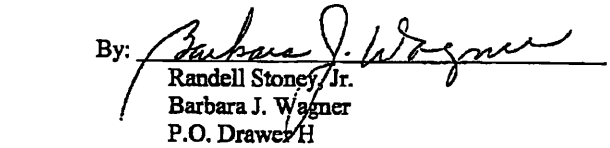
In addition, Plaintiffs have taken over the defense of Summit Contractors, Inc., which has filed cross-claims against NFF for negligence, breach of contract, breach of warranties, and indemnity. (Def. Summit's Answer to 2nd Amended Complaint and Cross Claims ¶¶ 124-143 (July 14, 2009)).

To allow the fact-specific evidence on Plaintiffs' claims for damages to contaminate the evidence related to liability in this case would work a gross prejudice to NFF and threaten its right to a fair trial. Commingling these two types of evidence will serve only to confuse and rile the jury, thus impairing it's ability to assess whether Plaintiffs have proved their negligence claims. The potential for prejudice and jury confusion to NFF is reason enough to bifurcate the trial of this case.

Bifurcation is appropriate in this instant action because the issues of liability and damages are distinct and a trial of each alone will not result in injustice. Deferring the trial of Plaintiffs' claim for damages also has the potential to greatly expedite the trial, conserve judicial resources and simplify complex issues involved in this case. Simply put, because a finding of liability is required for damages to be awarded, a defense verdict on Plaintiffs' claim for liability necessarily will eliminate the need for presentation of additional evidence and argument on damages. It would be significantly shorter to try the liability phase of this case separately because of the extensive evidence and testimony regarding Plaintiffs' damages. See generally Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). This is highlighted by the magnitude of evidence and the time in which the parties have to present it. The instant action is set for a date certain for three weeks, beginning on May 9, 2011. To date, approximately 36 depositions have been taken. This includes at least three experts for the Plaintiffs and potentially approximately eight to ten experts for the remaining Defendants. The liability phase alone, without any evidence or testimony related to damages, will likely consist of 25-30 fact witnesses. Bifurcation, therefore, has the potential to shorten these proceedings substantially and eliminate the need for evidence that is only relevant to damages. Moreover, bifurcation will simplify for the jury the complex construction issues and theories that the

damages phase would necessarily require (without the risk of confusion or prejudice in the process). Finally, in considering convenience, expedition, and judicial economy, bifurcation is proper because it would eliminate the expense of numerous witnesses, located both out of state and in-state, as well as additional fact witness to testify to damages if the jury enters a verdict in favor of the Defendants in the liability trial.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

Randell Stoney, Jr.
Barbara J. Wagner
P.O. Drawer H
Charleston, SC 29402-0197
(843) 577-7700
Fax: (843) 577-7708

ATTORNEYS FOR DEFENDANTS NORTH FLORIDA FRAMING, INC. AND MARQUEZ CONSTRUCTION, INC.

May 2, 2011
Charleston, South Carolina

**Kim Sansbury**

**From:** Jlucey [jlucey@lucey-law.com]
**Sent:** Friday, May 06, 2011 3:05 PM
**To:** Kim Sansbury
**Subject:** Fwd: Teseniar - North Florida Framing

Sent from my iPhone

Begin forwarded message:

**From:** Jlucey <jlucey@lucey-law.com>
**Date:** May 6, 2011 3:02:10 PM EDT
**To:** "Randell C. Stoney, Jr." <rstoney@barnwell-whaley.com>
**Cc:** "Gary S. Kull" <gkull@cmk.com> — N/Law firm?
**Subject: Re: Teseniar - North Florida Framing**

Agreed.

Sent from my iPhone

On May 6, 2011, at 2:58 PM, "Randell C. Stoney, Jr." <rstoney@barnwell-whaley.com> wrote:

Justin,

Below is what I believe to be the terms of the proposed settlement:

1) Plaintiffs have settled with Crum & Forster and Scottsdale on behalf of North Florida Framing and Marquez Const. for a contribution of $400,000;

2) Plaintiff enters a Covenant not to Execute with N.F.F. and Marquez as to all assets of both companies except any non-paying insurance policies, including Mt. Hawley;

3) Plaintiff is granted an assignment of those rights and claims belonging to N.F.F. and Marquez against all other parties, including but not limited to:
(a) claims against its subcontractors to include Nava Guzman;
(b) N.F.F. & Marquez insured status on subcontractor policies;
(c) Crum & Forster and Scottsdale's rights relating to this suit, including but not limited to rights of subrogation, indemnity, contribution, and pro rata allocation (for both payment and defense) against non-settling parties and carriers, including Mt. Hawley;

4) Upon the Plaintiffs completion of their collection of funds from non-settling parties and carriers, to whatever extent they may collect any funds, Plaintiff will satisfy and retire any outstanding judgment(s) against N.F.F. and Marquez, and shall file a Stipulation of Dismissal with Prejudice in favor of N.F.F. and Marquez;

5) Plaintiffs consent to counsel for N.F.F. and Marquez employed by Crum & Forster and Scottsdale, withdrawing from the case, and shall permit Mt. Hawley to substitute new counsel should it reverse its position of refusing to defend and indemnify in this matter, provided however, this shall not provide a basis for a delay in the trial of this lawsuit.

I look forward to your comments,

Randell

**From:** Justin Lucey [mailto:jlucey@lucey-law.com]
**Sent:** Friday, May 06, 2011 1:18 PM
**To:** Randell C. Stoney, Jr.
**Subject:** Re: Tesenlar - North Florida Framing

Randall:

Below is an edited version of the letter. Most changes are called out in italics.

Justin

Gary:

This is to confirm that we have settled Plaintiffs' claims against *the carriers for North Florida Framing & Marquez Construction (hereinafter collectively referred to as NFF)*, Crum & Forster Insurance and Scottsdale Insurance *and covenanted not to execute on NFF*, for $_____ and an assignment of rights, with Plaintiffs reserving all claims against all other parties. The assignment of rights includes, but is not limited to, NFF's claims against its subcontractors, including Nava Guzman; NFF's insured status on its subcontractor policies; and Crum & Foster and Scottsdale's rights relating to this suit including, but not limited to, rights of subrogation, indemnity, contribution, and pro rata allocation (for both payment and defense) against non-settling parties and carriers, including Mt. Hawley Insurance.

In consideration thereof, Plaintiffs will provide NFF with a Covenant Not to Execute on NFF's assets *except* on non-paying NFF *insurance* policies, including Mt. Hawley. *Plaintiff consents to NFF counsel employed by C&F and Scottsdale to withdraw from the case and shall permit Mt. Harley to subsitute new counsel should it reverse its refusal to defend and indemnify in this matter, provided however, this shall not provide a basis for a delay in the trial of this matter.* After Plaintiffs complete their collection against non-settling parties and carriers, Plaintiffs will satisfy any outstanding judgments against NFF and shall file a Dismissal of NFF with Prejudice.

Settling parties shall provide Plaintiffs with copies of all communications with Mt. Hawley.

*Sample assignment forms are attached.* Any dispute as to language in the settlement documents shall be submitted to the mediator or presiding judge for final binding resolution and shall not be a ground for setting aside this settlement, which shall be irrevocable once countersigned.

Gary, if this confirmation comports with your understanding of our agreement, I would appreciate it if you would first confirm by email; and then print this email, and, in accordance with our local rules and practice, affix your signature and scan the same back to me and I will do the same.

Justin Lucey

On Fri, May 6, 2011 at 11:38 AM, Alden Stair <astair@lucey-law.com> wrote:

Mr. Stoney:

Please see attached letter and assignment of claims which Justin asked me to send to you in connection with the above-referenced matter.

Thanks,

Alden

Alden J. Stair

Justin O'Toole Lucey, P.A.

415 Mill Street

Mount Pleasant, SC 29464

843.849.8400 phone

843.849.8406 fax

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO.: 2008-CP-10-0049 |

MARK F. TESENIAR and NAN M. TESENIAR, et al,

PLAINTIFFS,

VS.

FENWICK PLANTATION TARRAGON, LLC, ET AL,

DEFENDANTS.

**JURY TRIAL**

**VOLUME 1**

held before the Honorable Kristi L. Harrington

Mia Perron, Circuit Court Reporter, 9th Judicial Circuit

in the Charleston County Courthouse

Charleston, South Carolina

on Monday, May 9, 2011, Commencing at 11:28 a.m.

**SUSAN "MIA" PERRON, CVR-CM**
***Circuit Court Reporter - 9th Judicial Circuit***
**Post Office Box 31865**
**Charleston, South Carolina 29417-1865**
**1-706-231-6028**

COPY

FORM C-100 - LASER REPORTERS PAPER & MFG. CO. 800-626-3313

applies, but I don't think that's going to affect the trial.

THE COURT: All right. Mr. Leath?

MR. LEATH: Ours is only with regard to the opening, Your Honor.

We propose to use in our opening some slides and photographs of the property and some of the investigation. And we gave it to counsel either on Friday or before that, I think, to Mr. McCloud, also, for your review. Hopefully we don't have a problem with that but if we do, I would like to address it now.

THE COURT: Were there any objections to the photograph --

And they were all contained on the disk; is that correct?

MR. LEATH: Yes, Your Honor.

We may have modified them to add two. One is a site plan and one is an overview, like an aerial overview. But those would be the only modifications.

THE COURT: Any objections?

MR. ANDERSON: Your Honor, they're a part of Mr. Glick's evidence anyway, and we've agreed to these photos coming in, so we'll let it stand.

THE COURT: All right. Thank you.



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All right. And with that, are there other pretrial motions?

MR. LEATH: That takes care of them.

THE COURT: Okay.

MR. LEATH: Thank you.

THE COURT: Mr. Lucey?

MR. LUCEY: Yes, ma'am.

There still are several settlement matters --

THE COURT: Right. I'm just trying to make sure so that then those -- those of you who are not involved in the putting the settlement on the record can take this few moments and get ready for your opening.

MR. LUCEY: Yes, ma'am.

One matter I have involves a part of a settlement but it also involves a legal matter for the Court so --

THE COURT: For this trial?

MR. LUCEY: Yes, ma'am.

THE COURT: I'll be happy to hear from you.

MR. LUCEY: Ma'am, the first one -- we reached a settlement with North Florida Framing with the two carriers that were insuring them and defending them in this case. And we've reached a settlement with those carriers and we've reached a covenant with North



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Florida Framing.

We have agreed that the attorneys for those carriers, Barnwell Whaley, being Randal Stoney and Barbara Wagner, we have a consent order for them to be relieved as counsel.

If I may approach the bench?

THE COURT: You may.

[Whereupon, Mr. Lucey proffers documents to the Court]

THE COURT: All right. You may continue.

MR. LUCEY: Yes, ma'am.

With that, ma'am, North Florida Framing is actually still in the case but they have a covenant. They -- it is the call of the case. They're not here. We ask the Court to place them in default. We have one other defendant that's already in default and there's a default hearing set in front of Judge Scarborough in several weeks time. We would ask that North Florida Framing be referred to that same default hearing for a final resolution.

THE COURT: All right. Does anyone -- I'll be happy to hear -- have any position?

Mr. Anderson?

MR. ANDERSON: As I understand it, he's indicating that North Florida Framing is still part of



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this trial, although they have -- he's trying to place them in default; is that correct? We would --

THE COURT: Mr. Lucey?

MR. ANDERSON: Simply put, we would object to that. Either -- we believe that they -- if they've got a settlement, they've got a settlement.

MR. LUCEY: Mr. Anderson's client does not have any claims pending against North Florida Framing and it's my understanding is they do not have standing to object to a default by North Florida Framing.

We are here at a scheduled trial. North Florida Framing is not here to defend themselves and we would ask that they be placed in default and that be referred to the default hearing. Again, it's already been referred to Judge Scarborough.

MS. MANN: Your Honor, I believe -- it comes down to this. The nuts and bolts of it is whether what -- what they're doing is, I assume, would be to keep them in as name only so that they can have a joint and several liability verdict and try to impugn North Florida's Framing fault to both defendants, which would severely prejudice us because we cannot take up a defense with them at this point.

Do you see what I'm saying? They're going to say that North -- our allegation has been that North



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Florida Framing installed the windows where the water is intruding. If they keep them as a defendant in the case, they're going to be able to say that all the defendants together are jointly and severally liable for them. We can't -- and it's very difficult for us to defend North Florida Framing's work when they're not a party to this lawsuit and haven't been a defendant before.

MR. LUCEY: If I may, Your Honor?

THE COURT: You may.

MR. LUCEY: Respectfully, I think counsel misheard me.

We're not seeking to keep them in this trial. We're asking for our default and we're asking that they be referred to the default hearing that's already been scheduled for the other default defendants, which is the developer and the developer entities.

MS. MANN: Then no objection, Your Honor. As long as they are not trying to keep them in for a joint and several liability in this case, we have no objection to that at all. I apologize, Your Honor.

THE COURT: All right. Well, where are they? Where are they in the -- the attorneys were at the pretrial, right -- conference; correct?

MR. LUCEY: Yes. Those attorneys have settled



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for their carriers.

There is a third carrier that's refusing to defend the insured, North Florida Framing. North Florida has been given a covenant by the plaintiff, a covenant not to execute, except as to the proceeds, if any, that are procured from that recalcitrant third carrier at some other date and time. In the present context, North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them in this proceeding. And the two active carriers that were defending have agreed to pay us a substantial sum of money to settle the current liability and get their attorneys out of the cases.

THE COURT: All right. Your order relieving counsel has been -- consent order relieving counsel has been signed.

MR. LUCEY: Thank you, ma'am.

THE COURT: Your request is granted. Do you have an order or will a Form 4 be sufficient?

MR. LUCEY: Form 4 is sufficient, Your Honor. Thank you.

THE COURT: All right. Anything before we put the settlement? Other than the settlement, is that the only remaining --

MR. TRAVIS: I'm Britt Travis, here for Young



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Clement, for Nava Gooseman, and we've also reach a settlement. I don't know if you wanted to hear it before we put everything on the record, as well. We were actually a third-party defendant from North Florida Framing. We've reached a settlement with -- settle the terms with plaintiffs to pay them a substantial amount of money and -- under terms of -- agreeing to that the defendant indemnifies us in this trial. Since they're not in this trial, I don't think that's -- it doesn't matter.

And then, also, as far -- there's a declaratory judgment action regarding this case that the plaintiffs have brought. They agreed to dismiss that one, as well, and to keep this settlement contained into this litigation.

There's also a North Carolina declaratory judgment against my carrier and they've agreed not to utilize this part of the consideration to settle -- these -- the same attorneys agree not to utilize this as a portion of that litigation and that this settlement would be contained in this lawsuit and it would not be used against us later on.

MR. KIRCHNER: Your Honor, we've agreed with those terms.

And I think if it's easy enough, I can read the



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list of the settlements that we've agreed to, I can read those into the record, if you would like.

THE COURT: All right. Please. Thank you.

MR. KIRCHNER: Your Honor, with APS Stucco, the plaintiffs have settled for $100,000. Magna Wall, $637,500, North Florida Framing, $400,000 plus the situations that Mr. Lucey mentioned, Albert Gooseman, Mr. Travis' client, was $137,500, and General Aluminum, Mr. Cobbs's client, he mentioned that before, $12,500, for a total of $1,287,500.

We've also reached a settlement with one of the insurance carriers for Professional Plastering -- AIG, formerly doing business as Audubon, that settlement is for $100,000, on the representation that that is an actual exhaustion of their policy limits for I believe the policy year of 2002 to 2003.

MS. MANN: Yes, Your Honor. That would be for a complete exhaustion. Hypothetically, if there was a little bit more money that had not been exhausted, that would be offset so I assume that would also go to the settlement.

And there are certain stipulations between counsel which we don't need to put on the record. But that will be for the exhaustion of the Chartis policy period.



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MR. KIRCHNER: That's correct, Your Honor.

THE COURT: All right.

MR. KIRCHNER: So that actually brings the total up to $1,387,500, assuming that there is not some additional full dollars to actually exhaust their policies.

THE COURT: All right. And where are your clients? Is this --

MR. KIRCHNER: Mr. Jessup is here.

THE COURT: Mr. Chestner?

MR. KIRCHNER: Mr. Jessup. He's the board president.

THE COURT: I'm sorry.

Mr. Jessup, you have indicated -- you've heard what Mr. Kirchner has indicated to the Court as to the nature of the settlements?

MR. JESSUP: Yes, Your Honor.

THE COURT: Have you been informed of all of the settlements and the terms and conditions thereof?

MR. JESSUP: Yes, Your Honor.

THE COURT: Are you in agreement with --

MR. JESSUP: Yes --

THE COURT: -- those settlements?

MR. JESSUP: Yes, Your Honor.

THE COURT: Have you been satisfied with the



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services of Mr. Kirchner?

And, Mr. Kirchner, who else has Mr. Jessup been dealing with?

MR. KIRCHNER: All of us, Your Honor: Mr. Sequi, Mr. Chakeris, Mr. Leath, Mr. Lucey.

THE COURT: All right. Have you been satisfied with the services of your counsel?

MR. JESSUP: Yes, Your Honor.

THE COURT: Any complaints about the way they've handled this matter?

MR. JESSUP: No, Your Honor.

THE COURT: All right. Thank you.

MR. JESSUP: Thank you.

MR. KIRCHNER: Thank you, Your Honor.

THE COURT: All right. Anything further, regarding the settlement, to be placed on the record?

MR. KIRCHNER: Nothing from the plaintiffs, Your Honor --

THE COURT: All right. Anything from the defendants, regarding the settlement, to be placed on the record?

MS. MANN: No, Your Honor.

THE COURT: All right. Counsel, you may now leave.

UNIDENTIFIED: Thank you, Your Honor.



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THE COURT: All right.

MR. MCCANTS: Good afternoon, Your Honor. I'm John McCants. I'll reintroduce myself. I'm counsel for National Fire -- Insurance Company. We met briefly the other day and I introduced one of -- I was here on behalf of -- we were the insurer for Professional Plastering for a one-year period. And I had submitted samples or examples of special interrogatories. I had suggested -- renew the suggestion that the matter be taken up at an appropriate time with the jury charge after the evidence has been submitted.

THE COURT: All right. Thank you. We will address that matter at the appropriate time.

All right. Gentlemen, anything else?

MR. KIRCHNER: Your Honor, the only other thing is for our PowerPoint. If I may just have a few moments just to hook up whatever it is I need to --

THE COURT: You may. I have over-anticipated how long that we were going to be. So as soon as the jury gets here. That will give us a few minutes. But they're not supposed to be back until 2:30. Once they all get here we'll get started, since we're a little bit ahead, and we'll begin with opening statements.

And do we anticipate that Mr. Glick will be the



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demonstrate that they were doing about twenty-million dollars worth of business in their best year. And they had a set -- and you'll hear about them -- of specific specification and installation requirements from Magna Wall, as well as their contract obligated them to put this up correctly. That's the rule that was broken, the rule that's important. They had to follow the specific directions and instructions correctly in order to give the owners an effective water-management system and, instead, what the owners got was a water-trapping system.

We're going to prove these things to you. We're going to prove them with a qualified architect. We're going to prove to you what should have been done, we're going to prove to you what was done, we're going to prove to you what was not done, we're going to prove to you what the damage is, we're going to prove to you what the repair fix is and why and as well as the cost. And while in a project this big there may have been others that contributed partially to this particular problem, we'll show you that Professional Plastering was the major cause of the stucco deficiencies, the rot and deterioration, that exists on this project.

The defendants may say that it's not as bad as



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we say it is. You'll listen to this evidence for yourself and make up your mind. They may say others contributed. Others may have contributed to some small degree. These folks were the major cause. And they may say, well, it's not as expensive to repair as we say it is. That is your job and your judgment call in this case to determine that. Again, if you find that they're a contributing cause -- and they are major -- then they're responsible.

Well, what are the consequences to the homeowners in this case and where are they? Happily for everyone here, us as well as you-all, when we started this case it was much, much larger than just having this stucco issue. We had many other issues and many other defendants. They had roofing problems, they had framing problems, windows, and mechanical problems, and happily we've been able to resolve those problems with these other defendants. And that's why they're not here right now.

You'll hear that we have an overall estimate from ProCon, a highly-skilled professional corporation which does this type of mediation and repair all around -- not only this part of the country, but all over the country, for the total repairs to this project of about $15,718,000.



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The other parties have already resolved this for approximately eight million, their part of it. What's left, that has not been resolved by the entity largely, if not wholly, responsible for these stucco problems which is the bulk of the building envelope with these associated damages -- is about 7.2 million dollars. That's an estimate. That's what we're here about.

Now, when you finally hear all the evidence and you listen to everything that's been said, you'll have two things to decide. One of them is, the first thing, was Professional Plastering a contributing cause to these stucco problems and their related damages at Twelve Oaks. And we believe you'll find clearly, and the answer will be, yes, we have proved it.

If you find that, as we believe you will, the second question you will answer is how much will it cost to remedy those problems to which Professional Plastering contributed. And we believe it will be the difference between the estimate we will prove to you of the overall damages and what the other persons paid. They paid their fair share. Professional Plastering has not, which is why we need your help.

This is an important case for these homeowners.



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They are trying to get buildings they can live in and they can sell. They, and we, appreciate your attention to this large and important case.

THE COURT: Mr. Anderson?

MR. ANDERSON: Thank you, Your Honor. May it please the Court.

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A. I would say that I started it. But others have taken it quite a bit further, and they deserve the credit.

Q. All right. After Kiawah, what kind of work did you do?

A. In March of 1981, I went into my business. I have thirteen employees and I do both commercial work and residential work.

Q. Okay. And what is the name of your firm?

A. It's Glick-Boehm, Associates.

Q. Okay. And where is your office?

A. Right up here on King Street.

Q. All right. Tell us a little bit about the type of work that you do today, if you could.

A. I do a mixture of work. I'm a practicing architect and I do some forensic work, which was mentioned earlier in the opening.

Some of the work that I've done, that you may have seen, is Moultrie Middle School, the farmer's market in Mount Pleasant, the IMax complex next to the aquarium downtown, the new animal shelter on Remount Road, projects of that nature.

Q. And it come up a little bit earlier, and you just mentioned it again, forensic architecture. Could you explain in layman's terms to the jury kind of what that means, as far as how you do your job or what is -- what is



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your aim with that type of work?

A. Forensic architecture is really the analysis of what went wrong with a building, whether it's water intrusion or a structural failure.

And it takes a combination of I call it inquisitiveness, just like a detective is looking for clues to why something happened, in combination with construction knowledge and a strong design knowledge of architecture.

Q. Are you basically trying to solve a mystery, of sorts, as to what went wrong?

A. Yes.

I mean, you usually have a picture of what's in a building, because anyone could see what's in a building. You just take a picture of it. But what's not in the building and what's not done properly is really what the focus of the forensic investigation is.

Q. Mr. Glick, have you had an opportunity to testify in court prior to today?

A. Yes, I have.

Q. Okay. How many times would you estimate you've given architectural expert opinion in court?

A. Well, I've been in court between five and seven times giving an opinion. I've done over 400 forensic investigations, starting in 1981.



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Q. All right. And tell us a little bit about maybe the type of forensic -- or some of the higher-line forensic projects that -- give us sort of an idea of the type forensic projects you're involved with.

A. Some of the projects I'm involved with right now, forensically, are eight or nine multi-family condominium projects very similar to Twelve Oaks; the Beaufort County Complex, I'm rebuilding that right now from a forensic investigation that I did in 2004; and looking at different office buildings, smaller law-firm-type offices, things of that nature.

Q. Anything that stands out as far as even the jury may be aware of?

A. Well, I think about two years ago they took every brick off of this building because of water intrusion.

I was the forensic architect hired by Charleston County to investigate the sources of water intrusion and to be the architect responsible for the re-cladding of this entire complex that we're sitting in today.

Q. And have you ever failed to be qualified as an expert in court where you were offered to provide expert testimony?

A. I've never failed to qualify as an expert in design -- architecture, design, construction, forensic



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architecture, no.

MR. SEQUI: Your Honor, at this point we would like to have Mr. Glick qualified as an expert witness in the areas of architecture, forensic architecture, and construction, please.

MR. ANDERSON: That's without objection.

THE COURT: Ladies and gentlemen of the jury, normally a person cannot give opinion testimony. Normally, when a person testifies they must testify as to either what they saw, heard, or sensed by smell or something of that nature. There is an exception when someone is qualified because of their education or experience. They will then be permitted to give their opinion in certain areas, if the Court qualifies them in that way.

This witness will be qualified in the area of architecture, forensic architecture, and design construction, to give opinion testimony in those areas. That does not mean that you must accept the opinion. It is simply evidence for you to use in any way that you see fit.

Mr. Sequi.

MR. SEQUI: Thank you, Your Honor.

Q. [Mr. Sequi] Mr. Glick, to kind of move things along most efficiently -- or most efficiently as possible,



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can we agree that all the opinions that you will give us today, or on Wednesday if we don't finish with you today, will be to a reasonable degree of certainty in the areas of architecture, forensic architecture, and construction, unless you state otherwise?

A. Yes.

Q. Thank you.

Are you familiar with the project known as Twelve Oaks Fenwick --

A. Yes.

Q. -- located off Maybank Highway down on Johns Island?

A. Yes, I am.

Q. All right. And have you had an opportunity to perform an investigation of that -- of some of the problems out there?

A. Yes. I visited the site on four occasions.

Q. Okay. And give us a ballpark, as far as the time periods involved. When was the first time you went out there?

A. The first time I went out there was shortly after a conversation, September of 2008, with Mr. John Chakeris.

I then went out in October of 2008 to walk through the interior of a number of units to look at

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water- intrusion concerns. I also walked around the entire project, just to get a feel for how the buildings were built in terms of consistency. There are a lot of buildings and I could tell a lot by walking around the facility.

And then back in the latter part of October of 2008, I did a destructive test, which is basically going on site with the help of a contractor, making some holes where I think there could be some issues, to help me define better -- because I can't see behind the walls without doing what we call destructive test holes -- and made six holes that day, analyzed them, and then did a fourth visit, which was six more destructive test holes, in March of 2009.

Q. All right. You mentioned these words holes. Are those the openings we saw in the slides where the stucco had been removed to expose what was behind it?

A. Yes.

Q. Why do you do that?

A. Well, I had the plans and the specifications. But things change in the field. And you want to make sure how a project is really built before you can really analyze it and try to find the reasons for the problems.

Q. Was anybody else consulting with you professionally as part of your overall investigation when



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you initially went out there?

A. Yes.

There were a lot of construction deficiencies in many categories. Russell Meese was there to investigate the roof. Mr. Lenny Greene was a mechanical engineer looking at mechanical problems. And Mr. Tom Carlson, with CalLite Construction, who's assisting me with his crews, to cut these holes that we talked about.

Q. Okay. And when did you focus -- in what areas did you focus your attention on?

A. Well, I focused my attention on the exterior shell, which was a combination of the Magna Wall stucco system that was mentioned earlier; the roof intersections with walls when you had a lower gabled roof hitting a wall -- and we'll show -- I'll show pictures of that later -- the Hardiplank system, which is on some of the bay windows, and those kind of areas.

Q. Okay. And Mr. Leath mentioned in his opening statement a mention of rules for people to look to in sort of providing them things. What type of materials have you reviewed or relied upon in formulating your opinions as a result of your investigation in this case?

A. Well, the biggest starting point for architects and contractors is what the law says, and that is the building code.



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When the permits were issued for this project, it was the 2000 IBC, which is the International Building Code. The year of the building code is never the year that you build the project or issue the permits. So those are off by a couple of years, for different reasons, legislatively.

That book is about a three- to four-inch binder and it's based on performance specifications. That book refers to evaluation tests. Magna Wall, like many products -- because there are hundreds of thousands of products that construction people use, are then referred to by the code that they have to meet certain performance characteristics. So there's different testing third-party arms-length laboratories that say different products meet the different requirements of the building code.

But the code is what you have to build by. It doesn't matter what the contract says. You have to build by the building code. That's what we have to follow.

Q. In these evaluation reports, are these sort of approved exceptions to the building code because of something different about the system?

A. They're not exceptions to it. But what's very significant about the evaluation report is in the compliance section or the conditions of use of the Magna Wall product. For instance, it specifically says that



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this product will meet the building code and its performance requirements if the building product is installed in accordance with the Magna Wall specifications.

So you have to follow the specifications. And one of their specifications is that the installer has to be a certified installer, which means he needs to know how to put the product up and shouldn't necessarily need to rely on everybody else telling him that it was not put up right or put up correctly. He's supposed to know by law.

Q. Now, Mr. Glick, there's a few things I'm going to want into evidence and I'm going to ask you to bear with me.

MR. SEQUI: I ask the jury to bear with me.

May I approach the witness, Your Honor?

THE COURT: You may.

Q. [Mr. Sequi] I'm going to hand you what's been marked as Plaintiff's Exhibits Numbers 5 and Number 6, please, and ask if you'll identify those for us, please.

A. Exhibit Number 5 is the National Evaluation Services, Incorporated. This is a third-party testing agency. It's NER-459. And this is the -- what I call the compliance report that says Magna Wall meets the performance characteristics of the building code, given the conditions that I explained earlier.



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| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON | ) | |
| Mark T. Teseniar, et al | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Case No. 08-CP-10-0049 |
| | ) | |
| Fenwick Plantation Tarragon, LLC et al | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

# PARTIAL TRANSCRIPT OF JURY TRIAL
## May 11-13, 2011

The within transcript is a portion of the jury trial held in the above-captioned action on May 10 through May 13, 2011, before The Honorable Kristie L. Harrington, in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Jesse Kirchner , Esq.
Phillip Sequi, Esq.
John Chakeris, Esq.
Jefferson Leath, Jr., Esq.
Justin Lucey, Esq.
Appearing for Plaintiffs

J.J. Anderson, Esq.
Christy Mahon
Appearing for Defendants

**Vivian Cross, Court Reporter**
***Transcribed by***
***Deborah Garrison***
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the only parties that did wrong. Everybody did wrong that was in the suit." The only difference is -- huge difference, huge difference -- the only difference is all the other parties have stepped up to the plate and taken responsibility for what they did wrong.

MR. ANDERSON: May we approach?

THE COURT: You may.

(OFF RECORD BENCH CONFERENCE)

THE COURT: Ladies and gentlemen, please remember that I will instruct you on the law applicable to this case at the close of closing arguments. Mr. Lucey?

MR. LUCEY: Yes, ma'am. As I said, there's only one party left in this case. Eight million has been paid by those other participants that they want to blame for some of the problems. And we're good with that, that eight million has been paid. And we're not going to ask you for it again.

But as we stated, Mr. Leath, plaintiffs' counsel, conceded to you on day one, hour one, other people were at fault. That's not the question.

The question is -- the two questions that

Mr. Leath posed in his opening, which we believe, that the judge will pose to you in just a few minutes. That this defendant, Professional Plaster and Stucco -- that this defendant materially caused some of the defects that we've shown you this week. That they materially contributed to that rotten wood.

The only testimony you've heard this week on proximate causation has been by Mr. Glick who testified unequivocally on Monday, during direct examination, Wednesday, during cross examination, and this morning during rebuttal, that it is the defectively-installed stucco system that has proximately caused -- that's a legal term that's saying directly caused the damage, the rot, the problems we've shown you at Twelve Oaks. That is the question.

The next question is -- which we'll get to in a moment -- is damages. How much? What's it going to take to fix it? But before we get there, I'd like to address some other admissions which I wrote down this morning that y'all heard this week -- admissions by

either the defendant or their agents that they brought to trial to testify on their behalf.

Mr. King -- never onsite, never saw or checked his company's work. Never onsite during original construction. Never onsite when they went back to try to fix a couple of things in the breezeways.

And let's pause on that breezeway for a second, because I'll be honest with you, I missed that. That's an additional defense they have. They showed you two letters from 2004 regarding -- one from 2004 and one from June 2002, regarding, in 2004, some re-flashing they were doing, and in 2002 regarding whether or not the breezeways were ready for them to start work -- two letters to the general contractor. And they wanted somehow -- they bring these letters to you, by the way, about four times again in the context of those depositions they read to you yesterday. They want to somehow extrapolate that because twice they wrote the general contractor on things that we're really not here litigating -- that somehow they put the general contractor on notice that they were

going to defectively install stucco.

But you recall I asked Mr. King to stand up and to show you the letter where he told the general contractor that he wasn't going to put casing beads in around the windows. He didn't have a letter, did he?

I asked him to stand up and show you the letter that he sent to the general contractor that he wasn't going to put the weep screed in at the base of the walls. He didn't have a letter.

He didn't have a letter that pertained to any of the defects that we've shown you this week. This is smoke and mirrors. That's why they read it to you four times in those depositions yesterday.

Back to the admissions -- we've already talked about the admissions regarding the violation of the building code. There's another important admission by Mr. King that's really relevant and I think you'll find it ties into what the law is that the judge is going to instruct you, although hers will be more in legalese.

He admitted to you on the witness

stand that each subcontractor on the job site -- each one has an independent duty to comply with the building code -- each one. What does that tell you? It tells you that all that stuff they read to you out of depositions that some other people violated the building codes too doesn't matter. One question. One question -- did Professional Plaster violate the building code?

He admitted to you that his sub-contract required him to check the substrate, in other words check the surfaces of the buildings before he applied his product or Professional Plastering's product. And that, essentially what Mr. Glick had already told you, a subcontractor buys the substrate, so to speak, takes responsibility for the substrate that they apply their product to. In other words, if you conceal somebody else's defect, it's your problem now.

Why was that important? The un-controverted proof was that Professional Plaster and Stucco covered up the missing kickout flashing at the roof/wall inter-sections. They also covered up the reverse

lap, the back lap moisture barrier, the felt with a title. They covered it up with their product. This is before we get to the fact that they back-lapped their own product, the lath paper. Before you get to that, they covered up the back lapped moisture barrier on the structure that was there when they went to apply their product.

Their contract made them responsible for checking all those services before they applied the product. And let me pause there. Because we're talking about kickout flashing, and I know we had admissions. But you all will recall that we showed the defendant Sheet 106 in the Glick photograph group that's in evidence that's Plaintiffs' Exhibit 19. This is my copy with all the tags -- your copy right here. 106, we showed him the hole at the end of the metal at the end of the roof where his stucco was. And then we showed you a blowup of that hole showing that the water just flows right in the wall. But he kept denying that that was causing any problem.

Well, because of time -- because we tried to get this case done quickly for you

all, most of what you saw this week were photographs out of Exhibit 20, the PowerPoint -- the Glick PowerPoint that just had some of the highlights. But in the jury room you're going to have this complete set of photos. And what's unique about these Glick photos is they actually progressed with the testing. So not only does he first show you the hole where there should have been kickout flashing -- this is a separate issue. One, there's no kickout flashing. He covers up -- Professional Plaster and Stucco covers up the lack of kickout flashing. They then leave a hole in the structure.

Well, Mr. Glick's photographs are sequential. You get a blowup of that hole, you get the surrounding area and then they've got a peel back for you and the stucco underneath that hole. And when you get there, to slide 117, you see the rotted-out joists, the beam's gone, the truss plate's rusted -- all right under that hole that Professional Plastering wouldn't admit was causing problems to the structure.

And we have slide 117 -- you've

heard a lot about contingencies this week. See that rusted truss plate and those roof trusses that are gone? Rusted truss plates are in these estimates. Those are the type of things that you finally uncover a structure and you have that contingency allowance for it. That is why the engineer, the architects require a ten percent contingency in a proper repair estimate.

This isn't isolated. We can only show you so many. I believe this is test cut number six. If you flip back in this book to test cut number seven and you'll find the same thing -- different location, same kickout -- missing kickout, hole in the wall, rotted beams underneath.

Mr. King also told you that he folded Professional Plaster and Stucco after this suit was filed. And lo, and behold, opens up -- two, no three new multi-million dollar stucco companies at the same address.

What did Mr. Pusheck admit? Their damage expert -- what did he admit in their behalf? He admitted to you that at least nine buildings need repairing. And that's at least

$4.2 Million dollars. He admitted to you that if it's twelve buildings, it at least $5 Million dollars.

The judge will also charge you about your role in examining the credibility of the witnesses. You were in the same courtroom with me when Mr. Pusheck denied that Exhibit 24, the document he produced, entitled "estimate" wasn't an estimate. How do you do that? You were also in the room when we used the items mentioned in his own estimate, Exhibit 24, from June of 2010 to contradict the unit costs that he produced during the middle of trial, at 7:00 a.m. on Wednesday morning. When we did that, you all recall we actually took -- we asked him what were the items inside that $10.50 per square foot of stucco? And we took those same items on his estimate from six months earlier, and we showed with just square-foot prices that $10.50 during trial was $13.13 six months ago. And he still hadn't added in all the accessories, which would take it to over $15.50 a foot. What does that mean to you? Well, we've heard testimony all week that

there's a quarter of a million feet of stucco on this property. His estimate with his $5.00 a foot, that's already a one and a quarter million dollar error in his estimate.

And then what happened after we showed that with his own numbers? He started backing away from his own estimate. He started saying again that's not really an estimate. 'That's a budget.' I'm sorry. What's the difference between an estimate and a budget?

Now, we're talking about the credibility and we talk about Mr. Pusheck in just a moment. I'll remind you of something else. I want to remind you that in the last case in Charleston County where he was sworn under oath he changed his estimate -- this half million dollar estimate that existed the day before. In twenty-four hours he changed that estimate to $1.8 Million dollars -- a three hundred and fifty percent increase at soon as he was placed under oath.

And then you saw all his numbers on the overhead projector. You see all these numbers. You've got these numbers. I think

we can all conclude that he's really, really good with numbers and that apparently repair estimates, according to this witness, that they can be manipulated. You can just change your numbers. The stucco just changes from $15 a square foot to $10 a square foot because you're in the middle of trial.

My clients are in a numbers game. My clients didn't go all the way up to Maryland to get somebody to come down and change his numbers three times for you. My client brought to trial a South Carolina contractor who told you what it's going to cost to do this job in addition to his Charleston architect that told you what was going to have to be done on this job. And that Charleston architect, you'll recall, was involved in the repairs of this very structure we're in here today, the Charleston County Court House, just in the last couple of years. He was involved in the repair of the Beaufort office buildings. He was involved in the IMAX design, the animal shelter design -- one dear to my hear, Moultrie Middle School, where my daughter goes. That was a local architect who

makes his living in this community, representing homeowners and contractors and buildings and advising and sharing his testimony with you. He had as much credibility as any witness in this courtroom, I would submit to you.

Let me talk to you about the damages. We have an estimate in evidence, Plaintiff's Exhibit Number 15, the ProCon estimate, $15.7 Million. This is an older estimate. It applied to everybody who was in the case. You have frankly been told repeatedly this week that the plaintiffs have been paid $8 Million dollars.

In opening, Mr. Leath asked you for the difference. He said he would like for you to award us $15.7 Million less the eight million that we've been paid. That's $7.7 Million.

Just to make sure that everybody was correct about the numbers, Mr. Gallagher also produced what's been admitted into evidence as Plaintiff's Exhibit 14. It itemized the stucco-related-only damages in this case. It totals $8.7 Million, a million dollars more

than what we have remaining on the original estimate.

We're not asking for that extra million. We're still only asking for what we haven't been paid on the total job, even though the total stucco damages are documented by Mr. Gallagher at $8.7 Million.

When the defendants discussed their estimate, Defendant's Exhibit Number 3, they tried to confuse, as best I could tell, what's actually in Mr. Gallagher's estimate by talking about siding, windows and various other things. There is no siding and there is no windows in Mr. Gallagher's $8.7 Million stucco estimate. How do you know that? He actually lists up here the sections out of his original estimate where he took the numbers as being stucco related.

For example, section seven, which has the window replacement is not anywhere referenced on here, and you won't find that money in this estimate. There are no windows. There is no window work in this estimate, even though you heard Mr. Glick tell you on Monday that to repair the substrate, we must remove

the windows, because the substrate runs under the window flange and the substrates are rotted. Even though Mr. Gallagher could have put it in here, he did not.

You heard from the defendant's damage expert about what he thought it would cost. You also heard that the company that submitted the bid for you to consider this week, CRW, Carolina Restoration and Waterproofing, has no employees. You heard him tell you that he doesn't charge ten and ten, profit and overhead, because he self-performs all his work. Now, I ask you how do you do that if you have no employees? But nonetheless, if you go to their defense damage expert's itemization of the entire job -- they've still got it at almost $10 Million, even with a fifth of the line items zeroed out. And their second estimate is still at $5 Million, even though it excludes many of the stucco repair items and has the trial costs he used that don't match his costs from last year.

And one last note on the damages, because that's what this is all about. It's

obvious that the stucco's not applied right. The damage is overwhelming. The physical damage. The question left is what's it going to cost to repair this? Let me ask you -- you're aware that this damage expert that came here this week on behalf of the defendants was selected by Professional Plastering's team here at trial, their repairman. Now, let me ask you -- if you had your investment account with Bernie Madoff and you lost all your money, would you let Bernie's attorney recommend to you who should repair it -- who should invest your last few dollars? What kind of credence would you give their repair recommendation, when they're still trying to argue about whether or not they really did cause any damage.

What are the defects that were proven at trial? Stucco defects -- stucco in contact with roof shingles, no casing beads at the windows, no weep screeds at the base of walls, stucco too thin and too thick and the differential causing cracking, installed reverse weather lap, paper-backed lath paper. I don't have enough fingers.

Six -- not taking the paper out between the paper-back lath so the lap could combine.

Seven -- not corrosive-resistant fasteners.

Eight -- unembedded lath. In other words, stucco lacking any structural integrity.

Next -- I've forgotten my number -- next, sill flashing trapping water, covering up the defects of others.

The absent kickout flashing at the roofs, covering up the reverse weather lap of the moisture membrane.

Flat decorative bands with no sealant in the joint between the bands. You heard from Mr. Glick just talk about that again just this morning, that every building here -- and the pictures are right there. Every building out there -- twelve buildings that has decorative bands around each floor and around all the windows, there's no sealant at the band intersection. All those bands are water access points, three hundred sixty degrees on each of three and a half floors on

every of the twelve structures out at Fenwick, in addition to the window problems you saw, the weep screed at the bottom, et cetera.

I need to address some legalese with you briefly. Plaintiff has essentially brought two claims. One's called negligence. One's called breach of implied warranty. The negligence claim basically says you didn't do what you're supposed to do. You had a duty to do something -- in other words, in this case, apply the stucco properly. You breached it. In other words, you didn't do it. And that that breach proximately caused damage to plaintiffs who, in this case, as you know, the plaintiffs are the homeowners association that's responsible for the common elements and the two hundred and sixteen homeowners. That's it. That's negligence. Duty, breach, proximately caused damages.

There's an additional aspect of negligence, though. Plaintiff believes that they showed gross negligence or reckless negligence, which the judge will give you the definitions of, and that they're entitled to a charge on punitive damages. And we believe

the judge will instruct you that violation of the building code, in and of itself, in and of itself, is sufficient evidence of recklessness and willfulness for you, the jury, to award punitive damages.

So that's negligence and gross negligence. And sometimes that violation of the building code is a violation of statute, violation of law. Sometimes it's referred to as negligence *per se*. So you might hear that term in the charge.

The second cause of action or claim, so to speak, legal claim that the plaintiffs have asserted in this case is called breach of implied warranty of workmanship, good workmanship. And, basically, we believe the judge will instruct you that every construction activity within this state comes with an implied warranty, in other words, something that the law provides. An implied warranty that you will do that work competently and in conformance with industry standards, which we've already heard, part of industry standards is the building code, doing it the way you're supposed to do it. So we've

brought a second claim based on the breach of implied warranty of workmanlike service.

The judge, as I said, is going to charge you on the law, the elements, that we call them, of each of those claims. She's also going to charge you on the legal matter that Mr. Leath briefly addressed in the opening and I briefly addressed which is we do not need to prove that this defendant was the sole cause of our damage. We only need to prove that he was a substantial cause of the damage.

Lastly, or second to last, I'd like to briefly talk to you about the verdict form that the judge is going to give you to decide this case. It's going to have both of those claims on there. It's going to ask you whether or not we've proved our case. And let's about -- what does it mean for a plaintiff to prove his case? Imagine a scale. It starts balanced at the beginning of this trial. If we tip this scale every so slightly in our favor, then we have proved our case to you.

The judge's instructions will tell

you. We tipped that scale just like this. That's our burden of proof as to our actual damages, as to that $7.7 Million that we're asking for. That's our burden of proof.

Now, she might tell you we have a little higher burden of proof on the punitive damages, because we need to be more convincing. But I'll leave that to her charge. Whatever she charges you, we believe we've proved it. We believe we've proved beyond a doubt they were reckless and willful and repeatedly violated our state laws by violating the building code. So we believe we have proved by clear and convincing evidence our case.

You have seen the saga. You've seen the saga. You know about our two hundred and sixteen clients. But the saga's not over. Y'all will write the last chapter. The judge is going to give this case to you. You are the ones that have the opportunity, the responsibility and the opportunity to right the wrongs the plaintiffs have shown you this week. You are the ones that have the opportunity to help those homeowners get their

homes fixed. You have the opportunity to complete their repair recovery so they can embark upon their final journey which is that eighteen to twenty-four month repair process that they're going to undertake.

You also have the opportunity to punish the wrongdoer, to vindicate my clients, the two hundred and sixteen homeowners and the homeowners association, to right the wrong without ever having to deal with this situation. There's only one way for you to do that. One. That's an award of punitive damages, to send a message to this defendant and other subcontractors in this state, or as in this case, subcontractors that travel to this state from out of state, to send a message to prevent matters like this from occurring again.

Now, you heard that Professional Plaster and Stucco was grossing $20 Million a year -- $20 Million a year before they folded shut after this lawsuit was filed. I respectfully suggest to use that number to send a message. And, yes, Professional Plaster and Stucco is defunct. Don't concern

yourselves about whether or not we'll ever see a dime of it. But send a message. Right the wrong that you've seen. Help my clients get their houses back. Thank you.

THE COURT: Mr. Anderson?

MR. ANDERSON: May it please the Court? Thank you, Your Honor.

Good afternoon. I want to thank you for the attention that you've given to this case. I know that some of our presentation was really pretty agonizing for both of us. But it was information that we had to present to you from witnesses who are outside the scope of subpoenas in this case. We had the general contractor's representation, Tacy McGinty, who was from Florida. And then we also had the owner's representative, Mr. McNabb, who is in Texas. And the only way that we could present their testimony to you was through deposition. And I appreciate the attention that you gave to our readers during that time period.

Now, I'd like to correct what I perceive to be a misinterpretation by the plaintiffs of our case. We have tried to

present to you and give you a view into what occurs on a job site. Some of you may have been on a job site before and know how it works with contractors and the interplay of subcontractors going back and forth. But some of you may not have been. So we want you to understand the complexities of that particular area.

And when we did that we did most of it through the testimony of Tacy McGinty. Her testimony was important because she and Mr. McNabb are the only two witnesses that you have heard from that were actually there at the job site while the work was being performed.

Now, Mr. Lucey is upset that we brought the corporate representative for Professional Stucco and Plastering here to participate in this trial. He came up because he's concerned with this matter. And we didn't present to you or bring up past employees who are no longer with the company who were actually on the job site and may have done some supervision and so forth.

So he's asking you to punish

Professional Plastering for choosing a business model, essentially. And we ask you to look at the overall performance. And when he talks about punitive damages, what he's saying is the willful, wanton conduct of the workers in that they intentionally were up there saying, "Hey, let's make this part a quarter of an inch, and put a little eighth of an inch up here," and so forth. When actually they're up there, they've got a trowel and they've got a whole wall. And they've got to get this plaster up. And they're moving down the wall. And their primary goal is to keep it level on the outside. So they're moving a trowel back and forth, moving up and down. And it's done by hand. Nothing is machine-precisioned. It's done by hand.

And so you're not going to get an absolute three-eights, one-half, perfect thickness all the way down unless it's done in a factory or something and is bought in panels. Stucco doesn't go up like that. Anytime you have anybody putting a substance like cement up, it's going to have variations in it. Look at bricks. Look at the brickwork

that you have. Unless it has been machine-tooled or decoratively tooled, there's going to be a variation in how it's applied. That's just human nature.

Now, so I would submit to you that the workers out there were not intentionally doing something to harm the current homeowners out there eleven years later or ten years later. And we would ask you not to consider punitive damages on that basis.

I would ask you not to transfer what may be a proper righteous indignation against the people that sold it to them, Tarragon, the people that built it, the people that had the investigation done in 2003, the ones that had the repair done in 2004, and then converted them into condos in 2005 and sold them in 2006. They may have an intentional act in that level, but certainly not with the workers out on the -- at the wall putting the cement up.

Now, the plaintiffs have also missed what we were showing as far as the other subcontractors. We are not blaming any defects in the stucco that have been presented

on the other contractors. What occurs and what you are to analyze when the judge tells you is that was there negligence? And you make the decision yes or now, that they were negligent, that the application may have been improper or it may have been correct, or part of it was improper, part of it was correct and it's mixed. And, number two, is were there damages as a result of that application of stucco? Was the wood rot directly caused by the negligent application of the stucco?

And this is where you need to focus. The damage is consistent. It's at the window corners. It's at the edge of the balcony. And it's at where the roof and the wall intersection meets. It is consistent both by Mr. Glick's testimony on the first day, where he verified that those types of damages appear under the Tyvek -- excuse me, under the HardiPlank as well as under the stucco. And I'd like you to analyze it when you look back there for a moment -- what if we have HardiPlank over the entire building, no stucco? You'd have the same damages.

The upper floors with the HardiPlank

show the damage the same as the windows on the lower areas under the stucco. And, basically, what we're dealing with is I'd ask you when you analyze it to ask yourself where does the water get into the wood? Mr. Glick testified this morning that the way that they wrapped the windows, they brought the Tyvek up, cut an X in it and folded it back in. That's what they were told to do. That's what the plans said. And that left a gap at the corners. There's a gap in the coverage of the wood at the corners. In addition, the sill flashing, the peel-and-stick that was put in at the base of the windows was improperly installed.

So we have a situation, whether it's under the HardiPlank or under the stucco, where that condition exists and your point of entry becomes where the break at the corners is with the Tyvek. It's not -- and that's where the water gets into the wall sections up against the wood. And you have to get the water up against the wood before we have rot. That is consistent throughout the buildings, from the testimony.

Now, how did that work? You have

heard a lot from different contracts and we read you some language as to who was responsible for what part of the building. Well, Tacy McGinty, the project manager, the person in charge of the project, told you exactly who did that work. She said the walls were put up by -- and by that I mean -- excuse me, the wood sheathing was put up by North Florida Framing. The building wrap, whether it's primary or secondary, but the building wrap up against the wood was put up by North Florida Framing. The windows were supposed to be wrapped with the peel-and-seal. And that was put in by North Florida Framing.

The Z-bar -- and we had this read specifically out of the contract yesterday -- the Z-flashing at the top, the piece that is at the top, that was put in and required by contract to be put in by North Florida Framing. And then on top of it the window was taped across the top. We showed you a window so that you could see what was being done there. And that was taped across the top. When they do that tape, if you remember the pictures, that tape across the top is wider

than the Z-flashing. If you have a piece of tape that extends across the entire top of the window, you have pieces on both sides of the window, and you have one across the bottom of the window.

Well, what does that do to your ability to visualize what is behind the window? You can't see it. The critical point where the Tyvek meets the window -- if you see one of the pictures with tape, you can't see whether the lap is over the top or if it's inside because of the tape. So, in addition, your stucco applicators come in and they put up the lath, the paper-backed lath so that when the people with the trowels and the cement come up, they are faced with a wall that is -- has a black background and silver mesh. And they start putting their stucco up.

It's not reasonable or required for Professional Plastering to pull that tape off to double check. They are presented with a finished product. They're told by the general contractor that wall is ready. They go up, they look and they make sure that the tape is on, because that's the last piece that North

Florida Framing is supposed to put in place on there. And if it's on and you've got essentially the big pieces in place, then they go to work.

So we ask you when you analyze it to look at that. Now, the same occurred underneath the HardiPlank. You remember the HardiPlank has again the building wrap and then the tape.

One thing I'm curious from Mr. Glick's -- and this may have been mistaken by him, but the primary weather barrier he indicated was the first one you come to as you go in. But when you're building a building, you're not starting on the outside and working in. You don't put up the stucco and then try to put wrap behind it and plywood. You're building from the inside out. So for a builder, the first layer of building wrap to go on is the Tyvek or the white material in the pictures. That's your primary wrap. And the other reason that it would be primary is because it runs from the top of the building to the bottom and runs from side to side.

Now, Mr. Lucey spent a lot of time

about the sealant at the buildouts. The buildouts were a problem. They required Professional Plastering to raise the stucco to about an inch in thickness around the window, with that band around the windows. If you look at the pictures, some of the cuts, where they show variations in thickness -- a lot of those cuts are pieces of the band that they've cut through and you're seeing the wall coming down to the band and then the band being built out. So you'll see these big bulges of stucco. That's actually up against the window.

Now, what's the complaint about the bands? The complaint is lack of sealant. They're not sealed properly.

What did we learn from Mr. Glick, from Tacy McGinty, who was on the site and from the information given to you in the contracts? Who was responsible for that sealant? Los Campos is responsible for that sealant. If the sealant's missing, that is Los Campos's responsibility. That is not Professional Plastering's responsibility.

Professional Plastering is done with

its job and has moved on to the next building or gone home by the time they come around to do the sealant. Mr. Glick -- I asked him the paint and sealant were done after it was cured. And he said, "Well, I hope it's cured." It takes a day or so to cure the stucco. So the stucco applicator is no longer there. He's gone from the job. And it is Los Campos coming behind him who then applied that caulk.

Now, the other thing that was interesting from Mr. Glick's presentation was the blocking of the flashing, the Z-flashing at the head. He had several pictures of that in earlier presentations, and then he removed some where he showed you the before-and-after manipulation of the titling of the furrow. And his initial concerns about what was causing the water to back up was, in fact, the fact that the flashing had been sealed. They put a string of caulk or sealant across an opening that would not allow water to come through. And it was supposed to be left as an open drain, and that had been caulked shut. So again this is Los Campos coming behind

Professional Plastering.

We asked Tacy McGinty a number of questions about specifically the kickout flashing. And if you remember her testimony, her testimony indicated that kickout flashing was not on the plans. It wasn't on the drawings by the architect. It wasn't there. She further indicated in her testimony that kickout flashing was not delegated to any subcontractor. It was nobody's job on that job to put in kickout flashing. The architects didn't spec it, didn't require it. And on top of that, the general contractor didn't award a contract to anyone to go behind and put in the kickout flashing.

Now, our client indicated that ought to be kickout flashing. There isn't any covering up of the kickout flashing. You can't cover up -- you can't stucco over kickout flashing. As Mr. Glick admitted when I asked him questions about it, he just said -- and also Donnie King -- I said "Can you see kickout flashing when you're walking around a jobsite?" He said, "If you know what you're looking for." And that is exactly the way

that they would have checked that. But there wasn't anybody looking for it because it wasn't on the plans and it wasn't given in a contract to anybody. We don't know whether or not there was a conversation onsite about "hey, there's no kickout flashing here. Well, it's not in the contract. Keep moving. Keep putting your stucco on." That's the response that they got at the breezeways, was just keep moving. Keep moving.

Mr. Lucey's absolutely right. I thought that my client had written a letter. That would have been perfect. And that letter wasn't written. But the two letters that he referred to concerning the breezeway, that is an excellent defense. It's an excellent defense for Professional Plastering. They said the substrate's not ready. It's not, you know -- we can't do this. It won't come out right, and we won't be held responsible. And the general contractor said okay, we understand that. We want it done anyway. So what happens? Two years later they cut it all out and they're back up there and they ask him to replaster it after there had been some

minor repairs done.

Now, again, very clearly, the letter even says "you're coming in to do the labor. We're going to direct you exactly how to do it, and you are not responsible for that area." So that would be an area that should be deducted from any consideration on damages. That is something that should go into the column of Summit Contracting.

There's no real trick about this. They said, "We don't think we're responsible." And Summit said, "You're right. We're responsible, and we'll pick up the tab for it." Now, the owner and Summit, if it had been Pro Plastering's responsibility, could have charged Pro Plastering for that job. They could have said, "Listen, we want you to come back in here and do it for free and buy all the materials." That didn't happen. They got paid to do that.

Now, Mr. Lucey was kind enough to leave the numbers up here for me. There's been a lot of complaints about the fact that we came in with a proposal and the proposal was drawn up as late as it was. Because when

you look at this proposal there's a couple of things that you'll find in this proposal that you will not find in Mr. Gallagher's list of $15 Million.

Number one -- and what's important about it is that a number of these are protective measures for the homeowner. Number one is that the proposal has in there information and costing for a bond, a bond against the work being performed. That's not in Mr. Gallagher's or ProCon's. There's no bond. There's no guaranty on this job or on the work to be done. There's nothing in his that covers that.

Number two, what did he tell you? He said, "We need to do a whole bunch more work. I'm not going to stick to that number until I get drawings and I get all these other people in to help me. And, you know, you need to come up with a million-five to get an architect on board," and so forth. The repair world on commercial property really doesn't work that way.

This is -- now, the other thing, the other thing is there's no acceptance sheet on

Mr. Gallagher's exhibit. There's nothing on there where he says, "I will do it for this price, and I will do it today." This is a binding contract. If the homeowner had signed this, then Mr. Pusheck and his company would have been set up to do the work. That is how committed and sure he was of his number. He was willing to take a signature on the line right then. That's what that means.

Now, he alerted the homeowners to the fact that most of your damage and the information that we have covers only nine buildings. The information from Mr. Glick and from the other people indicates damage in nine buildings. So they priced the nine buildings that they knew the damage to be there. And then they gave them an alternative, if they want to do all twelve buildings, then this is what it'll cost to do the other twelve. That's why it's priced that way.

Now, there wasn't really -- when we look at this comparative study that was done between C. A. Winman and ProCon, I found it interesting that the plaintiffs would use our exhibit instead of having Mr. Gallagher

prepare a separate one. But if you'll look, the line items and so forth -- and remember the testimony of Mr. Gallagher. What did Mr. Gallagher tell us? He said, "Well, you know, this is really -- it's really not a proposal. It's a budget. You know, I put it together to get an idea of where we're going. This is a general, first-time attempt, and this is what I believe it'll cost. Now, there may be some big changes later." If you look at the number of allowances and contingencies in there, you'll see that his testimony on how this was put together is not much different than what Mr. Pusheck said when he was cross checking. He was cross checking it to make sure that we're not paying $300 per square foot for lumber or something like that, just to double check the numbers, and to put in numbers on his first go-through, like Mr. Gallagher, approximately what it would cost.

No one has offered to fix the buildings at this price. Nobody has given a contract or any commitment to do that work. Nobody. And there's a reason for that.

Now, I'm going to talk to you again

about -- when you talk about the difference in prices between the settlement amount and the $15 Million -- that's the number that the plaintiffs are asking for -- a comparative study was done between -- on the bid, the $8 Million bid that they gave you and the stucco numbers that would be in this document. Now, you will not be allowed to take this back into the jury room with you, but I'm going to put it back up and just point out a couple of things that I would like you to remember as you're considering your verdict.

As Mr. Pusheck told you, down here, the comparison between ProCon's number, the three million -- and this was done by breaking out all the fees, take out everything extraneous and -- same square footage, and both of them had the same scope. That is, the same type of fix materialwise together. And they come out together within eight -- about nine percent, 8.7 percent of each other. That's the difference when we just do the raw construction cost.

When you move over here and you add in the fees that are being charged by ProCon,

you get an $870,000 difference in how the numbers are calculated and what the client would have to pay -- what the homeowners at Fenwick would be required to pay, for the same work -- $870,000, a 68.6 percent increase or difference.

So what we have is $2.895 Million to do the stucco against the -- I'm sorry, I read the number incorrectly. You have a $3.662 is what that number is. The $3.662 Million to do the stucco as against the $8 Million -- $8.7 Million that Mr. Gallagher would charge under his current value. That's a forty percent markup in the way it is in the -- it's calculated, it's compounded in his $15 Million assessment. And by "compounding", that means that you do each ten percent differently. So you end up with being overcharged, I believe, almost twenty-three percent.

You are tasked with doing several things, and one of those is to determine credibility of witnesses. Now, you will be told that -- to use your common sense and indicators -- whatever you use to determine whether or not the person you're talking to is

an honest person. And you do the same thing back in the jury room. There's nothing special. There's no magic formula. It is what you determine, you know, who's telling the truth and who isn't.

Now, if you determine that part of a person's testimony is good, is accurate, is truthful, you can accept it. If you feel that they've gone too far in another area, you can reject it. So you can partially believe or you can partially disbelieve a witness. Or you can believe everything they say or nothing they say. So you're not restricted in how you analyze a person's truthfulness in applying the information that you got. So you can do it, and you can believe part of what Mr. Glick says. You can say, "Well, I'm not sure I understand or am following in this area." And you can do the same thing with Donnie King and Mr. Pusheck or any of the other witnesses.

I thought it particularly interesting when Mr. Glick this morning was talking about the amount of onsite supervision that his office gives a project. And he felt that giving this project a million five hundred

worth of onsite supervision was required. He's got to check materials. You've got to do all these other things to make sure that they put them up in the right sequence -- all the things that we talked about that are the general contractor's job and that the architect is supposed to check off.

If it takes that to do a repair, imagine what it took to do the initial building. Now, the reason that we bring out the inspections is not to say, "Hey, you didn't catch me, you know, therefore it doesn't count." The reason we bring that up is that the system that is established is to create a good work product. It doesn't always do that. But at the time that the stucco was put up it was inspected by the architect. I know that that word causes architects to have shivers, but they looked at the stucco. They looked at the lath. They looked at the Tyvek or the building wrap. And what that indicates is it was done properly in their professional judgment.

Now, that is was done properly -- so the message sent to Professional Plastering was,

"Your job's okay. Keep doing it the way you're doing it." Same message comes from the general contractor. The general contractor checks it. And you heard from Tacy McGinty how careful they were in checking it and the seriousness with which they took it. They're required to give a sworn statement that it's done properly. And you'll see that -- we put up on the exhibits folder. But that sworn statement -- so they have sworn under oath that the stucco was applied properly at the time in the original construction.

You also had Mr. McNabb who was down there reviewing it, looking at it. And he was the owner's representative and was saying, "This looks good to me. Let's keep moving." So you've got all these people who are telling you that whatever the application that they're doing is, it's correct.

Now, you've got all these people who have said that and they put it on the record and signed were sworn for it. And then eight years later or six years later, excuse me, bingo, it's bad, without any notice to Mr. King or anybody else. Just all of a sudden

it's horrible. The buildings are going to fall down. The trusses are coming apart. The beams are rotting, and the whole place is going to collapse.

I believe that that's a little bit of hyperbole by Mr. Glick in that he didn't report to the building inspector, which is a requirement which you would do if there was a real danger out there. That's not to say it doesn't need to be fixed and that there's problems out there. That's just to say that the level of the amount of damages need to be kept in perspective.

But you've got -- all of these various people are coming in and looking at it and saying it's okay. That's the problem. So you've got a contractor who was encouraged. Even before they started the job what did they have to do? What did Tacy McGinty tell you? They did a mock-up. They built a false wall and the trades come in and show how they're going to do it. They demonstrate to the architect and to the general contractor, "This is what we're going to build." And they put up this wall, this mock wall, and everybody

comes in and looks at it and so forth and says, "That's it. Keep doing it that way on the rest of the buildings." So there's a practice run and they're told that what they've done is either good or bad.

So that is not hiding behind a failure to discover or 'he didn't catch me, your security was bad' -- whatever the example of the bank robbery was. That's not the purpose of it. The only thing that we're saying is that we've got all these people telling you that you're doing it correctly. They continue to do it, and it was accepted by the owner.

Now, one thing that Tacy McGinty said -- and I hope that you all caught it, because it was toward the end of it -- and that was the owner has the option to accept the work regardless of how it comes out. Tarragon is a corporation that's around building apartments and has the option of saying, "The building's okay. Here's your check. I'm going to go work on it as an apartment, and we're going to do that." That is an option that they have. And so they can

accept that work. And there's nothing that Mr. King or anybody else can do about that. They'd paid, and told to be gone.

So that is who the buildings were built for, was Tarragon. And when the owner says the job's over, the job's over.

THE COURT: Five minutes, Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor.

There's one additional detail that I wanted to talk about. If you remember, Tacy McGinty talked about a waterproofing meeting that they had. And she said that in that waterproofing meeting they approved doing the windows by putting the stucco in the slide. The general contractor decided that that was the way to do it and instructed the stucco applicator to do it. So, again, he's doing what he's supposed to on the job, because he's instructed to do it that way. And, in addition, the Z-flashing on the top, the piece of metal that sits up there, they were told to put the stucco down hard onto the Z-flashing and then to be the J-bead at the top of the build-out. That's how

they were able to do the build-out. You may see in one of the photos a little tiny white little clear-looking spot. That is the J-bead that's in the build-out. But that assembly was approved, somewhat very critically approved.

The problems that were testified to by Mr. Glick occurred at -- here's the wall sheathing and then there is the building paper. I'm going to take that to mean the wrap. He doesn't have paper-backed lath up there. But it happened between the wall paper or, excuse me, the weather barrier sheet, the white material that you'll see in the photos, and the work. That's where all the damage is. The question to ask is how does the water get back there? Who put up the material that is -- that material? Who made the cuts to put in the windows that allowed the slits down at the bottom of the corners and so forth? It was not Professional Plastering. What Professional Plastering is saying is that even though there may be defects in our work, it does not -- it's not the proximate cause. It's not a proximate cause of water getting

behind the paper. Because in order for the water to get behind the building wrap or the building paper, there has to be something wrong with the building paper. And there has to be something -- and as Mr. Glick told you, water comes through stucco. It's not waterproof. And they anticipate the water's going to be coming through the stucco.

So what we would ask you is, after you've listened to the judge's instructions, listen carefully to the proximate cause charge and then analyze this specifically, looking at the building as a whole. Because that's how the system works. You have to take into account the entire building and the entire system. If you focus just on the stucco, you can find places. It's not a perfect job. And there's always some defect that you can find. But is that defect what caused the water to get behind the weather barrier and cause the damage?

We think that the evidence has shown that it is not the cause of those damages. Thank you.

THE COURT: Five minutes, Mr. Leath.

MR. LEATH: Thank you, Your Honor. Five minutes. Thank you all very much. I'm proud and I commend you for everything you've done and I'm proud of you for listening to it. It's a big case.

When we started it, we told you we'd prove some things. We proved them. We told you that there were rules and that Professional Plastering broke them. We told you that the breaking of those rules caused significant damages to our two hundred sixteen homeowners. We told you that it was important, critical in the rules, that a stucco applicator had to strictly conform to the manufacturer's specifications and the building code and the rules and regulations. That's been proved.

We've proved to you every aspect of the case that we told you we would do. And now, we also asked you during the opening, that you have two things to decide. One is was Professional Plastering, a, not the, major contributor to these problems? That's not only been proved. That's been admitted. I think you can get beyond that aspect of your

deliberations very quickly. Because the defendants have not put up any witness to contrast that, to contest that. They haven't. You haven't heard it.

All of the evidence is to the effect that they are a major cause of this problem. The real question for deliberations here is what's the appropriate cost that should be allocated to them.

Now, if you'll recall, the analysis done by Mr. Gallagher was that the stucco itself, just that portion of it, repair would cost $8.7 Million. But we're not asking for that. We're asking for less than that, and Mr. Lucey explained that.

And why is that? Because it wouldn't be fair and wouldn't be appropriate for us to ask you for more than the total repair on these buildings, which is $15,778.00 as you'll see in Mr. Gallagher's estimate. And, yes, some of the other folks have paid some part of Professional Plastering's part. You have heard and another thing that we told you in the opening is that the defendants would likely try to blame others. They have

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | 2008-CP-10-0049 |
| | ) | |
| | ) | |
| 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), | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| 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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P. AS SUCCESSOR IN INTEREST TO BEST MASONRY & TOOL SUPPLY, INC., AS SUCCESSOR IN INTEREST TO MAGNA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKER INDUSTIES, 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 ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON D/B/A MASON CONTRACTORS, KMAC OF THE | ) | **CONSENT ORDER RELIEVING COUNSEL** |

FILED
2011 MAY 18 PM 3:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CAROLINAS, INC., AND NEO CORPORATION,

Defendants.

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PROFESSIONAL PLASTERING & STUCCO, INC.,

Third-Party Plaintiff,

vs.

LUIS MARTINEZ, VILLAGOMEZ PAINTING, INC., AND D.M. PAINTING,

Third-Party Defendants.

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NORTH FLORIDA FRAMING, INC.

Third-Party Plaintiff,

vs.

NAVA GUZMAN CONSTRUCTION, INC.,

Third-Party Defendant.

---

APS ENTERPRISES UNLIMITED, INC.,

Third-Party Plaintiff,

vs.

C&N STUCCO AND PLASTERING, INC.

Third-Party Defendant.

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5/9/14

On motion of North Florida Framing, Inc. and Marquez Construction, Inc. and with consent of Plaintiff it is hereby ordered that Barnwell Whaley Patterson and Helms, LLC and attorneys Randell C. Stoney, Jr. and Barbara J. Wagner are relieved as counsel for North Florida Framing, Inc. and Marquez Construction, Inc.

AND IT IS SO ORDERED!

Circuit Court Judge
Ninth Judicial Circuit

May 9, 2011
Charleston, South Carolina

WE SO MOVE:

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5/9/11

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT<br>CASE NO. 08-CP-10-0049 |
| 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),<br><br>Plaintiffs,<br><br>vs.<br><br>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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OASK AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA WALL, INC., ALL SOUTH VINYL PRODUCITS, 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, | NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF A PARTIAL SETTLEMENT OF A CLASS ACTION |

FILED
2011 MAY 19 AM 11:39
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

TO: THE ABOVE-NAMED PARTIES AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE, that the Plaintiffs, by and through their undersigned counsel, will move before this Honorable Court, pursuant to Rule 23 SCRCP, ten (10) days hereafter at the Charleston County Judicial Center located at 100 Broad Street, for an Order preliminarily approving the terms of the partial settlement reached by and amongst certain parties as outlined in Exhibit "1" attached hereto and allowing for the mailing and distribution of notice of partial class settlement as outlined in Exhibit "2" attached hereto setting forth the process for objection by class members and a hearing date for final approval.

Please be present if so minded.

*(Signature page to follow)*

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

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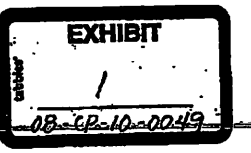
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*Attorneys for the Plaintiffs*

May 19, 2011
Charleston, South Carolina.

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO. 08-CP-10-0049 |
| 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), | ) | |
| Plaintiffs, | ) | |
| vs. | ) | ORDER PRELIMINARILY APPROVING CLASS ACTION PARTIAL SETTLEMENT, ATTORNEYS' FEES, APPROVING SETTLEMENT NOTICE PROGRAM, AND SETTING FINAL HEARING |
| 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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, 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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

Plaintiffs moved this Court, pursuant to Rule 23 SCRCP, for preliminary approval of a partial settlement of the above-captioned class action. The settlements were placed on the record on Monday, May 9, 2011 before the Court.

The above captioned action involves claims for construction deficiencies and undisclosed defects in common elements and limited common elements combined within the Twelve Oaks at Fenwick Property Owners Association (hereinafter the "POA"). At the time suit was originally filed, the governing board of directors of the POA was still controlled by the developers. As such, a class of condominium unit owners was certified by this Court on or about October 16, 2008. Ultimately, the developers turned over control of the POA to the homeowners and the POA was added as a party-plaintiff in this proceeding. As such, the POA, in essence, took over the claims concerning damage and repairs to common elements as defined by the governing documents of the POA, namely the Master Deed. The suit also involves class action allegations asserting claims on behalf of the individual condominium unit owners at Twelve Oaks for loss of use, interior damage and the like.

On Monday, May 9, 2011, counsel indicated that Plaintiffs have reached a full, final and complete settlement with the following Defendants: **Best Masonry & Tool Supply, Inc.,**

**as a successor in interest to Magna Wall, Inc., North Florida Framing, Inc., Marquez Construction, Inc., Nava Guzman, Inc., APS Enterprises Unlimited, Inc., J.T. Industries d/b/a General Aluminum Corporation, and General Aluminum Company of Texas, LP** (hereinafter referred to as the "Settling Defendants") in the amount of One Million Two Hundred Eighty-Seven Thousand Five Hundred and No/100 Dollars ($1,287,500.00). The attorneys for the POA and the class have advised the Court that the POA intends to allot the members of the Settlement Class One Hundred Twenty-Eight Thousand Seven Hundred Fifty and No/100 Dollars ($128,750.00) (the "Class Fund") as the class' **gross** portion of the settlement proceeds from the settlement with the Settling Defendants. This Partial Settlement only ends the Plaintiff's claims against the Settling Defendants. Plaintiffs' claims, including class claims, shall continue with respect to the non-settling Defendants. With respect to the class claims, this ten percent (10.0%) apportionment to the Class Fund is with respect to this Partial Settlement only and shall not be deemed binding on any future recovery or settlement with the non-settling Defendants. Class Representatives and Class Counsel may petition the Court for approval of whatever portion of any future recovery or settlement with the non-settling Defendants they deem necessary to make the class whole with respect to their actual damages and attorney's fees.

The Court has reviewed the record in connection with the motion and has considered all supporting evidence in the record and as presented by counsel at the hearing.

NOW, THEREFORE, good cause appearing, the Court hereby ORDERS the following:

1. Preliminary Partial Settlement Approval

This Partial Settlement satisfies Rule 23 SCRCP criteria for preliminary approval:

(a) The Partial Settlement is sufficiently fair, adequate, and reasonable to justify notice to those affected, along with an opportunity to be heard, pursuant to South Carolina Rule of Civil Procedure Rule 23;

(b) The Partial Settlement substantially fulfills the purposes and objectives of this Action, and provides benefits to Class Members, without the costs, risks, and delays of further litigation at the trial and appellate levels, and does not require a finding or admission of liability by Settling Defendants;

(c) The allocation to the Class of 10% of the gross settlement proceeds is fair and reasonable taking into consideration, among other factors, the nature, extent and scope of repairs contemplated by the POA;

(d) The proposed Notice Plan submitted by the Class Counsel provides individual notice to all known Class Members and all Class Members who can be identified through reasonable efforts and constitutes the best notice practicable under the circumstances of this action;

(e) The settlement negotiations culminating in the Partial Settlement occurred at arm's length; there was sufficient investigation and discovery; the counsel for Plaintiffs are experienced in similar litigation; and the number of anticipated objections to the Partial Settlement is small compared to the class size;

(f) The Partial Settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representative Plaintiffs or of segments of the class, or excessive compensation for Class Counsel, and appears to fall within the range of possible approval.

As indicated above, this Partial Settlement only ends the Plaintiffs' claims against the Settling Defendants. Plaintiffs' claims, including class claims, shall continue with respect to

the non-settling Defendants. The Court therefore grants preliminary approval to the Partial Settlement. The Partial Settlement shall be submitted to Class Members for their consideration and for a Fairness Hearing, as provided below.

2. Settlement Class Definition

The settlement class is defined as follows:

> *All persons or entities who own a condominium unit at Twelve Oaks at Fenwick Plantation who did not opt out of the Class and who are not affiliated with the developer or developer-related entities, 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.*

3. Notice

The Court approves, as to form and content, the Notice of Proposed Partial Settlement of Class Action (attached hereto as Exhibit "A") and approves it for mailing to Class Members. The Court finds that this Notice form provides Class Members with all of the information necessary to make an informed decision regarding the fairness of the Partial Settlement.

The Court finds that the mailing and distribution of the Notice to the last known address of each of the class members provided to the POA meets the requirements of Rule 23 and due process, and shall constitute due and sufficient notice to all persons entitled thereto and shall be deemed effective when deposited in the United States Mail, sufficient first class postage affixed thereon. Such notice is the best practicable notice under the circumstances of this case; it complies with due process, and it provides sufficient notice to bind all Class Members, regardless of whether a particular Class Member receives actual notice.

4. Standing to Object

Any Class Member who has timely filed notice of opposition to approval of the Partial Settlement may appear at the Fairness Hearing to show why the Partial Settlement should not be approved as fair, reasonable, and adequate, or why Judgment should or should not be entered thereon, or why attorney fees and expenses should or should not be awarded to Class Counsel out of the Claims made under the Partial Settlement. Any Class Member who wishes to object to the Settlement must file with the Court and serve upon Plaintiffs' Counsel a written Notice of Objection on or before _____. The Notice of Objection must state the reasons for the objection and, must demonstrate the objecting Class Member's membership in the Settlement Class. Only persons who have filed and served Notices of Objection will be entitled to be heard at the Fairness Hearing. Any Class Member who does not make his or her objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the Partial Settlement as incorporated in the Partial Settlement and/or to any award of attorney fees and expenses to Class Counsel, unless otherwise ordered by the Court.

5. Final Approval

A final approval hearing (the "Fairness Hearing") shall be held before this Court on _____ **at** ____:____ __**.m. at Charleston County Court of Common Pleas, 100 Broad St., Charleston, South Carolina,** to determine whether: (1) the Settlement is fair, reasonable, and adequate and should receive final approval from the Court; (2) notice has been given to Class Members in accordance with this Order; (3) a Judgment as provided in the Partial Settlement should be entered herein; and (4) the one-third percentage that Class Counsel is authorized to take as their attorney fees and expenses

is fair and reasonable and should receive approval from the Court. The Court finds that this date allows adequate time for Class Members and their counsel to support, oppose, or object to the Partial Settlement.

6. Further Matters

This Court shall retain jurisdiction of this matter until it is concluded.

IT IS SO ORDERED.

_____
Honorable Kristi Lea Harrington
Chief Administrative Judge
Ninth Judicial Circuit

This _____ day of _____, 2011

_____, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT<br>CASE NO. 08-CP-10-0049 |
| 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),<br><br>Plaintiffs,<br><br>vs.<br><br>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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008); PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKER INDUSTRIES, INC., J.T. INDUSTRIES d/b/a GENERAL ALUMINUM | ) | NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION AND FINAL HEARING |

EXHIBIT
2
08-CP-10-0049

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants,

TO: ALL CLASS MEMBERS, being all persons and/or entities who own a condominium unit within Twelve Oaks at Fenwick Plantation who did not opt-out of the Class Action:

**PLEASE READ THIS NOTICE CAREFULLY**
**YOUR RIGHTS MAY BE AFFECTED BY THIS SETTLEMENT**

You were previously sent a Notice of Class Action and exclusion form on November 26, 2008. That Notice explained the litigation, contained the exclusion form for opting out of the Class Action, and explained how counsel fees and expenses would be paid in the event of a settlement. You also previously received two separate Notices of a Final Settlement with certain Defendants totaling $5,960,000.00 and $777,500.00.

**This** Notice is provided to advise you that another partial settlement has been reached with some of the Defendants which will provide monies to individual unit owners in partial settlement of your claims for loss of use and interior damages, in addition to monies being provided to the Property Owners Association regime in partial settlement of the claims for damages to the common elements.

The overall gross amount of the partial settlement is One Million Two Hundred Eighty-Seven Thousand Five Hundred and No/100 Dollars ($1,287,500.00). The gross portion of the partial settlement being awarded to the Class is One Hundred Twenty-Eight Thousand Seven

Hundred Fifty and No/100 Dollars ($128,750.00). Out of the gross amount, the agreed upon one-third deduction of Forty-Two Thousand Nine Hundred Sixteen and 67/100 Dollars ($42,916.67) will be taken by Class Counsel as attorneys' fees, leaving a net amount to be distributed to the Class of Eighty-Five Thousand Eight Hundred Thirty-Three and 33/100 Dollars ($85,833.33). The expenses of the litigation thus far will be deducted from the POA's share of the recovery. The balance of the settlement funds, less attorney's fees and expenses, will be paid to the POA for repairs to the common elements.

YOU ARE HEREBY NOTIFIED that a hearing will take place in the Court of Common Pleas at the Charleston County Judicial Center located at 100 Broad Street, Charleston, South Carolina, pursuant to Rule 23 SCRCP, to approve this settlement, class counsel fees, and expenses, before the Honorable Kristi Lea Harrington on _____, _____, **2011 beginning at___:____ __.m.** If you agree with the terms of this partial settlement, YOU DO NOT HAVE TO ATTEND THIS HEARING – NO FURTHER ACTION WILL BE REQUIRED ON YOUR PART AND YOU WILL RECEIVE YOUR DISTRIBUTION FROM THE SETTLEMENT PROCEEDS. If you have a valid, legal reason to object to this settlement and you wish to appear at the hearing to voice your objections, you **must** provide the Clerk of Court and Class Counsel a **written notice** of your intention to appear at the hearing to object. This notice must be sent to the Clerk of Court at 100 Broad Street, Charleston, South Carolina, 29401 and Class Counsel at the address indicated below, **along with your written objection**, postmarked by _____, _____, **2011.**

In the event you have assigned or pledged your rights to receive proceeds from this Class Action to some other individual or entity, please notify Class Counsel of this fact, submitting the names and addresses of those assignees.

If you have any questions about this notice or this procedure, DO NOT CONTACT THE COURT. Rather, please contact Class Counsel listed below:

W. Jefferson Leath, Esquire
LEATH BOUCH & CRAWFORD
92 Broad Street
Charleston, SC 29401
843.937-8811
jl@leathbouchlaw.com

Jesse A. Kirchner, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
843-937-8000
jkirchner@tktylawfirm.com

Justin O. Lucey, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
843.849-8400
Jlucey@lucey-law.com

John T. Chakeris, Esquire
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, SC 29401
843.853.5678
john@chakerislawfirm.com

Phillip W. Segui, Jr., Esquire
THE SEGUI LAW FIRM
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Mt. Pleasant, SC 29464
843.884.1865
psegui@seguilawfirm.com

*Attorneys for the Plaintiffs*

## CERTIFICATE OF SERVICE

Pursuant to Rule 5(b)(1), SCRCP and counsel's regular business practices, I, Cathi P. Adkins, an employee of THURMOND KIRCHNER TIMBES & YELVERTON, P.A., do hereby certify that I have this date, electronically mailed a true and correct copy of the **Plaintiffs' Notice of Motion and Motion for Preliminary Approval of a Partial Settlement of a Class Action** to the following counsel of record:

**Attorneys for Professional Plastering & Stucco, Inc.**
Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
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P.O. Box 12129
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-and-
Jonathan J. Anderson, Esquire
Anderson Reynolds & Stephens, LLC
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**Attorneys for North Florida Framing, Inc. and Marquez Construction, Inc.:**
Randell C. Stoney, Jr., Esquire
Barbara J. Wagner, Esquire
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**Attorney for Development, Compliance & Inspections, Inc.**
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**Attorney for General Aluminum Company of Texas, LP**
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**Attorneys for Best Masonry & Tool Supply, L.P. as successor in interest to Best Masonry & Tool Supply, Inc. as successor in interest to Magna Wall, Inc.**
R. Bryan Barnes, Esquire
J. Geoffrey Osborn, Jr., Esquire
Rogers Townsend & Thomas, PC
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FILED
2011 MAY 19 AM 11:39
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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**Attorneys for NEO Corporation**
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cappleby@collinsandlacy.com

By: Cathi P. Adkins
Cathi P. Adkins
Paralegal to Jesse A. Kirchner

This 19 day of May, 2011
Charleston, South Carolina

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF, SUITE 101
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Steven D. Epps
Christopher P. Deters
David L. Barnes, Jr.

*Also admitted in Georgia
**Also admitted in North Carolina

Phone: 843.937.8000
Fax: 843.937.4200
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May 19, 2011

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Mark F. Teseniar and Nan M. Teseniar, et al. v. Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Plantation, et al.
Case No.: 2008-CP-10-0049

Dear Ms. Armstrong:

Enclosed for filing please find the original and one (1) copy of Plaintiffs' Notice of Motion and Motion for Preliminary Approval of a Partial Settlement of a Class Action, in connection with the above-referenced matter. I have also enclosed a motion coversheet and this firm's check in the amount of Twenty Five and No/100 Dollars ($25.00) representing the filing fee associated with this matter. I would appreciate it very much if you would file this pleading with the Court and return a file-stamped copy to me via my courier.

Your assistance with this matter is greatly appreciated.

With best regards, I remain

Very truly yours,

Cathi P. Adkins

Cathi P. Adkins
Paralegal to Jesse A. Kirchner

JAK/cpa
Enclosure
cc: All Counsel of Record (via electronic mail only)

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, 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,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-0049

FINAL ORDER APPROVING CLASS ACTION PARTIAL SETTLEMENT AND ATTORNEYS' FEES

FILED
2011 JUN 10 PM 1:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

6/10/11

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants.

This matter was before the Court upon Plaintiffs' motion for a Fairness Hearing to finally approve the settlement reached with the Settling Defendants[1]. A Fairness Hearing was conducted on June 10, 2011 beginning at 1:00 p.m. at the Charleston County Judicial Center located at 100 Broad Street, Charleston, South Carolina.

The above-captioned action involves claims for construction deficiencies and undisclosed defects in common elements and limited common elements combined within the Twelve Oaks at Fenwick Property Owners Association (hereinafter the "POA"). At the time suit was originally filed, the governing board of directors of the POA was still controlled by the developers. As such, a class of condominium unit owners was certified by this Court on or about October 16, 2008. Ultimately, the developers turned over control of the POA to the homeowners and the POA was added as a party-plaintiff in this proceeding. As such, the POA, in essence, took over the claims concerning damage and repairs to common elements as defined by the governing documents of the POA, namely the Master Deed. The suit also

[1] Settling Defendants are Best Masonry & Tool Supply, Inc., as a successor in interest to Magna Wall, Inc., North Florida Framing, Inc., Marquez Construction, Inc., Nava Guzman, Inc., APS Enterprises Unlimited, Inc., J.T. Industries d/b/a General Aluminum Corporation, and General Aluminum Company of Texas, LP.



6/10/11

involves class action allegations asserting claims on behalf of the individual condominium unit owners at Twelve Oaks for loss of use, interior damage and the like.

As a result of lengthy, arms-length negotiations, Plaintiffs have reached a full, final and complete settlement with the Settling Defendants in the amount of One Million Two Hundred Eighty-Seven Thousand Five Hundred and No/100 Dollars ($1,287,500.00) (the "Partial Settlement"). The Class Representatives and the Board of Directors for the POA have advised the Court that the POA intends to allot the members of the Settlement Class One Hundred Twenty-Eight Thousand Seven Hundred Fifty and No/100 Dollars ($128,750.00) (the "Class Settlement Fund") as the class' gross portion of the settlement proceeds from the settlement with the Settling Defendants.

To date, the POA and its attorneys have expended various costs, including expert fees, in the prosecution of the above-captioned action. In this Partial Settlement, the POA has agreed to bear all of the expenses of the litigation to date such that the only deduction from the Class Settlement Fund will be the attorney's fees. In this regard, the Notice of Class Action and exclusion form, which was circulated on or about November 26, 2008 to all class members, indicated that class counsel would petition the Court for attorneys' fees not to exceed forty percent (40.0%), plus expenses and costs. The Notice of Proposed Partial Settlement of Class Action and Final Hearing, which was circulated on or about June 3, 2011 to all class members, indicated that Class Counsel would petition the Court to award Class Counsel only one-third of the Class Settlement Fund recovery as their attorneys' fee. Class Counsel has petitioned the Court for a one-third attorneys' fee from the Class Settlement Fund, in the amount of Forty-Two Thousand Nine Hundred Sixteen and 67/100 Dollars ($42,916.67), and for the recovery of no costs and expenses from the Class Settlement Fund, and the Class Representatives have agreed to the same.



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From the evidence presented, I find that an allocation to the Class of One Hundred Twenty-Eight Thousand Seven Hundred Fifty and No/100 Dollars ($128,750.00) is fair and reasonable. I find that an allocation of ten percent (10.0%) of this Partial Settlement is fair and reasonable taking into consideration, among other factors, the nature and extent of the repairs to the common elements and limited common elements contemplated by the POA.

Based on the record before the Court and the testimony presented, the Court makes the following findings of fact and conclusions of law:

NOW, THEREFORE, good cause appearing, the Court hereby finds the following:

1. The Court has received an Affidavit from Christine Petit, legal assistant to Plaintiffs' attorney, John T. Chakeris, Esq., dated June 9, 2011, affirming that the "Notice of Proposed Partial Settlement of Class Action and Final Hearing" was sent to each class member in accordance with the "Order Preliminarily Approving Class Action Partial Settlement, Attorneys' Fees, Approving Settlement Notice Program, and Setting Final Hearing" entered by the Honorable Kristi Lea Harrington on June 3, 2011. I, therefore, find that proper and reasonable notice of this Final Hearing has been sent to each class member. The Affidavit further affirms that Christine Petit has examined the records of the Clerk of Court in the above-captioned matter and that no objections to the settlement by any class member have been filed or received.

2. Plaintiffs' counsel and the Class Representatives have asked the Court to approve the attorneys' fees. With respect to attorneys' fees, the Supreme Court of South Carolina has approved contingency fee agreements and has set forth factors which must be considered by this Court in determining the reasonableness of the attorneys' fees. The factors, and my findings in regard thereto, are as follows:

(a) The nature, extent and difficulty of the case. This lawsuit was commenced in February of 2008. This litigation involves claims for design and construction



6/10/11

deficiencies and undisclosed defects in an apartment complex which was later converted to condominiums for sale to the public. The litigation has been extremely complex and difficult. The prosecution of this case thus far has taken more than three years and has resulted in many hours being expended by the legal teams for both sides. The Plaintiffs have engaged experts to determine the nature and extent of the deficiencies as well as experts to determine the cost of repairing the deficiencies. Extensive written discovery has been conducted and more than thirty-five thousand documents have been exchanged among the parties. Many depositions been taken, with many occurring outside of South Carolina, involving much travel, time and expense.

(b) Professional standing of counsel. Class Counsel is made up of five different law firms, Leath Bouch & Seekings, Thurmond Kirchner Timbes & Yelverton, The Chakeris Law Firm, The Segui Law Firm, and Justin O'Toole Lucey, PA, all of which are in good standing with the legal community and enjoy excellent reputations. Among the class counsel, the individual attorneys, W. Jefferson Leath, Jr., Jesse A. Kirchner, John T. Chakeris, Phillip W. Segui, Jr., and Justin O. Lucey, have handled large and complicated construction deficiency cases ranging from single family residences, to multi-family projects, government projects and hospital projects and they are well known for their expertise in this area of the law. The Class Counsel are well experienced in class action litigation.

(c) The contingency of compensation. In this case, the Class Representatives specifically requested Class Counsel to take this matter on a contingency fee basis, and it was agreed in writing by the Class Representatives and by Class Counsel that they be compensated on a contingency basis. In this case, there



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were significant questions concerning insurance coverage and insurance availability among the Settling Defendants and other contingencies upon which a successful recovery depended. Despite these obstacles, Class Counsel were able to bring this matter to a partial resolution.

(d) Beneficial results obtained. Two mediations have occurred spanning five full days and many hours were spent negotiating outside of the mediation setting in an effort to secure the settlement obtained. It is clear that the results obtained in this Partial Settlement are excellent. Including this Partial Settlement, Class Counsel has thus far recovered $8,025,000.00 by way of a gross settlement for the project.

(e) Legal fees for similar services. Construction defect cases are typically handled on a contingency fee basis ranging from 33.33% to 40.0% in South Carolina. The Notice of Class Action and exclusion form, which was circulated on or about November 26, 2008 to all class members, indicated that class counsel would petition the Court for attorneys' fees not to exceed forty percent (40.0%), plus expenses and costs. Because Class Counsel now only petition the Court for a one-third fee and no expenses or costs, the Court finds that a contingency fee of One-Third (1/3) is fair and reasonable and should be approved by this Court.

3. Less the Class Counsel attorneys' fee, the net payment to the class totals Eighty-Five Thousand Eight Hundred Thirty-Three and 33/100 Dollars ($85,833.33). The Court finds that this amount is fair and reasonable given that the bulk of the damages discovered thus far in this case involve common or limited common elements which the POA controls and the POA is bearing all expenses of the litigation. The POA shall place Eighty-Five Thousand Eight Hundred Thirty-Three and 33/100 Dollars ($85,833.33) (the "Class



6/10/11

Fund") into an interest bearing account in a federally insured institution in the name of the Twelve Oaks at Fenwick Property Owners Association. The Class Fund shall be held in a separate fund by the POA and disbursed in accordance with this Order. The Class Fund shall be kept separate from any other funds belonging to the POA. The principal and any interest accruing from the Class Fund shall be used in the following priorities:

(a) The POA shall disburse the Class Fund to class members in accordance with their respective percentage of ownership in the common elements as set forth in the Master Deed, increased to reflect the two units that opted out of the Class. The POA shall keep precise records of all monies expended from the Class Fund and shall provide an accounting for examination by any class member or, if requested, by the Court.

(b) It is further ordered that prior to any disbursement of settlement funds to any class member, that member's regime fees and assessments must be brought current or, in the alternative, that class member's settlement funds shall be applied toward payment of past due regime fees, assessments or fines, and the balance, if any, be paid to the class member.

4. It also appearing to the Court that no objection has been made by any class member and that proper notice was given of the hearing to each of the known class members.

5. From the evidence before the Court, the testimony presented, and the arguments of counsel, the Court finds that all the criteria of Rule 23 SCRCP have been met and that this settlement should be approved.

6. Upon payment of the settlement proceeds by the Settling Defendants, the Class Representatives are authorized to execute a general release(s) as to the Settling Defendants,



6/16/11

and/or settlement agreement(s) on behalf of the Class and an order(s) or stipulation(s) ending this case and all class claims with prejudice against the Settling Defendants.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(a) Attorneys fees in the amount of Forty-Two Thousand Nine Hundred Sixteen and 67/100 Dollars ($42,916.67) shall be paid to Class Counsel in connection with the class claims and the same is hereby declared reasonable and such fee is hereby approved;

(b) The settlement of the class action as to the Settling Defendants and the allocation to the class the net sum of Eighty-Five Thousand Eight Hundred Thirty-Three and 33/100 Dollars ($85,833.33) is reasonable and proper and is hereby approved under the terms and conditions of distribution set forth herein;

(c) Upon payment of the settlement proceeds by the Settling Defendants, the Class Representatives are authorized to execute a general release(s) as to the Settling Defendants, and/or settlement agreements on behalf of the Class and an order(s) or stipulation(s) ending this case and all class claims with prejudice against the Settling Defendants; and

(d) This Court shall retain jurisdiction of this matter until it is concluded.

IT IS SO ORDERED.

Honorable Kristi Lea Harrington
Judge, Ninth Judicial Circuit

This 10th day of June, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON ) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 08-CP-10-0049
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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKER INDUSTRIES, INC., J.T. INDUSTRIES d/b/a GENERAL ALUMINUM

AFFIDAVIT OF CHRISTINE PETIT

2011 JUN -9 PM 4:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., and NEO CORPORATION,

Defendants,

PERSONALLY APPEARED **before me, Christine Petit, who, first being duly sworn, deposes and says:**

1. That I am the legal secretary to John T. Chakeris, Esquire.

2. In accordance with the Order Preliminary Approving Class Action Partial Settlement, Attorneys' Fees, Approving Settlement Notice Program, and Setting Final Hearing by the Honorable Kristi Lea Harrington, I, Christine Petit sent the Notice the Proposed Partial Settlement of Class Action and Final Hearing to each of the class members at their last known address provided by the Property Owners Association via the U.S. Postal Service First Class Mail.

3. That no written objections to the Partial Settlement have been received by the Chakeris Law Firm by any class member.

4. I have also examined the case file at the Clerk of Court for Charleston County and no written objections are included in the case file by any class member as of the date of my affidavit.

CHRISTINE PETIT

SWORN to before me this
9 day of June, 2011.

Notary Public for South Carolina
My Commission Expires: 9-5-12

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

COVENANT NOT TO EXECUTE

WHEREAS, Plaintiffs Mark F. Teseniar and Nan M. Teseniar filed a class action lawsuit in the Charleston County Court of Common Pleas, Civil Action No. 2008-CP-10-0049, on behalf of themselves and the other co-owners of the Twelve Oaks at Fenwick Horizontal Property Regime, and Twelve Oaks at Fenwick Property Owners Association, Inc. (from December 16, 2008 to present) joined the lawsuit as a named Plaintiff, seeking damages against various Defendants, including North Florida Framing, Inc. and Marquez Construction, Inc. (hereinafter collectively referred to as "NFF") for negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, breach of warranty of habitability, breach of warranty against latent defects, breach of warranty of workmanlike services, breach of warranty of fitness for a particular purpose, breach of warranty of merchantability and serviceability, and unfair trade practices arising out of the construction, repair, remediation, abatement, investigation and maintenance of Twelve Oaks at Fenwick Horizontal Property Regime, all of which is set forth in the Fourth Amended Complaint in the lawsuit referenced above; and

WHEREAS, the Court certified the lawsuit as a class action by order filed October 20, 2008; and

WHEREAS, the Plaintiffs have settled all claims against NFF's carriers, Crum and Foster and Scottsdale Insurance, for a payment of Four Hundred Thousand and 00/100 Dollars ($400,000.00); and

NOW THEREFORE, in partial consideration of the payment of Four Hundred Thousand and 00/100 Dollars ($400,000.00) by or on behalf of NFF, and other assignments being given contemporaneously herewith, the receipt of which is hereby acknowledged, Mark F. Teseniar

and Nan M. Teseniar, individually and on behalf of all persons, firms, corporations, partnerships, associations, trusts, or legal entities owning condominiums at Twelve Oaks at Fenwick Horizontal Property Regime, their heirs, personal representatives, successors and assigns, and Twelve Oaks at Fenwick Property Owners Association, Inc. (from December 16, 2008 to present) (hereinafter "Plaintiffs"), do covenant not to execute on NFF's assets except insurance policies (and related rights) issued by carriers which have not contributed to the within settlement, specifically including Mt. Hawley Insurance Co.

Upon the completion of all collection activity pertaining to the aforereferenced assignments, Plaintiffs shall dismiss NFF from this suit with prejudice and satisfy any outstanding judgments against NFF and shall release and forever discharge NFF, their officers, directors, employees, agents, heirs, personal representatives, successors and assigns, and their insurers and indemnitors, of and from any and all claims, demands, damages, actions, causes of action, or suits of law or in equity, of whatsoever kind or nature, for or because of any act or omission by anyone prior to and including the date hereof on account of any and all damages resulting to or resulting from the construction, repair, remediation, abatement, investigation, and maintenance of the property known as Twelve Oaks at Fenwick Horizontal Property Regime including all claims that were or could have been set forth against NFF in Civil Action No. 2008-CP-10-0049.

The covenant specifically includes any rights Plaintiff now have or may have against NFF by virtue of rights procured by assignment or otherwise from third parties, including Summit Contractors. Further, Crum and Foster and Scottsdale are forever discharged by Plaintiff with regards to these policies issued to NFF.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7 day of July, 2011.

WITNESSES:

Mark F. Teseniar

Nan M. Teseniar

Twelve Oaks at Fenwick POA
(December 16, 2008 to present)

By: _____

Its: _____

IN WITNESS WHEREOF, we have hereunto set our hands and seals this _____ day of _____, 2011.

WITNESSES:

_____

_____
Mark F. Teseniar

_____

_____
Nan M. Teseniar

_____

Twelve Oaks at Fenwick POA
(December 16, 2008 to present)

_____

By: _____

Its: HOA BOARD PRESIDENT
JEFFREY A JESSUP

I, the undersigned attorney for Plaintiffs, hereby certify that the contents, meanings and effects of the foregoing Covenant Not to Execute have been carefully and fully explained by me and I recommended the execution of said Covenant Not to Execute for the consideration therein expressed.

Justin Lucey, Esquire
Attorney for Plaintiffs

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

---

Case No. 2008-CP-10-0049

---

FILED
2011 JUL 22 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Mark Teseniar and Nan Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. ..... Respondents

v.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, F/K/A Fenwich 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 Contractors Group, Inc., Summit Contractors, Inc, Fugleberg Koch Architects, Inc, Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks At Fenwick Property Owners Association, Inc., (From August 8, 2006 To December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., D/B/A Johnson Roofing, Inc., Los Campos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, L.P. As Successor In Interest To Best Masonry & Tool Supply, Inc., As Succesor In Interest To Magna 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 Rosales, APS Enterprises Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason D/B/A Mason Contractors, KMAC of the Carolinas, Inc. and NEO Corporation,

Of Whom Professional Plastering & Stucco, Inc. is the ..... Appellant

And

APS Enterprises Unlimited, Inc. ..... Respondents

v.

C & N Stucco and Plastering, Inc.

FILED
2011 JUL 22 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

AMENDED/ CORRECTED
NOTICE OF APPEAL

Professional Plastering & Stucco, Inc. appeals the Order of the Honorable Kristi L. Harrington granting APS Enterprises Unlimited, Inc.'s Motion for Summary Judgment (Exhibit A) that was signed May 9, 2011, filed May 11, 2011, copy obtained on May 19, 2011 and written notice was received on May 20, 2011. A motion pursuant to Rule 59(e) was filed on May 20, 2011. An Order denying the Rule 59(e) Motion (Exhibit B) was signed July 13, 2011, filed July 19, 2011, and notice of the signing of the Order was received via e-mail on July 18, 2011.

Professional Plastering & Stucco, Inc. appeals the judgment of the Honorable Kristi L. Harrington (Exhibit C) dated May 13, 2011 that was entered following the return of a jury verdict in favor of the Respondents, and the Order of the Honorable Kristi L. Harrington denying the Appellant's Motion for New Trial Absolute, Motion for Judgment Notwithstanding the Verdict, Motion for New Trial *Nisi Remittitur*, and Motion for Set-Off (collectively "Appellant's Post Trial Motions") (Exhibit D). The Order denying Appellant's Post Trial Motions was signed June 15, 2011, filed June 17, 2011 and written notice of the Order was received on June 21, 2011. A motion pursuant to Rule 59(e) was filed on June 29, 2011. An Order denying the Rule 59(e) Motion (Exhibit B) was signed July 13, 2011, filed July 19, 2011, and notice of the signing of the Order was received via e-mail on July 18, 2011.

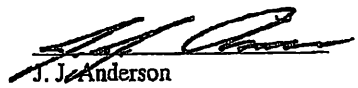
Further, Professional Plastering & Stucco, Inc. appeals the consolidated Order of the Honorable Kristi L. Harrington (Exhibit B) denying the Rule 59(e) Motions to Alter

or Amend the Court's denial of Professional Plastering & Stucco, Inc.'s Post Trial Motions and the Rule 59(e) Motion to Alter or Amend the Court's granting of APS Enterprises Unlimited, Inc.'s Motion for Summary Judgment.

This appeal is timely pursuant to Rule 203 of the South Carolina Appellate Court Rules.

Respectfully submitted,

ANDERSON REYNOLDS
& STEPHENS, LLC



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Other Counsel of Record and Interested Parties

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843-849-8400
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*Mark Teseniar and Nan Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc.*

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843-766-8101
*Attorneys for Respondents*
*APS Enterprises Unlimited, Inc.*

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

---

Case No. 2008-CP-10-0049

---

FILED
2011 JUL 22 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Mark Teseniar and Nan Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. ..... Respondents,

v.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, F/K/A Fenwich 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 Contractors Group, Inc., Summit Contractors, Inc, Fugleberg Koch Architects, Inc, Development, Compliance & Inspections, Inc., H2L Consulting Engineers , Twelve Oaks At Fenwick Property Owners Association, Inc., (From August 8, 2006 To December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., D/B/A Johnson Roofing, Inc., Los Campos, Inc ., North Florida Framing, Inc., Best Masonry & Tool Supply, L.P. As Successor In Interest To Best Masonry & Tool Supply, Inc., As Succesor In Interest To Magna 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 Rosales, APS Enterprises Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason D/B/A Mason Contractors, KMAC of the Carolinas, Inc. and NEO Corporation,

Of Whom Professional Plastering & Stucco, Inc. is the ..... Appellant

And

APS Enterprises Unlimited, Inc. ..... Respondents

v.

C & N Stucco and Plastering, Inc.

FILED
2011 JUL 22 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

AMENDED/CORRECTED

PROOF OF SERVICE

I certify that I have served Appellant's Notice of Appeal by depositing a copy in the U. S. mail, postage paid on July 20, 2011 addressed to Respondents' attorneys as set forth below:

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*Attorneys for Appellant Professional Plastering & Stucco, Inc.*

July 21, 2011

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 08-CP-10-0049

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OASK AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, 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,

ORDER OF DISMISSAL AS TO CERTAIN DEFENDANTS (WITH PREJUDICE)

FILED
2011 AUG -8 PM 1:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION, and NAVA GUZMAN CONSTRUCTION COMPANY, INC.,

Defendants.

IT APPEARING TO THE COURT that the Plaintiffs have reached a full, final and complete settlement with Best Masonry & Tool Supply, Inc., as a successor in interest to Magna Wall, Inc., Nava Guzman Construction Company, Inc., APS Enterprises Unlimited, Inc., JT Industries d/b/a General Aluminum Corporation, and General Aluminum Company of Texas, LP (hereinafter "Settling Defendants").

NOW, THEREFORE, PURSUANT TO RULE 41(a)(2) of the South Carolina Rules of Civil Procedure, the Court hereby dismisses, *with prejudice*, the above-caption matter as to the Settling Defendants, with all parties to bear their own costs. Notwithstanding the foregoing, this Order does not dismiss or otherwise affect the pending crossclaims or other claims not yet asserted that Best Masonry & Tool Supply, Inc. as a successor in interest to Magna Wall, Inc. may have against Professional Plastering & Stucco, Inc. Additionally, this Order does not dismiss or otherwise affect the pending crossclaims and third party claims or other claims not yet asserted that APS Enterprises Unlimited, Inc. may have against Professional Plastering & Stucco, Inc. and/or C&N Stucco and Plastering, Inc. Further, this Order does not affect any claims by and among any parties not dismissed herein.

IT IS SO ORDERED!

Honorable Kristi L. Harrington
Chief Administrative Judge
Ninth Judicial Circuit

August, 2011

Charleston, South Carolina.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO.: 08-CP-10-0049 |
| 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), | ) | |
| Plaintiffs, | ) | ORDER OF DEFAULT AS TO DEFENDANT, NORTH FLORIDA FRAMING, INC. AND ORDER OF REFERENCE TO MASTER IN EQUITY FOR DAMAGES HEARING |
| vs. | ) | |
| 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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OASK AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, 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, | ) | |

FILED
2011 AUG -9 AM 9:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION, and NAVA GUZMAN CONSTRUCTION COMPANY, INC.,

Defendants.

UPON THE CALL of the case on May 9, 2011, after counsel for Defendant, North Florida Framing, Inc., had been granted leave to withdraw from the case, Plaintiffs called the Court's attention to Defendant, North Florida Framing, Inc.'s failure to appear for the trial of the case and moved for an Order of Default against Defendant, North Florida Framing, Inc., which was granted. Further, Plaintiffs moved for the claim and default against Defendant, North Florida Framing, Inc., be referred to the Master In Equity for a Damages Hearing, which was granted.

IT IS SO ORDERED!

Honorable Kristi L. Harrington
Chief Administrative Judge
Ninth Judicial Circuit

August 3, 2011

Charleston, South Carolina.

Transcript 5-14-13 Scarborough

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON | FOR THE NINTH JUDICIAL CIRCUIT |
| MARK N. TESENIAR, ET AL, Plaintiff, VS. FENWICK PLANTATION TARRAGON, LLC, Defendants. | CASE NO.:2008-CP-10-0049 |

Hearing before the Honorable Mikell R. Scarborough, reported by Bernadette A. Cali, CSR and Notary Public, on May 14, 2013 at 100 Broad Street, Charleston, South Carolina.

A P P E A R A N C E S

For the Plaintiff Hunter Higgison, Esq.
Chakiris Law Firm
Charleston, S.C.

For the Defendant: No appearance

Bernadette A. Cali, CSR
Notary Public



THE COURT: This is Teseniar versus Fenwick Plantation. Who is the victim today?

MS. HIGGISON: North Florida Framing, Inc.

THE COURT: Okay. All right.

This is a separate entity than the last default damages hearing which was an individual, if I remember right?

MS. HIGGISON: That was done.

THE COURT: All right. I see an Order Of Default in the file from August of 2011; proof of service for notice of hearing. Looks like it was sent April 15, 2013; today's date. That was served on the agent for service of process?

MS. HIGGISON: It went to the registered agent, David Anderson. And we did receive one green card. We sent it to two separate addresses. One was a street address, one was a PO box. We received a green card in the mail from the last known street address. It was signed by a Catherine Anderson. And the regular mail letter that we sent to that street address never came back. Then, I believe it was last week, I received the certified letter back from the PO box address. But we haven't heard anything from anyone other than the green card was signed.



THE COURT: It came back?

MS. HIGGISON: Yes, I have the originals.

(Hands up document.)

THE COURT: Sure. All right. Thank you.

(pause)

THE COURT: So the actual registered agent address was returned unclaimed. The other one was

signed for by Catherine Anderson, although it was addressed to David Anderson, registered agent for North Florida Framing. All right.

Very good then. I'll find they've been provided with notice of the hearing for today. This is a default damages hearing?

MS. HIGGISON: Yes, Your Honor.

THE COURT: All right, Ms. Higgison, you may proceed.

MS. HIGGISON: This is another default damages hearing arising out of Twelve Oaks, which as you know is on Johns Island just on the other side of the Stono River. In lieu of having a witness here today we have prepared testimony from Miles Glick and Robert Gallagher(phonetic). And Robert Gallagher has prepared our repair estimate.

THE COURT: Tell me what Mr. Glick says needs to be done and what Mr. Gallagher says it would



cost.

MS. HIGGISON: For North Florida Framing they were engaged in framing the buildings. They installed the secondary weather barrier, the windows, the doors and related flashings out at Twelve Oaks. The damages, there was significant water intrusion, damage to the sheathing, structural framing members, and all of that will require extensive repairs. And Mr. Gallagher's repair estimate for all of the damages at Twelve Oaks is 15,748,225.56.

THE COURT: 15,748,225.56?

MS. HIGGISON: Yes, sir.

THE COURT: Okay. Damages sought. And he's broken out how he got that?

MS. HIGGISON: It's in his report in the back.

THE COURT: All right. I'm assuming, is that joint and several?

MS. HIGGISON: Yes, Your Honor.

THE COURT: Very good. All right. If you'll hand that up. And did you bring a proposed order?

MS. HIGGISON: I did, with my Form 4C.

THE COURT: She's on the ball. Isn't she?

(Hands up document.)



MS. HIGGISON: Prepared testimony.

THE COURT: Very good.

(pause)

THE COURT: Is the report of Mr. Gallagher the same or similar to the one that was previously entered in against, I think, the Defendant Marquez(phonetic)?

MR. CHAKIRIS: It is, Your Honor. And I don't believe it was Defendant Marquez. I believe it was one of the Fenwick Plantation Tarragon related entities, but it's the same estimate, Your Honor.

THE COURT: Okay. Got you.

(pause)

THE COURT: Ms. Higgison, I have executed your Order, as well as the Form 4C. And I'll be

glad to give that to you if you would like to take it down and file it or --

MS. HIGGISON: I can take it down and file it.

THE COURT: Very well. Thank you, ma'am.

MS. HIGGISON: Thank you.

THE COURT: Thanks for your prompt presentation. Very well done.

MS. HIGGISON: Thank you.

6

THE COURT: All right, Mr. Chakiris.

MR. CHAKIRIS: Thank you very much.

STATE OF SOUTH CAROLINA )

C E R T I F I C A T E

COUNTY OF CHARLESTON )

I, Bernadette Cali Leland, Notary Public, do hereby certify that the within hearing was taken and transcribed by me; and that the foregoing pages are a true and accurate transcript of the within proceedings. I further certify that the persons were present as stated.

I further certify that I am not of counsel or kin to any of the parties to this action, nor am I interested in the result of said action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this July 1, 2015.

Bernadette Cali Leland, CSR
Notary Public
My Commission Expires
April 5, 2020

STATE OF SOUTH CAROLINA )
) IN THE CIRCUIT COURT
COUNTY OF CHARLESTON )
) CASE NO.: 2008-CP-10-0049

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P. AS SUCCESSOR IN INTEREST TO BEST MASONRY & TOOL SUPPLY, INC., AS SUCCESSOR IN INTEREST TO MAGNA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKER INDUSTIES, 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 ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON D/B/A MASON CONTRACTORS, KMAC OF THE CAROLINAS, INC., AND NEO CORPORATION,

Defendants.

**ORDER GRANTING JUDGMENT AGAINST NORTH FLORIDA FRAMING, INC.**

FILED
2013 MAY 14 AM 10:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter came before me on May 14, 2013, for a Default Damages hearing pursuant to an Order of Default for North Florida Framing, Inc., and an Order of Reference for a Damages Hearing entered on August 9, 2011. Present at the hearing were counsel for Plaintiffs, Hunter Higgison, Esquire, and John T. Chakeris, Esquire. No one appeared on behalf of North Florida Framing, Inc.

The complaint in this matter alleges that North Florida Framing, Inc. was involved in constructing various elements at the Twelve Oaks at Fenwick Plantation community, which resulted in extensive construction deficiencies. As a result of these deficiencies, it is further alleged that North Florida Framing, Inc., was negligent with respect to the construction of the buildings at Twelve Oaks at Fenwick Plantation and that this negligence resulted in significant water intrusion and damage to the sheathing, structural framing members, and other building components which will require Plaintiffs to make extensive repairs.

Plaintiffs have produced evidence of the need to repair the construction deficiencies which caused significant water intrusion and damage to the sheathing, structural framing members, and other building components, as well as a repair estimate. Plaintiffs' repair estimate has been produced by a qualified expert, Robert A. Gallagher, the President of Procon & Associates, Inc., and the estimate totals Fifteen Million Seven Hundred Forty Eight Thousand Two Hundred Twenty Five and 56/100 Dollars ($15,748,225.56). Through the prepared testimony of Robert A. Gallagher, Plaintiffs have demonstrated that this repair estimate is necessitated by improper construction which has resulted in significant water intrusion and damage to the

sheathing, structural framing members, and other building components for which North Florida Framing, Inc. is responsible for.

Accordingly, it is ORDERED, ADJUDGED, AND DECREED that judgment be granted in favor of Plaintiffs against defaulting Defendant, North Florida Framing, Inc., jointly and severally, in the amount of Fifteen Million Seven Hundred Forty Eight Thousand Two Hundred Twenty Five and 56/100 Dollars ($15,748,225.56), which represents repair costs associated with this matter.

IT IS SO ORDERED!

The Honorable Mikell R. Scarborough
Master-in-Equity for Charleston County

Charleston, South Carolina
May 14, 2013

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON )
)
MARK F. TESENIAR, ET AL ) CIVIL ACTION COVERSHEET
Plaintiff(s) )
) 2015-CP-10-2994
vs. )
)
MT. HAWLEY INSURANCE COMPANY )
Defendant(s) )

FILED
2015 MAY 26 P 1:33
JULIE J. ARMSTRONG
CLERK OF COURT

Submitted By: Hunter James, Esq.
Address: 864 Lowcountry Blvd., Suite A
Mount Pleasant, SC 29464

SC Bar #: 78877
Telephone #: (843) 884-1865
Fax #:
Other:
E-mail: hjames@seguilawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (*Check One Box Below*)

**Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
X Other (199)

**Declaratory Judgment**

**Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case # 20___-NI-_____-_____
☐ Notice/ File Med Mal (230)
☐ Other (299)

**Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

**Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

**Inmate Petitions**
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

**Administrative Law/Relief**
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture—Consent Order (850)
☐ Other (899)

**Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799)

**Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999)

**Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature: _____ Date: 5/21/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

**Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York**

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**You are required to take the following action(s):**

1. **The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.**

2. **The initial ADR conference must be held within 300 days after the filing of the action.**

3. **Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)**

4. **Cases are exempt from ADR only upon the following grounds:**

    a. **Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;**

    b. **Requests for temporary relief;**

    c. **Appeals**

    d. **Post Conviction relief matters;**

    e. **Contempt of Court proceedings;**

    f. **Forfeiture proceedings brought by governmental entities;**

    g. **Mortgage foreclosures; and**

    h. **Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.**

5. **In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.**

6. **Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.**

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT
)
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) ) CASE NO. 2015-CP-10-2994
)
Plaintiffs, ) **SUMMONS**
) **(Non-Jury)**
v. ) **(Declaratory Judgment)**
)
MT. HAWLEY INSURANCE COMPANY. )
)
Defendant. )

FILED
2015 MAY 26 PM 4:33
JULIE J. ARMSTRONG
CLERK OF COURT

**TO THE DEFENDANT ABOVE-NAMED:**

**YOU ARE HEREBY SUMMONED** and are required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at 864 Lowcountry Blvd., Ste. A, Mount Pleasant, South Carolina 29464, within thirty (30) days after the service thereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

SEGUI LAW FIRM PC

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Mount Pleasant, South Carolina
May 21, 2015

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Attorneys for Plaintiffs

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON<br><br>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)<br><br>Plaintiffs,<br><br>v.<br><br>MT. HAWLEY INSURANCE COMPANY,<br><br>Defendant. | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT<br><br>CASE NO. 2015-CP-10-2994<br><br>**COMPLAINT**<br>**(Non-Jury)**<br>**(Declaratory Judgment)** |

FILED
2015 MAY 26 PM 4:33
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiffs, complaining of the Defendant above-named, allege as follows:

1. Plaintiffs are owners of a residential condominium project known as Twelve Oaks at Fenwick Plantation (hereinafter "Twelve Oaks"), in Charleston County, consisting of 216 residential dwelling units. This project is exhibiting severe construction deficiencies regarding the exterior building envelopes of all of the buildings. North Florida Framing, Inc., was involved in major aspects of the construction which led to the deficiencies, and was named as a Defendant in Civil Action Number 2008-CP-10-0049. Plaintiffs properly served North Florida Framing, Inc. in Civil Action Number 2008-CP-10-0049 pursuant to the South Carolina Rules of Civil Procedure. An Order of Default as to North Florida Framing, Inc. was entered in Civil Action Number 2008-CP-10-0049 on August 9, 2011 (attached as "Exhibit A"), and a judgment in the amount of $15,748,225.56 was entered against North Florida Framing, Inc. (hereinafter "North Florida") on May 14, 2013 (attached as "Exhibit B").

2. Defendant, Mt. Hawley Insurance Company (hereinafter "Mt. Hawley"), is a foreign corporation that issued policies of insurance to North Florida insuring its property and interests in this state, which policies were in effect from 2001 through 2004, and of which these Plaintiffs are constructive third-party beneficiaries and judgment creditors.

3. This Court has jurisdiction over the parties and subject matter hereto.

**FACTUAL ALLEGATIONS**

4. Plaintiffs brought suit against North Florida in Civil Action Number 2008-CP-10-0049 and properly served North Florida pursuant to the South Carolina Rules of Civil Procedure. An Order of Default as to North Florida was entered in Civil Action Number 2008-CP-10-0049 on August 9, 2011 (See Exhibit A) and a judgment in the amount of $15,748,225.56 was entered was entered against North Florida on May 14, 2013 (See Exhibit B).

5. Mt. Hawley issued its insurance policy numbered MGL0124405 to North Florida on May 1, 2001 such that the policy period expired on May 1, 2002. Mt. Hawley issued its insurance policy numbered MGL0132152 to North Florida on May 1, 2002 such that the policy period expired on May 1, 2003. Mt. Hawley issued its insurance policy numbered MGL0134726 to North Florida on May 1, 2003 such that the policy period expired on May 1, 2004. Mt. Hawley was properly put on notice regarding its insured, North Florida's, involvement in Civil Action Number 2008-CP-10-0049.

6. North Florida performed framing of the buildings and installation of the secondary weather barrier, windows, doors, and related flashings and siding on the Fenwick project in Charleston County, such that the policies were written to insure property and interests in South Carolina.

7. Plaintiffs have filed this Declaratory Judgment action to determine insurance coverage for the construction deficiencies in Civil Action Number 2008-CP-10-0049.

**CLAIMS**

8. This claim is made pursuant to the South Carolina Declaratory Judgment Act, SC. Code § 15-53-10, *et. seq.*, in that Plaintiffs allege that damages have been caused to them by virtue of the negligent acts of North Florida.

9. Plaintiffs allege that because there has been a judgment entered in favor of Plaintiffs against North Florida in the amount of $15,748,225.56, Plaintiffs are the beneficiaries of and judgment creditors to the insurance coverage policy limits of Mt. Hawley in accordance with the terms of the policies referenced above.

10. Pursuant to South Carolina Statutory Authority, § 38-61-10 of the South Carolina Code of Laws, all contracts of insurance on property, lives, or interests in this State are considered to have been issued in this State and are subject to this State's decisional law.

11. That South Carolina has and does recognize the concept of "continuous trigger" with multiple policies of insurance where occurrences such as damages to buildings occur over time due to the continual and repeated exposure to the same generally harmful conditions.

12. That Mt. Hawley and refused to fulfill its contractual obligations and did not provide counsel for North Florida to defend the defective construction claims which the Plaintiffs in the underlying litigation alleged to have a value exceeding $15 million.

13. Plaintiffs allege that Mt. Hawley is obligated under its policies for no longer just up to the total occurrence limit for each of the policy years for North Florida, but now, as Mt. Hawley had an obligation to defend and waived that opportunity, and likewise has waived any insurance policy defenses—including any limiting endorsement or exclusions—that may have

applied, Mt. Hawley is therefore responsible for the full judgment amount including any otherwise non-covered damage as well as any amount in excess of the policy limits.

**COLLECTION AS A CREDITOR ARISING FROM JUDGMENT AGAINST NORTH FLORIDA**

14. An Order of Default as to North Florida was entered in Civil Action Number 2008-CP-10-0049 on August 9, 2011 (See Exhibit A), and a judgment in the amount of $15,748,225.56 was entered against North Florida on May 14, 2013 (See Exhibit B).

15. Mt. Hawley is obligated under its policies for the full payment and satisfaction of this judgment.

16. Plaintiffs are informed that a justiciable controversy exists between and among the parties, that the parties have a legal and actual interest in each of said matters, and that each of said matters is ripe for resolution. Plaintiffs ask that this Court inquire into the dispute between and among the parties, review the policies of insurance issued by Mt. Hawley, and issue a Declaratory Judgment that Mt. Hawley is obligated to insure North Florida for the claims made by the Plaintiffs for no longer just up to the total occurrence limit for each of the policy years for North Florida, but now, as Mt. Hawley had an obligation to defend and waived that opportunity, and likewise have waived any insurance policy defenses—including any limiting endorsement or exclusions—that may have applied, Mt. Hawley is therefore responsible for the full judgment amount including any otherwise non-covered damage as well as any amount in excess of the policy limits.

WHEREFORE, the Plaintiffs pray as follows:

That the Court issue an Order declaring the rights of the parties under the policies of insurance issued by Mt. Hawley in regards to the claims made and the judgment awarded against

North Florida, and further declare that Mt. Hawley is required to insure and indemnify North Florida and pay the judgment against North Florida up to and beyond the full amount of their policy coverage as alleged above, as well as for the attorneys fees and cost of this action.

SEGUI LAW FIRM PC

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Mount Pleasant, South Carolina
May 21, 2015

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jkirchner@tktylawfirm.com

Attorneys for Plaintiffs

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT<br>CASE NO.: 08-CP-10-0049 |
| 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),<br><br>Plaintiffs,<br><br>vs.<br><br>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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OASK AT FENWICK PROPERTY OWNERS ASSOCIATION, INC., (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., d/b/a JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MANGA WALL, INC., ALL SOUTH VINYL PRODUCITS, 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, | ORDER OF DEFAULT AS TO DEFENDANT, NORTH FLORIDA FRAMING, INC. AND ORDER OF REFERENCE TO MASTER IN EQUITY FOR DAMAGES HEARING |

FILED
2011 AUG -9 AM 9:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**EXHIBIT A**

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 ROSALES, APS ENTERPRISES, UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON, d/b/a MASON CONTRACTORS KMAC OF THE CAROLINAS, INC., NEO CORPORATION, and NAVA GUZMAN CONSTRUCTION COMPANY, INC.,

Defendants.

UPON THE CALL of the case on May 9, 2011, after counsel for Defendant, North Florida Framing, Inc., had been granted leave to withdraw from the case, Plaintiffs called the Court's attention to Defendant, North Florida Framing, Inc.'s failure to appear for the trial of the case and moved for an Order of Default against Defendant, North Florida Framing, Inc., which was granted. Further, Plaintiffs moved for the claim and default against Defendant, North Florida Framing, Inc., be referred to the Master In Equity for a Damages Hearing, which was granted.

IT IS SO ORDERED!

Honorable Kristi L. Harrington
Chief Administrative Judge
Ninth Judicial Circuit

August 3, 2011
Charleston, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-10-0049

Mark F. Tesenlar and Nan M. Tesenlar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (From December16, 2008 to present)
PLAINTIFF(S)

North Florida Framing, Inc., et al.
DEFENDANT(S)

| Submitted by: Hunter Higgison, Esq. | Attorney for: Plaintiff |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

**JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

**XX DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.

**ACTION DISMISSED** (*CHECK REASON*): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other

**ACTION STRICKEN** (*CHECK REASON*): Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

**DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2013 MAY 14 AM 10:28
JULIE J. ARMSTRONG
CLERK OF COURT

**IT IS ORDERED AND ADJUDGED:** See attached order (formal order to follow) Statement of Judgment by the Court:

**ORDER INFORMATION**

**This order does not end the case.**

Additional Information for the Clerk: Please see attached Order Granting Judgment Against North Florida Framing, Inc.

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| Mark F. Tesenlar and Nan M. Tesenlar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (From December16, 2008 to present) | North Florida Framing, Inc. | $15,748,225.56 |
| | | |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest



EXHIBIT B

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ 3062 Judge Code 5/14/13 Date

## For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA ) IN THE CIRCUIT COURT

COUNTY OF CHARLESTON ) CASE NO.: 2008-CP-10-0049

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),

Plaintiffs,

vs.

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 CONTRACTORS GROUP, INC., SUMMIT CONTRACTORS, INC., FUGLEBERG KOCH ARCHITECTS, INC., DEVELOPMENT, COMPLIANCE & INSPECTIONS, INC., H2L CONSULTING ENGINEERS, TWELVE OAKS AT FENWICK PROPERTY OWNERS ASSOCIATION, INC. (from August 8, 2006 to December 15, 2008), PROFESSIONAL PLASTERING & STUCCO, INC., JOHNSON COMPANIES, INC., D/B/A JOHNSON ROOFING, INC., LOS CAMPOS, INC., NORTH FLORIDA FRAMING, INC., BEST MASONRY & TOOL SUPPLY, L.P. AS SUCCESSOR IN INTEREST TO BEST MASONRY & TOOL SUPPLY, INC., AS SUCCESSOR IN INTEREST TO MAGNA WALL, INC., ALL SOUTH VINYL PRODUCTS, INC., MARQUEZ CONSTRUCTION, INC., J.T. WALKER INDUSTIES, 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 ROSALES, APS ENTERPRISES UNLIMITED, INC., HR ELECTRIC, A.M. JACOBS, INC., MICKEY MASON D/B/A MASON CONTRACTORS, KMAC OF THE CAROLINAS, INC., AND NEO CORPORATION,

Defendants.

**ORDER GRANTING JUDGMENT AGAINST NORTH FLORIDA FRAMING, INC.**

FILED
2013 MAY 14 AM 10:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter came before me on May 14, 2013, for a Default Damages hearing pursuant to an Order of Default for North Florida Framing, Inc., and an Order of Reference for a Damages Hearing entered on August 9, 2011. Present at the hearing were counsel for Plaintiffs, Hunter Higgison, Esquire, and John T. Chakeris, Esquire. No one appeared on behalf of North Florida Framing, Inc.

The complaint in this matter alleges that North Florida Framing, Inc. was involved in constructing various elements at the Twelve Oaks at Fenwick Plantation community, which resulted in extensive construction deficiencies. As a result of these deficiencies, it is further alleged that North Florida Framing, Inc., was negligent with respect to the construction of the buildings at Twelve Oaks at Fenwick Plantation and that this negligence resulted in significant water intrusion and damage to the sheathing, structural framing members, and other building components which will require Plaintiffs to make extensive repairs.

Plaintiffs have produced evidence of the need to repair the construction deficiencies which caused significant water intrusion and damage to the sheathing, structural framing members, and other building components, as well as a repair estimate. Plaintiffs' repair estimate has been produced by a qualified expert, Robert A. Gallagher, the President of Procon & Associates, Inc., and the estimate totals Fifteen Million Seven Hundred Forty Eight Thousand Two Hundred Twenty Five and 56/100 Dollars ($15,748,225.56). Through the prepared testimony of Robert A. Gallagher, Plaintiffs have demonstrated that this repair estimate is necessitated by improper construction which has resulted in significant water intrusion and damage to the

sheathing, structural framing members, and other building components for which North Florida Framing, Inc. is responsible for.

Accordingly, it is ORDERED, ADJUDGED, AND DECREED that judgment be granted in favor of Plaintiffs against defaulting Defendant, North Florida Framing, Inc., jointly and severally, in the amount of Fifteen Million Seven Hundred Forty Eight Thousand Two Hundred Twenty Five and 56/100 Dollars ($15,748,225.56), which represents repair costs associated with this matter.

IT IS SO ORDERED!

The Honorable Mikell R. Scarborough
Master-In-Equity for Charleston County

Charleston, South Carolina
May 17, 2013

Summons and complaint of within entitled cause received at this office and service accepted in accordance with law this 2 day of Jan 2015

Raymond A. Farmer
Director of Insurance
and Attorney to Accept Service
Columbia, SC

Code of Laws of South Carolina 1976 Annotated
Title 15. Civil Remedies and Procedures
Chapter 38. South Carolina Contribution Among Tortfeasors Act

Code 1976 § 15-38-50

# § 15-38-50. Effect of release, covenant not to sue, or not to enforce judgment.

Currentness

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

**Credits**
HISTORY: 1988 Act No. 432, § 5.

Notes of Decisions (15)

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Code 1976 § 15-38-50, SC ST § 15-38-50
Current through 2016 Act No. 147, effective March 15, 2016, subject to technical revisions by the Code Commissioner as authorized by law before official publication.

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOURTEENTH JUDICIAL CIRCUIT |
| COUNTY OF BEAUFORT | ) | CASE NO.: 2011-CP-07-3885 |
| PLANTATION POINT HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC., JENNIFER M. WELSH n/k/a JENNIFER WORRELL, ELIZABETH A. HINCHEY, NANNETTE J. MANNING, NANNETTE J. MANNING as Successor Trustee of the 4J Trust Agreement dated March 28, 2000, JAMES D. MANNING, AND JOHN DOE AND MARY ROE, individually and on behalf of others similarly situated<br><br>Plaintiffs,<br><br>vs.<br><br>ASHLEY PLANTATION LIMITED PARTNERSHIP, ASHLEY PLANTATION DEVELOPMENT CORPORATION, COLONIAL REALTY LIMITED PARTNERSHIP, COLONIAL PROPERTIES TRUST, KINGS ASHLEY PLANTATION APARTMENTS, LLC, KINGS CL ASSOCIATES, LP, KINGS CL REALTY, LLC, CONTRAVEST CONSTRUCTION CO. A/K/A CONTRAVEST BUILDERS, CONTRAVEST, INC., COASTAL FRAMING, INC. F/K/A GWB, INC., TERMINIX SERVICE, INC., CHARLAN BROCK AND ASSOCIATES, INC., PROFESSIONAL PLASTERING & STUCCO, INC., FORUM CONSTRUCTION, INC., SANTANA CONSTRUCTION, ATLAS ELECTRICAL COMPANY, INC. n/k/a AMERICAN RESIDENTIAL SERVICES OF SOUTH CAROLINA, INC. NORMA GONZALES, ORKIN, LLC, CAROLINA TERMITE & PEST CONTROL, INC., ACTION PEST CONROL, INC., WRIGHT CONTRACTING CO., CONSTRUCTION ANALYSIS SYSTEMS, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL I, INC., DONNIE M. KING, | ) | **FINAL ORDER APPROVING CLASS ACTION PARTIAL SETTLEMENT** |

2014 JUN 5 PM 3:02

CONSTRUCTION OFFICES OF STANFORD, INC., HORIZON, INC., BEST MASONRY & TOOL SUPPLY, L.P. as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA WALL, INC., KEENAN HOPKINS SCHMIDT & STOWELL CONTRACTORS, INC., RUPERT CHAMBERS, CHAMBERS ENTERPRISES OF AMERICA, INC. d/b/a CHAMBERS STUCCO, JORGE BATRES, IMPERIAL PLASTERING, INC., MARCOS CORDAVA, SEBASTIAN LOPEZ, DAVID GODINEZ, JESSE J. MILLER, SONNY WRIGHT ROOFING AND CONTRACTING, ISLAND GLASS & BUILDING PRODUCTS, INC., LANDMARK RESIDENTIAL MANAGEMENT, LLC, KINGS ACQUISITIONS, LLC, KINGS ACQUISITIONS II, LLC, ELCO LANDMARK RESIDENTIAL HOLDINGS, LLC, PARAMOUINT COMPANIES OF FLORIDA, LLC, CFH GROUP, LLC, CHF INVESTORS, LLC, JOHN DOE 2

Defendants.

This matter came before the Court pursuant to Plaintiffs' Motion for a Fairness Hearing to finally approve[1] the settlement reached with ContraVest, Inc., ContraVest Construction Co. a/k/a ContraVest Builders, Ashley Plantation Limited Partnership, Ashley Plantation Development Corporation, Professional Plastering & Stucco, Inc., Donnie M. King, Wellington Professional Stucco and Drywall, Inc., Wellington Professional Stucco and Drywall I, Inc., Construction Offices of Sanford, Inc., Colonial Realty Limited Partnership, Colonial Properties Trust, Kings Ashley Plantation Apartments, LLC, Kings CL Associates, LP, Kings CL Realty, LLC, Landmark Residential Management, LLC, Kings Acquisitions, LLC, Kings Acquisitions II, LLC, ELCO Landmark Residential Holdings, LLC, ELCO Landmark Residential Holdings II, LLC, Paramount Companies of Florida, LLC, CFH Group, LLC, CFH Investors, LLC, Keenan Hopkins Schmidt & Stowell Contractors, Inc., Forum Construction, Inc., Imperial Plastering, Inc., Marcos

[1] Preliminary approval of the settlement was granted by Order of this Court dated May 5, 2014.

Cordova, Atlas Electrical Company, Inc. n/k/a American Residential Services of South Carolina, Inc., Horizon, Inc., Best Masonry & Tool Supply, LP as successor in interest to Best Masonry & Tool Supply, Inc. as successor in interest to Magna Wall, Inc., and Island Glass & Building Products, Inc., (hereinafter the "Settling Defendants") and to approve Class Counsels' attorneys' fees. A Final Fairness Hearing was conducted on June 5, 2014 beginning at 2:00 p.m. at the Beaufort County Judicial Center located at 102 Ribaut Road, Beaufort, South Carolina.

The above-captioned action involves claims for damages resulting from latent construction defects contained within the buildings comprising Plantation Point Horizontal Property Regime Owners Association, Inc. (hereinafter the "Association"). This matter was initially filed September 16, 2011 seeking damages for all common element and limited common element deficiencies, as well as individual damages associated with loss of use, by the individual Plaintiffs pursuant to their status as owners of individual condominium units within the Association, as well as owners of an undivided interest in the common elements and limited common elements as tenants-in-common with all other unit owners pursuant to the terms of the Association's Master Deed. Subsequently, the Board of Directors for the Association joined the litigation seeking to recover damages for construction deficiencies contained within the common elements and limited common elements. As such, the Association, in essence, took over the claims concerning damage and repairs to the common elements as defined by the governing documents of the Association, namely the Master Deed. The individual Plaintiffs continued to maintain their claims for common element damage in support of the Association, but also advanced additional claims for which the Association does not have standing to assert – namely, loss of use of their individual "Units" as defined by the governing documents.

The Plaintiffs have reached a full, final and complete settlements with the Settling Defendants as follows:

| SETTLING DEFENDANT | GROSS SETTLEMENT AMOUNT |
|---|---|
| ContraVest, Inc., ContraVest Construction Co. a/k/a ContraVest Builders, Ashley Plantation Limited Partnership, and Ashley Plantation Development Corporation ("ContraVest") | $3,300,000.00[2] |
| Professional Plastering & Stucco, Inc., Donnie M. King, Wellington Professional Stucco and Drywall, Inc., Wellington Professional Stucco and Drywall I, Inc., and Construction Offices of Sanford, Inc. | $2,600,000.00 |
| Colonial Realty Limited Partnership and Colonial Properties Trust | $1,250,000.00 |
| Kings Ashley Plantation Apartments, LLC, Kings CL Associates, LP, Kings CL Realty, LLC, Landmark Residential Management, LLC, Kings Acquisitions, LLC, Kings Acquisitions II, LLC, ELCO Landmark Residential Holdings, LLC, ELCO Landmark Residential Holdings II, LLC | $700,000.00 |
| Paramount Companies of Florida, LLC, CFH Group, LLC, CFH Investors, LLC | $500,000.00 |
| Keenan Hopkins Schmidt & Stowell Contractors, Inc. | $2,750,000.00 |
| Forum Construction, Inc. | $90,000.00 |
| Imperial Plastering, Inc. | $250,000.00 |
| Marcos Cordova | $95,000.00 |
| Atlas Electrical Company, Inc. n/k/a American Residential Services of South Carolina, Inc. | $100,000.00 |
| Horizon, Inc. | $100,000.00 |
| Best Masonry & Tool Supply, LP as successor in interest to Best Masonry & Tool Supply, Inc. as successor in interest to Magna Wall, Inc. | $30,000.00 |
| Island Glass & Building Products, Inc. | $250,000.00 |
| TOTAL | **$12,015,000.00** |

The Association and the Class Representatives have advised the Court that the Association and the Class Representatives have agreed that One Million Two Hundred One Thousand Five Hundred and No/100 Dollars ($1,201,500.00 - the "Class Settlement Fund") will be allotted to the Class as their **gross** portion of the settlement proceeds from the settlement with the Settling Defendants. This Partial Settlement only ends the Plaintiffs' claims against the Settling Defendants. Plaintiffs' claims, including Class claims, shall continue with respect to all

[2] ContraVest has separately confessed judgment in favor of the Association in the amount of $9,000,000.00. The Association, not the class, will separately pursue collection of that judgment against assets of ContraVest as set forth in the documents memorializing that settlement.

non-settling Defendants[3]. With respect to the Class claims, this apportionment to the Class Fund is with respect to this Partial Settlement only and this percentage apportionment shall not be deemed binding but may indicate appropriate later apportionment on any future recovery or settlement with the non-settling Defendants. Class Representatives and Class Counsel may petition the Court for approval of whatever portion of any future recovery or settlement with the non-settling Defendants they deem necessary to make the class whole with respect to their actual damages for the Court's consideration.

To date, the Association and its attorneys have expended in excess of $150,000.00 to pay various expenses and costs, including expert fees, in the investigation and prosecution of this matter. In this settlement, the Association has agreed to bear all of the expenses of the litigation such that the only deduction from the Class Settlement Fund will be the attorney's fees and the stipend for the Class Representatives. In this regard, the Notice of Class Action and Partial Settlement, which was circulated on or about May 6, 2014 to all class members, indicated that class counsel would petition the Court for attorneys' fees not to exceed thirty-five percent (35%). Class Counsel has petitioned the Court for a thirty-five percent attorneys' fee from the Settlement Fund pursuant to a written fee agreement with the Class Representatives, in the amount of Four Hundred Twenty Thousand Five Hundred Twenty-Five and No/100 Dollars ($420,525.00), and for the recovery of **no** costs and expenses from the Class Settlement Fund, and the Class Representatives have agreed to the same. Further the Notice of Class Action and Partial Settlement provided that the Class Representatives petitioned the Court for a stipend to Jennifer Worrell and Elizabeth Hinchey in the amount of $10,000.00 each and to Nannette Manning and James Manning in the amount of $5,000.00 each. As a result of the deductions set forth above, the **net award** to the Class will be **Seven Hundred Fifty Thousand Nine Hundred Seventy-Five and No/100 Dollars ($750,975.00)** (the "Class Fund").

[3] The only non-settling defendants are those in default. Those claims are being referred to the Beaufort County Master-In-Equity for default proceedings and damages hearing(s).

From the evidence presented, I find that an allocation of the gross settlement proceeds to the Class of $1,201,500.00 is fair and reasonable taking into consideration, among other factors, the nature and extent of the repairs to the common elements contemplated by the Association.

Based on the record before the Court and the testimony presented, the Court makes the following findings of fact and conclusions of law:

NOW, THEREFORE, good cause appearing, the Court hereby finds the following:

1. The Court has received an Affidavit from Shannon K. Toth, paralegal to Class Counsel, Jesse A. Kirchner, Esq., dated June 3, 2014 affirming that the "Notice of Class Action and Partial Settlement" was sent to each class member in accordance with the "Order Preliminarily Approving the Partial Settlement, Attorneys' Fees, Notice Program, and Setting a Final Hearing" entered by Judge Carmen T. Mullen on May 5, 2014. I, therefore, find that proper and reasonable notice of this Final Hearing has been sent to each class member. The Affidavit further affirms that Class Counsel has not received any objection to the settlement by any class member. The Court has also received an Affidavit from Autumn Logan, paralegal to Class Counsel, Gregory M. Alford, Esq., dated June 3, 2014 affirming that she has examined the records of the Clerk of Court in the above-captioned matter and that no objections to the settlement by any class member have been filed with the Court.

2. Class Counsel and the Class Representatives have asked the Court to approve the attorneys' fees. With respect to attorneys' fees, the Supreme Court of South Carolina has approved contingency fee agreements and has set forth factors which must be considered by this Court in determining the reasonableness of the attorneys' fees. The factors, and my findings in regard thereto, are as follows:

(a) The nature, extent and difficulty of the case. This lawsuit was commenced in September of 2011. This litigation involves claims for design and construction deficiencies and latent defects in condominiums designed, developed, built and

converted by the various Defendants. The litigation has been extremely complex and difficult. The prosecution of this case thus far has taken more than two and one-half years and has resulted in many hours being expended by the legal teams for both sides. The Plaintiffs have engaged experts to determine the nature and extent of the deficiencies as well as experts to determine the cost of repairing the deficiencies. Numerous depositions have been taken involving much time and expense, with the bulk of the depositions occurring out of state. Extensive written discovery has been conducted resulting in voluminous documents having been exchanged among the parties.

(b) Professional standing of counsel. Class Counsel is made up of three different law firms, Thurmond Kirchner Timbes & Yelverton, Alford Law Firm, and The Capell Law Firm, all of which are in good standing with the legal community and enjoy excellent reputations. Among the Class Counsel, the individual attorneys, Jesse A. Kirchner, Gregory M. Alford, Thomas Williams, and Glynn L. Capell, have handled large and complicated construction deficiency cases. Class Counsel are well-experienced in class action litigation.

(c) The contingency of compensation. In this case, the Class Representatives, as well as the Association, specifically requested Class Counsel to take this matter on a contingency fee basis, and it was agreed in writing by the Class Representatives, the Association and by Class Counsel that they be compensated on a contingency basis. There were significant questions concerning insurance coverage and insurance availability among the Settling Defendants and other contingencies upon which a successful recovery depended. Despite the obstacles this case presented, Class Counsel were able to bring this matter to a resolution as to the Settling Defendants.

(d) Beneficial results obtained. Five days were spent in mediation and many hours spent negotiating outside of the mediation setting in an effort to secure the settlement obtained. Class Counsel has thus far recovered $12,140,000.00 for the Plantation Point complex, ten percent (10.0%) of which as been allotted to the Class. I find the results obtained in this settlement are beneficial to the Class.

(e) Legal fees for similar services. Construction defect cases are typically handled on a contingency fee basis ranging from ~~33.33%~~ 40% (CW) to 40.0% in South Carolina. The Notice of Settlement, which was circulated on or about May 6, 2014 to all class members, indicated that Class Counsel would petition the Court for attorneys' fees not more than Thirty-Five percent (35%), plus expenses and costs. Because Class Counsel now petition the Court a thirty-five percent fee and no expenses or costs and no class members objected to the same, the Court finds that a contingency fee of Thirty-Five percent (35%) is fair and reasonable and should be approved by this Court.

3. Class Representatives have petitioned this Court to receive a stipend to Jennifer Worrell and Elizabeth Hinchey in the amount of $10,000.00 each and to Nannette Manning and James Manning in the amount of $5,000.00 each. As indicated above, the Class Representatives, rather than the Board of Directors, originally initiated this action for the Association. Over the two and one-half years this case has been pending, Class Representatives have attended numerous meetings and strategy sessions with Class Counsel and have participated in answering extensive written discovery. The Class Representatives have been deposed by a numerous defendants in this case. Additionally, Class Representatives attended the various mediations and otherwise participated in settlement negotiations outside the mediation setting. Further, the Notice of Class Action and Partial Settlement provided that the Class Representatives petitioned the Court for a stipend to Jennifer Worrell and Elizabeth Hinchey in the amount of $10,000.00 each and to Nannette Manning and James Manning in the

amount of $5,000.00 each and no class member objected to the same. The Court, therefore, finds that a stipend to Jennifer Worrell and Elizabeth Hinchey in the amount of $10,000.00 each and to Nannette Manning and James Manning in the amount of $5,000.00 each is fair and reasonable and should be approved.

4. Less the Class Counsel attorneys' fee and the stipend to the Class Representatives, the net payment to the Class from the Class Settlement Fund totals **Seven Hundred Fifty Thousand Nine Hundred Seventy-Five and No/100 Dollars ($750,975.00)** (the "Class Fund"). The Court finds that this amount is fair and reasonable given that the bulk of the damages discovered in this case involve common elements which the Association controls pursuant to the governing documents. The Association shall place the Class Fund into an interest bearing account in a federally insured institution in the name of Plantation Point Horizontal Property Regime Owners Association, Inc. The Class Fund shall be held in a separate account by the Association and disbursed in accordance with this Order. The Class Fund shall be kept separate from any other funds belonging to the Association. The principal and any interest accruing from the Class Fund shall be used in the following priorities:

(a) The Association shall disburse the Class Fund to class members in accordance with their respective percentage of ownership in the common elements as set forth in the Master Deed, increased to reflect the two units that opted out of the Class. The Association shall keep precise records of all monies expended from the Class Fund and shall provide an accounting for examination by any class member or, if requested, by the Court. The record title holder as of the date of this order will be entitled to the proceeds.

(b) It is further ordered that prior to any disbursement of settlement funds to any class member, that member's regime fees and assessments must be brought current or, in the alternative, that class member's settlement funds shall be applied toward

payment of past due regime fees, assessments or fines, and the balance, if any, be paid to the class member.

5. It also appearing to the Court that no objection has been made by any class member and that proper notice was given of the hearing to each of the known class members.

6. From the evidence before the Court, the testimony presented, and the arguments of counsel, the Court finds that all the criteria of Rule 23 SCRCP have been met and that this settlement should be approved.

7. Upon payment of the settlement proceeds, the Class Representatives are authorized to execute a general release(s), and/or settlement agreement(s) on behalf of the Class and an order(s) or stipulation(s) ending this case and all class claims with prejudice as to the Settling Defendants. The claims against the non-settling defendants shall continue.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(a) Attorneys' fees in the amount of Four Hundred Twenty Thousand Five Hundred Twenty-Five and N0/100 Dollars ($420,525.00) shall be paid to Class Counsel in reference to the class claims and the same is hereby declared reasonable and such fee is hereby approved;

(b) A stipend to Jennifer Worrell and Elizabeth Hinchey in the amount of $10,000.00 each and to Nannette Manning and James Manning in the amount of $5,000.00 each is hereby declared reasonable and appropriate and such stipend is hereby approved;

(c) The settlement of the class action and the allocation to the class the **net** sum of **Seven Hundred Fifty Thousand Nine Hundred Seventy-Five and No/100 Dollars ($750,975.00)** is reasonable and proper and is hereby approved under the terms and conditions set forth herein;

(d) The Class Representatives are authorized to execute a general release(s) and/or settlement agreements on behalf of the Class and order(s) or stipulation(s) ending

this case and all class claims with prejudice as to the Settling Defendants. However, the releases do not become effective for a Settling Defendant until that Settling Defendant's settlement funds have been tendered to Class Counsel and no stipulation or order of dismissal shall be filed until all settlement funds have been tendered to Class Counsel;

(e) All settlement funds approved herein are due to Class Counsel no later than ten (10) days from the date of this Order. Any settlement funds not received by this deadline shall accrue daily interest to the Plaintiffs at the statutory rate for Judgments in this State. Should the Plaintiffs be forced to file a Motion to Compel the Settlement or a Rule to Show Cause for non-compliance with this Order, Plaintiffs shall be awarded all attorneys' fees and costs associated with the same; and

(f) This Court shall retain jurisdiction of this matter until it is concluded.

IT IS SO ORDERED.

Carmen T. Mullen
Judge, Fourteenth Judicial Circuit

This 5 day of January, 2014

Beaufort, South Carolina.

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOURTEENTH JUDICIAL CIRCUIT |
| COUNTY OF BEAUFORT | ) | CASE NO.: 2011-CP-07-3885 |
| PLANTATION POINT HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC., JENNIFER M. WELSH n/k/a JENNIFER WORRELL, ELIZABETH A. HINCHEY, NANNETTE J. MANNING, NANNETTE J. MANNING as Successor Trustee of the 4J Trust Agreement dated March 28, 2000, JAMES D. MANNING, AND JOHN DOE AND MARY ROE, individually and on behalf of others similarly situated | ) | **AFFIDAVIT OF SHANNON K. TOTH** |
| Plaintiffs, | ) | |
| vs. | ) | |
| ASHLEY PLANTATION LIMITED PARTNERSHIP, ASHLEY PLANTATION DEVELOPMENT CORPORATION, COLONIAL REALTY LIMITED PARTNERSHIP, COLONIAL PROPERTIES TRUST, KINGS ASHLEY PLANTATION APARTMENTS, LLC, KINGS CL ASSOCIATES, LP, KINGS CL REALTY, LLC, CONTRAVEST CONSTRUCTION CO. A/K/A CONTRAVEST BUILDERS, CONTRAVEST, INC., COASTAL FRAMING, INC. F/K/A GWB, INC., TERMINIX SERVICE, INC., CHARLAN BROCK AND ASSOCIATES, INC., PROFESSIONAL PLASTERING & STUCCO, INC., FORUM CONSTRUCTION, INC., SANTANA CONSTRUCTION, ATLAS ELECTRICAL COMPANY, INC. n/k/a AMERICAN RESIDENTIAL SERVICES OF SOUTH CAROLINA, INC. NORMA GONZALES, ORKIN, LLC, CAROLINA TERMITE & PEST CONTROL, INC., ACTION PEST CONROL, INC., WRIGHT CONTRACTING CO., CONSTRUCTION ANALYSIS SYSTEMS, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL I, INC., DONNIE M. KING, | ) | |

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|---|---|
| CONSTRUCTION OFFICES OF STANFORD, INC., HORIZON, INC., BEST MASONRY & TOOL SUPPLY, L.P. as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA WALL, INC., KEENAN HOPKINS SCHMIDT & STOWELL CONTRACTORS, INC., RUPERT CHAMBERS, CHAMBERS ENTERPRISES OF AMERICA, INC. d/b/a CHAMBERS STUCCO, JORGE BATRES, IMPERIAL PLASTERING, INC., MARCOS CORDAVA, SEBASTIAN LOPEZ, DAVID GODINEZ, JESSE J. MILLER, SONNY WRIGHT ROOFING AND CONTRACTING, ISLAND GLASS & BUILDING PRODUCTS, INC., LANDMARK RESIDENTIAL MANAGEMENT, LLC, KINGS ACQUISITIONS, LLC, KINGS ACQUISITIONS II, LLC, ELCO LANDMARK RESIDENTIAL HOLDINGS, LLC, PARAMOUINT COMPANIES OF FLORIDA, LLC, CFH GROUP, LLC, CHF INVESTORS, LLC, JOHN DOE 2 | ) |
| Defendants. | ) |

PERSONALLY APPEARED before me, Shannon K. Toth, who, first being duly sworn, deposes and says:

1. That I am a Paralegal to Jesse A. Kirchner, Esquire.

2. In accordance with the "Order Preliminarily Approving the Partial Settlement, Attorneys' Fees, Notice Program, and Setting a Final Hearing" entered by the Honorable Carmen T. Mullen, dated May 5, 2014, I, Shannon K. Toth, sent the "Notice of a Proposed Settlement of Class Action and Final Hearing" to each of the class members at their last known address provided by the Association via the U.S. Postal Service First Class Mail on May 6, 2014.

3. That no written objections to the Partial Settlement have been received by counsel for the Plaintiffs by any class member.

AFFIANT FURTHER SAYETH NAUGHT.

Shannon K. Toth

Shannon K. Toth

SWORN to before me this

3 day of June, 2014.

Notary Public for South Carolina

My Commission Expires: 9/13/21

STATE OF SOUTH CAROLINA )
)
COUNTY OF BEAUFORT )

PLANTATION POINT HORIZONTAL PROPERTY REGIME OWNERS ASSOCIATION, INC., JENNIFER M. WELSH n/k/a JENNIFER WORRELL, ELIZABETH A. HINCHEY, NANNETTE J. MANNING, NANNETTE J. MANNING as Successor Trustee of the 4J Trust Agreement dated March 28, 2000, JAMES D. MANNING, AND JOHN DOE AND MARY ROE, Individually and on behalf of others similarly situated

Plaintiffs,

vs.

ASHLEY PLANTATION LIMITED PARTNERSHIP, ASHLEY PLANTATION DEVELOPMENT CORPORATION, COLONIAL REALTY LIMITED PARTNERSHIP, COLONIAL PROPERTIES TRUST, KINGS ASHLEY PLANTATION APARTMENTS, LLC, KINGS CL ASSOCIATES, LP, KINGS CL REALTY, LLC, CONTRAVEST CONSTRUCTION CO. A/K/A CONTRAVEST BUILDERS, CONTRAVEST, INC., COASTAL FRAMING, INC. F/K/A GWB, INC., TERMINIX SERVICE, INC., CHARLAN BROCK AND ASSOCIATES, INC., PROFESSIONAL PLASTERING & STUCCO, INC., FORUM CONSTRUCTION, INC., SANTANA CONSTRUCTION, ATLAS ELECTRICAL COMPANY, INC. n/k/a AMERICAN RESIDENTIAL SERVICES OF SOUTH CAROLINA, INC. NORMA GONZALES, ORKIN, LLC, CAROLINA TERMITE & PEST CONTROL, INC., ACTION PEST CONROL, INC., WRIGHT CONTRACTING CO., CONSTRUCTION ANALYSIS SYSTEMS, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL, INC., WELLINGTON PROFESSIONAL STUCCO AND DRYWALL I, INC., DONNIE M. KING,

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-3885

2014 JUN -3 PM 1:22
JEAN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

**AFFIDAVIT OF AUTUMN LOGAN**

CONSTRUCTION OFFICES OF STANFORD, INC., HORIZON, INC., BEST MASONRY & TOOL SUPPLY, L.P. as successor in interest to BEST MASONRY & TOOL SUPPLY, INC., as successor in interest to MAGNA WALL, INC., KEENAN HOPKINS SCHMIDT & STOWELL CONTRACTORS, INC., RUPERT CHAMBERS, CHAMBERS ENTERPRISES OF AMERICA, INC. d/b/a CHAMBERS STUCCO, JORGE BATRES, IMPERIAL PLASTERING, INC., MARCOS CORDAVA, SEBASTIAN LOPEZ, DAVID GODINEZ, JESSE J. MILLER, SONNY WRIGHT ROOFING AND CONTRACTING, ISLAND GLASS & BUILDING PRODUCTS, INC., LANDMARK RESIDENTIAL MANAGEMENT, LLC, KINGS ACQUISITIONS, LLC, KINGS ACQUISITIONS II, LLC, ELCO LANDMARK RESIDENTIAL HOLDINGS, LLC, PARAMOUINT COMPANIES OF FLORIDA, LLC, CFH GROUP, LLC, CHF INVESTORS, LLC, JOHN DOE 2

Defendants.

PERSONALLY APPEARED before me, Autumn Logan, who, first being duly sworn, deposes and says:

1. That I am a Paralegal to Gregory M. Alford, Esquire.

2. I have examined the case file at the Clerk of Court for Beaufort County and no written objections are included in the case file by any class member as of the date of my affidavit.

AFFIANT FURTHER SAYETH NAUGHT.

Autumn Logan

Autumn Logan

SWORN to before me this

3rd day of June, 2014.

Katrena A Robb

Notary Public for South Carolina

My Commission Expires: 4-25-21

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT<br>CASE NO.: 08-CP-10-0049 |
| 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),<br><br>Plaintiffs,<br><br>vs.<br><br>PROFESSIONAL PLASTERING & STUCCO, INC.,<br><br>Defendants. | NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION AND FINAL HEARING |

FILED
2015 JUN 25 PM 12:49
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ALL CLASS MEMBERS, being all persons and/or entities who own a condominium unit within Twelve Oaks at Fenwick Plantation who did not opt-out of the Class Action:

**PLEASE READ THIS NOTICE CAREFULLY**
**YOUR RIGHTS MAY BE AFFECTED BY THIS SETTLEMENT**

The above-captioned matter was tried May 9-13, 2011 resulting in a verdict against the Defendant, Professional Plastering & Stucco, Inc. The verdict was appealed by Professional Plastering & Stucco, Inc. and was overturned by the South Carolina Court of Appeals. A Petition for Certiorari was denied by the South Carolina Supreme Court, effectively upholding the Court of Appeals decision. The Court of Appeals has remanded the case back to the trial court for a new trial. Since the remand, the parties have participated in another mediation and this Notice is provided to advise you that a settlement has been reached with Professional Plastering & Stucco, Inc.

The overall gross amount of this settlement with Professional Plastering & Stucco, Inc. is Ninety-Two Thousand Five Hundred and No/100 Dollars ($92,500.00). These settlement funds are in addition to the settlement approved by the Court on September 13, 2014 in the amount of

$1,300,000.00. In addition, the Plaintiffs have negotiated a settlement with Professional Plastering & Stucco, Inc.'s alleged joint venture partner, Keenan Hopkins Schmidt & Stowell Contractors, Inc. in the amount of $160,000.00 bringing the total gross settlement concerning the Twelve Oaks project to $9,577,500.00.

The prior gross settlements paid to the Class in this matter total $932,500.00. Given the total of the prior payments to the Class coupled with the large expense to the POA to repair the common elements of Twelve Oaks, the POA and the Class Representatives have agreed to allot the entire $92,500.00 (as well as the $160,000.00 KHS&S settlement), less attorneys' fees and expenses, to the POA for repairs to the buildings and common elements of Twelve Oaks.

YOU ARE HEREBY NOTIFIED that a hearing will take place in the Court of Common Pleas at the Charleston County Judicial Center located at 100 Broad Street, Charleston, South Carolina, pursuant to Rule 23 SCRCP, to approve this settlement, class counsel fees, and expenses, before the Honorable Kristi Lea Harrington on **July 29, 2015 beginning at 9:30 a.m.** If you agree with the terms of this partial settlement, YOU DO NOT HAVE TO ATTEND THIS HEARING – NO FURTHER ACTION WILL BE REQUIRED ON YOUR PART. If you have a valid, legal reason to object to this settlement and you wish to appear at the hearing to voice your objections, you **must** provide the Clerk of Court and Class Counsel a **written notice** of your intention to appear at the hearing to object. This notice must be sent to the Clerk of Court at 100 Broad Street, Charleston, South Carolina, 29401 and Class Counsel at the address indicated below, **along with your written objection**, postmarked by **July 22, 2015.**

In the event you have assigned or pledged your rights to receive proceeds from this Class Action to some other individual or entity, please notify Class Counsel of this fact, submitting the names and addresses of those assignees.

If you have any questions about this notice or this procedure, DO NOT CONTACT THE COURT. Rather, please contact Class Counsel listed below:

W. Jefferson Leath, Esquire
LEATH BOUCH & SEEKINGS
92 Broad Street
Charleston, SC 29401
843.937-8811
jl@leathbouchlaw.com

Jesse A. Kirchner, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
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Charleston, SC 29401
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jkirchner@tktylawfirm.com

Justin O. Lucey, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
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Mt. Pleasant, SC 29464
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John T. Chakeris, Esquire
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john@chakerislawfirm.com

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843.884.1865
psegui@seguilawfirm.com

*Attorneys for the Plaintiffs*



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index



Switch View

## Mark F Tesenlar , plaintiff, et al VS Fenwick Plantation Tarragon Llc A Sc Limited Liability Co Et , defendant, et al

| | | | | | |
|---|---|---|---|---|---|
| Case Number: | 2008CP1000049 | Court Agency: | Common Pleas | Filed Date: | 01/04/2008 |
| Case Type: | Common Pleas | Case Sub Type: | Special-Comp/Oth 699 | File Type: | Non-Jury |
| Status: | Settled | Assigned Judge: | Harrington, Kristi Lea | | |
| Disposition: | Withdrawn or Settled by Parties | Disposition Date: | 03/26/2015 | Disposition Judge: | Clerk Of Court C P, G S, And Family Court |
| Original Source Doc: | | Original Case #: | | Restore Reason: | Reopen Case for Appeal |
| Judgment Number: | 2008CP1000049 | Court Roster: | | | |

Case Parties | Judgments | Tax Map Information | Associated Cases | Actions | Financials

| Name | Description | Type | Motion Roster | Begin Date | Completion Date | Documents |
|---|---|---|---|---|---|---|
| Professional Plastering & Stucco Inc Etc | Order from Court of Appeals Granting Motion for Costs | Filing | | 10/25/2016-13:16 | | |
| Professional Plastering & Stucco Inc Etc | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:14 | | |
| Aps Enterprises Unlimited Inc Etc | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:14 | | |
| Professional Plastering & Stucco Inc Etc | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:13 | | |
| Tesenlar, Nan M | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:13 | | |
| Tesenlar, Mark F | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:13 | | |
| Professional Plastering & Stucco Inc Etc | Judgment/Taxation of Costs | Judgment | | 10/25/2016-13:13 | | |
| | Notice of Appeal by Mt Hawley Insurance Company, proof/srv | Filing | | 02/01/2016-08:51 | | |
| | Order/Mt Hawley Inc mot to intervene is denied | Order | | 01/19/2016-09:53 | | |
| | Materials in support of Mt Hawleys Motion to Intervene | Filing | | 01/12/2016-09:07 | | |
| | Order Evidence Destruction - contact clerk within 30 days | Order | | 12/22/2015-12:26 | | |
| Infinger, Marvin D. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Infinger, Marvin D. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Segul, Phillip Ward Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Segul, Phillip Ward Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Chakeris, John T. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Chakeris, John T. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Smith, Bachman S. IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Smith, Bachman S. IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Leath, W. Jefferson Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Leath, W. Jefferson Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Kirchner, Jesse A. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Kirchner, Jesse A. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Lucey, Justin O'Toole | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Lucey, Justin O'Toole | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Jowers, M. Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Jowers, M. Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Kendall, Everett Augustus II | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| | | Action | | | | |

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|---|---|---|---|---|---|---|
| Kendall, Everett Augustus III | Roster/Notice of Motions Roster Publication Sent | | | 11/09/2015-14:41 | | |
| Blackburn, Charles Grant | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Blackburn, Charles Grant | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Hollingsworth, Dunn Denson | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Hollingsworth, Dunn Denson | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| O'Neal, John Blanton IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| O'Neal, John Blanton IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Wilkes, Michael B.T. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Wilkes, Michael B.T. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Hallo, Andrew Steven | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Hallo, Andrew Steven | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Daigle, Jason Alan | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Daigle, Jason Alan | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Bruorton, James Atkinson IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Bruorton, James Atkinson IV | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Mahon, Christy Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Mahon, Christy Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Osborn, James Geoffrey Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Osborn, James Geoffrey Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cannon, Kelley S. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cannon, Kelley S. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cobb, David Starr | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cobb, David Starr | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Stubbs, Sidney Markey | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Stubbs, Sidney Markey | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Rothschild, Amy B. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Rothschild, Amy B. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cheek, Ellen S. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Cheek, Ellen S. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Adams, Christopher M. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Adams, Christopher M. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Mims, Kevin W. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Mims, Kevin W. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Waltz, Robert David | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Waltz, Robert David | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Jones, Michal Cooper | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Jones, Michal Cooper | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Scott, William A. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Scott, William A. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Anderson, Jonathan J. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Anderson, Jonathan J. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Travis, M. Brittain | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Travis, M. Brittain | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| McCants, John Lucius | | Action | | | | |

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|---|---|---|---|---|---|---|
| | Roster/Notice of Motions Roster Publication Sent | | | 11/09/2015-14:41 | | |
| McCants, John Lucius | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Barnes, Robert Bryan | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Barnes, Robert Bryan | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Martin, Curtis Brent | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Martin, Curtis Brent | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Maybank, Roy Pearce | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Maybank, Roy Pearce | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Wegener, Danielle Beck | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Wegener, Danielle Beck | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Epting, Andrew K. Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| Epting, Andrew K. Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 11/09/2015-14:41 | | |
| | Stipulation Of Dismissal of certain defendant W/ prejudice | Filing | | 11/06/2015-08:37 | | |
| | Miscellaneous Document | Filing | | 10/19/2015-13:26 | | |
| | Final Order approving class action settlement | Order | | 08/04/2015-11:32 | | |
| | Settlement Agreement | Filing | | 07/29/2015-11:22 | | |
| Epting, Andrew K. Jr. | Motion/Motion Filing Fee | Filing | | 07/28/2015-16:13 | | |
| Epting, Andrew K. Jr. | Motion/Intervene by Mt. Hawley Insurance Company, crt/srv | Motion | | 07/28/2015-11:01 | 01/14/2016-11:01 | |
| | Letter from Atty Danielle Wegener re Settlement Agreement | Filing | | 07/28/2015-10:59 | | |
| | Affidavit/Affidavit of J Ashley Garrett | Filing | | 07/27/2015-08:57 | | |
| | Miscellaneous Document | Filing | | 07/21/2015-08:57 | | |
| Tesenlar, Mark F | Order/Preliminarily approving class action partial | Order | | 06/25/2015-10:38 | | |
| Kirchner, Jesse A. | Motion/Preliminary Approval of Settlement by plaintiff | Motion | | 06/24/2015-16:19 | 11/09/2015-16:19 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee | Filing | | 06/24/2015-15:47 | | |
| | Order/Crt grants APS Enterprises mot to reconsider & denies | Order | | 05/13/2015-12:08 | | |
| | ADR/Mediation Results Report/Fully Settled | Filing | | 03/26/2015-10:01 | | |
| | Master order-case sent back to circuit crt | Order | | 01/22/2015-09:29 | 03/26/2015-09:29 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee | Filing | | 10/28/2014-10:18 | 03/26/2015-10:18 | |
| Maybank, Roy Pearce | Motion/Motion to Request Rule by defendant, crt/srv | Motion | | 10/27/2014-15:59 | 03/26/2015-15:59 | |
| | Remittitur Fr Crt Of Appeals-remand case for new trial etc | Filing | | 09/04/2014-11:00 | 03/26/2015-11:00 | |
| | Order fr Supreme Crt-pet for writ of certiorari is denied | Order | | 08/25/2014-09:44 | 03/26/2015-09:44 | |
| | Miscellaneous Document | Filing | | 05/05/2014-09:11 | 03/26/2015-09:11 | |
| | Order/fr Crt of Appeals-appeal is dismissed | Order | | 04/09/2014-11:01 | 03/26/2015-11:01 | |
| Tesenlar, Mark F | Order Fr Supreme Crt-denying the petition etc | Order | | 03/21/2014-11:14 | 03/26/2015-11:14 | |
| | Order/Order for partial settlement & atty fees is approved | Order | | 09/19/2013-09:34 | 03/26/2015-09:34 | |
| | Final Order approving class action partial settlement & atty | Order | | 09/13/2013-11:54 | 03/26/2015-11:54 | |
| | Affidavit/Affidavit of J Ashley Garrett | Filing | | 09/11/2013-09:11 | 03/26/2015-09:11 | |
| National Fire & Marine Insurance Company | Response to plaintiffs Mot/Preliminary Approval, crt/srv | Filing | | 08/09/2013-10:48 | 03/26/2015-10:48 | |
| | Order Preliminarily approving class action partial | Order | | 08/08/2013-08:39 | 03/26/2015-08:39 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee | Filing | | 07/19/2013-16:15 | 03/26/2015-16:15 | |
| Kirchner, Jesse A. | | Motion | | | | |

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|---|---|---|---|---|---|---|
| | Motion/Preliminary Approval of Settlement by plntf, crt/srv | | | 07/19/2013-10:01 | 03/26/2015-10:01 | |
| Tesenlar, Mark F | Order/Judgment Against North Florida Framing | Order | | 05/14/2013-09:52 | 03/26/2015-09:52 | |
| Tesenlar, Mark F | Judgment/Judgment | Judgment | | 05/14/2013-09:51 | 03/26/2015-09:51 | |
| Professional Plastering & Stucco Inc Etc | Return in Opposition to Motion/Reconsideration, crt/srv | Filing | | 03/15/2013-16:23 | 03/26/2015-16:23 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee | Filing | | 02/22/2013-16:34 | 03/26/2015-16:34 | |
| Lucey, Justin O'Toole | Motion/Reconsideration by plaintiff | Motion | | 02/22/2013-14:12 | 03/26/2015-14:12 | |
| | Master/Order on Donnie King's Mot to dismiss rule to show | Order | | 02/08/2013-16:27 | 03/26/2015-16:27 | |
| | Plaintiffs Memo in Opposition to Mot/Dismiss, crt/srv | Filing | | 01/04/2013-13:26 | 03/26/2015-13:26 | |
| Wegener, Danielle Beck | Motion/Motion Filing Fee | Filing | | 01/03/2013-16:17 | 03/26/2015-16:17 | |
| Anderson, Jonathan J. | Motion/Motion For Emergency Hearing by Donnie King, crt/srv | Motion | | 01/03/2013-10:52 | 03/26/2015-10:52 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee | Filing | | 11/14/2012-08:52 | 03/26/2015-08:52 | |
| Segui, Phillip Ward Jr. | Motion/Motion For Expedited Hearing by plaintiff | Motion | | 11/13/2012-09:51 | 03/26/2015-09:51 | |
| | Service/Corrected Certificate Of Service | Filing | | 10/26/2012-11:15 | 03/26/2015-11:15 | |
| Anderson, Jonathan J. | Motion/Motion Filing Fee | Filing | | 10/25/2012-15:44 | 03/26/2015-15:44 | |
| Anderson, Jonathan J. | Motion/Dismiss Rule to Show Cause by Donnie King, crt/srv | Motion | | 10/25/2012-09:39 | 03/26/2015-09:39 | |
| | Service/Affidavit Of Service | Filing | | 10/11/2012-09:42 | 03/26/2015-09:42 | |
| Professional Plastering & Stucco Inc Etc | Order/Professional Plastering mot for reconsideration denied | Order | | 09/27/2012-11:20 | 03/26/2015-11:20 | |
| | Service/Certificate Of Service | Filing | | 09/11/2012-10:58 | 03/26/2015-10:58 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 09/10/2012-14:10 | 03/26/2015-14:10 | |
| Wegener, Danielle Beck | Motion/Reconsideration by defendant & crt/srv | Motion | | 09/10/2012-13:20 | 03/26/2015-13:20 | |
| | Miscellaneous Document | Filing | | 09/05/2012-13:12 | 03/26/2015-13:12 | |
| Tesenlar, Mark F | Order to show cause, order of reference for supplemental | Order | | 08/24/2012-11:01 | 03/26/2015-11:01 | |
| Tesenlar, Mark F | Verified Petition/Order for Supplemental Proceedings | Filing | | 08/24/2012-11:00 | 03/26/2015-11:00 | |
| Tesenlar, Mark F | Affidavit/Affidavit of Phillip Segui | Filing | | 08/24/2012-10:59 | 03/26/2015-10:59 | |
| Professional Plastering & Stucco Inc Etc | Return to Rule to Show Cause & Petition, crt/srv | Filing | | 08/17/2012-16:30 | 03/26/2015-16:30 | |
| Tesenlar, Mark F | Order/Order Filing Fee | Filing | | 08/14/2012-14:23 | 03/26/2015-14:23 | |
| Tesenlar, Mark F | Order/Order Filing Fee | Filing | | 08/14/2012-14:21 | 03/26/2015-14:21 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee | Filing | | 03/06/2012-10:59 | 03/26/2015-10:59 | |
| Daigle, Jason Alan | Motion/Join & Compel Attendance by defendant & crt/srv | Motion | | 03/05/2012-11:23 | 03/26/2015-11:23 | |
| | Miscellaneous Documents (2) | Filing | | 02/17/2012-13:50 | 03/26/2015-13:50 | |
| | Order/from crt of appeals-appeal is held in abeyance | Order | | 01/30/2012-11:01 | 03/26/2015-11:01 | |
| | Letter fr/SC Court of Appeals in re: Notice of Appeal | Filing | | 08/09/2011-15:09 | 03/26/2015-15:09 | |
| Koenig, Robert | Order of default as to defnt North Florida Framing | Order | | 08/09/2011-12:26 | 03/26/2015-12:26 | |
| | Order-defnt Professional Plastering mot to alter or amend | Order | | 08/09/2011-12:23 | 03/26/2015-12:23 | |
| Tesenlar, Mark F | Order/Dismissal as to certain defnts | Order | | 08/08/2011-09:29 | 03/26/2015-09:29 | |
| Anderson, Jonathan J. | Motion/Substitution of Ntc/Appeal & proof/srv by dfndnt, srv | Motion | | 07/22/2011-10:06 | 03/26/2015-10:06 | |
| Professional Plastering & Stucco Inc Etc | Appeal/Notice of Appealing Order from 5/9/11 Amended & srv | Filing | | 07/22/2011-10:05 | 03/26/2015-10:05 | |
| Professional Plastering & Stucco Inc Etc | Appeal/Notice of Appealing Order from 5/19/11 & proof/srv | Filing | | 07/22/2011-10:00 | 03/26/2015-10:00 | |
| Professional Plastering & Stucco Inc Etc | Order/Defnt mot to alter or amend is denied | Order | | 07/19/2011-10:07 | 03/26/2015-10:07 | |
| | | Filing | | | | |

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| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee-Alter or Amend Judgment | | | 06/29/2011-16:41 | 03/26/2015-16:41 | |
| Anderson, Jonathan J. | Motion/Alter or Amend Judgment by defendant & crt/srv | Motion | | 06/29/2011-09:28 | 07/19/2011-09:28 | |
| | Stipulation/Dismissal with prejudice/General Aluminum Cmpny | Filing | | 06/22/2011-09:30 | 03/26/2015-09:30 | |
| Koenig, Robert | Order/Order-denies all of the defat's post trial motions | Order | | 06/17/2011-09:59 | 03/26/2015-09:59 | |
| Tesenlar, Mark F | Master/Master's Order for Damages Award | Order | | 06/14/2011-11:32 | 03/26/2015-11:32 | |
| Tesenlar, Mark F | Judgment/Judgment | Judgment | | 06/14/2011-11:05 | 03/26/2015-11:05 | |
| Tesenlar, Mark F | Judgment/Judgment | Judgment | | 06/14/2011-11:02 | 03/26/2015-11:02 | |
| Tesenlar, Mark F | Judgment/Judgment | Judgment | | 06/14/2011-11:01 | 03/26/2015-11:01 | |
| National Fire & Marine Insurance Company | Appeal/Notice of Appealling Order from 5/13/11 | Filing | | 06/13/2011-13:39 | 03/26/2015-13:39 | |
| Tesenlar, Mark F | Order/Final order approving class action partial settlement | Order | | 06/10/2011-14:25 | 03/26/2015-14:25 | |
| | Order/Dismissal as to certain defnts | Order | | 06/10/2011-14:22 | 03/26/2015-14:22 | |
| | Affidavit/Affidavit of Christine Petit | Filing | | 06/09/2011-11:21 | 03/26/2015-11:21 | |
| Professional Plastering & Stucco Inc Etc | Reply/Support of Defendants Post-Trial Motions | Filing | | 06/01/2011-10:06 | 03/26/2015-10:06 | |
| | Memo/Oppos by all pintffs to dfndnt post trial motions & srv | Filing | | 05/27/2011-16:08 | 03/26/2015-16:08 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-to alter | Filing | | 05/24/2011-09:42 | 03/26/2015-09:42 | |
| Professional Plastering & Stucco Inc Etc | Substitution of Exhibit | Filing | | 05/24/2011-08:57 | 03/26/2015-08:57 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee-for new trial | Filing | | 05/23/2011-16:57 | 03/26/2015-16:57 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 05/23/2011-16:55 | 03/26/2015-16:55 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee-for judgment | Filing | | 05/23/2011-16:54 | 03/26/2015-16:54 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 05/23/2011-16:52 | 03/26/2015-16:52 | |
| Daigle, Jason Alan | Motion/Alter or Amend by dfndnt/3rd prty pintff & crt/srv | Motion | | 05/23/2011-16:10 | 03/26/2015-16:10 | |
| | Stipulation/Dismissal with prjdc as to Johnson Companies Inc | Filing | | 05/23/2011-14:16 | 03/26/2015-14:16 | |
| Professional Plastering & Stucco Inc Etc | Memo/Support of its Motion for New Trial Absolute | Filing | | 05/23/2011-10:21 | 03/26/2015-10:21 | |
| Anderson, Jonathan J. | Motion/Set Off by defendant | Motion | | 05/23/2011-10:07 | 03/26/2015-10:07 | |
| Anderson, Jonathan J. | Motion/New Trial Nisi Remittitur by defendant | Motion | | 05/23/2011-10:06 | 03/26/2015-10:06 | |
| Anderson, Jonathan J. | Motion/Judgment notwithstanding the verdict by defendant | Motion | | 05/23/2011-10:04 | 03/26/2015-10:04 | |
| Anderson, Jonathan J. | Motion/Alter or Amend Order, by defendant | Motion | | 05/20/2011-15:10 | 03/26/2015-15:10 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 05/20/2011-14:57 | 03/26/2015-14:57 | |
| Kirchner, Jesse A. | Motion/Preliminary Approval/Partial sttlmnt by pintffs & srv | Motion | | 05/19/2011-13:17 | 03/26/2015-13:17 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee-FOR PRELIMINARY APPROVAL | Filing | | 05/19/2011-11:45 | 08/24/2012-11:45 | |
| North Florida Framing Inc Etc | Order/Relieve Counsel-Randell Stoney & Barbara Wagner | Order | | 05/18/2011-13:20 | 03/26/2015-13:20 | |
| Tesenlar, Mark F | Order/Jury Verdict in favor of Pltff | Order | | 05/16/2011-13:44 | 03/26/2015-13:44 | |
| Tesenlar, Mark F | Judgment/Judgment | Judgment | | 05/16/2011-13:44 | 03/26/2015-13:44 | |
| Professional Plastering & Stucco Inc Etc | Judgment/Judgment | Judgment | | 05/16/2011-13:44 | 03/26/2015-13:44 | |
| National Fire & Marine Insurance Company | Memorandum | Filing | | 05/12/2011-13:58 | 03/26/2015-13:58 | |
| | Order/Order granting APS Enterprises Mot for sum judg | Order | | 05/11/2011-16:54 | 03/26/2015-16:54 | |
| C&n Stucco And Plastering Inc Etc | Order/Order granting 3rd party defnt mot for sum judg | Order | | 05/11/2011-08:48 | 03/26/2015-08:48 | |
| | 5th Amended Summons And Complaint, jury trial demanded | Filing | | 05/09/2011-10:07 | 03/26/2015-10:07 | |
| | Deposition Designations/Donnie M King by all Pintffs & srv | Filing | | 05/06/2011-14:32 | 03/26/2015-14:32 | |
| | Motion/Motion Filing Fee | Filing | | | | |

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| Professional Plastering & Stucco Inc Etc | | | | 05/05/2011-15:46 | 03/26/2015-15:46 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 05/05/2011-15:44 | 03/26/2015-15:44 | |
| Anderson, Jonathan J. | Motion/Exclude by defendant | Motion | | 05/05/2011-11:35 | 03/26/2015-11:35 | |
| Anderson, Jonathan J. | Motion/Quash Greg Sirois Depo by defendant & crt/srv | Motion | | 05/05/2011-11:32 | 03/26/2015-11:32 | |
| Daigle, Jason Alan | Motion/In Limine by defendant & crt/srv | Motion | | 05/05/2011-10:59 | 03/26/2015-10:59 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-in limine | Filing | | 05/05/2011-09:48 | 03/26/2015-09:48 | |
| Aps Enterprises Unlimited Inc Etc | Answer/Amended Answer & crt/srv | Filing | | 05/04/2011-14:22 | 03/26/2015-14:22 | |
| Aps Enterprises Unlimited Inc Etc | Answer/Amended Answer & crt/srv | Filing | | 05/04/2011-14:12 | 03/26/2015-14:12 | |
| Aps Enterprises Unlimited Inc Etc | Answer/Amended Answer & crt/srv | Filing | | 05/04/2011-14:09 | 03/26/2015-14:09 | |
| Daigle, Jason Alan | Motion/Rqst for Special Verdict Form by defendant & crt/srv | Motion | | 05/04/2011-14:07 | 03/26/2015-14:07 | |
| Maybank, Roy Pearce | Motion/Sever by defendant & crt/srv | Motion | | 05/04/2011-14:05 | 03/26/2015-14:05 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-request for special verdict | Filing | | 05/04/2011-12:36 | 03/26/2015-12:36 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-motion to sever | Filing | | 05/04/2011-12:35 | 03/26/2015-12:35 | |
| Professional Plastering & Stucco Inc Etc | Notice/Filing Original Deposition Transcripts & crt/srv | Filing | | 05/03/2011-11:31 | 03/26/2015-11:31 | |
| | Affidavit/Affidavit of Christine Petit | Filing | | 05/03/2011-11:05 | 05/03/2011-11:05 | |
| | Order/Final Order approving class action | Order | | 05/03/2011-10:47 | 03/26/2015-10:47 | |
| Barnes, Robert Bryan | Motion/Motion Filing Fee | Filing | | 05/03/2011-09:17 | 05/03/2011-09:17 | |
| Osborn, James Geoffrey Jr. | Motion/Sever by defendants & crt/srv | Motion | | 05/02/2011-15:57 | 05/03/2011-15:57 | |
| North Florida Framing Inc Etc | Motion/Motion Filing Fee-to bifurcate | Filing | | 05/02/2011-15:36 | 05/03/2011-15:36 | |
| | Pre trial Brief/Bst Msnry & T S LP & Inc, Magna Wll & srv | Filing | | 05/02/2011-14:58 | 05/03/2011-14:58 | |
| Professional Plastering & Stucco Inc Etc | Return to Plaintiffs Motion/In Limine & crt/srv | Filing | | 05/02/2011-14:57 | 05/03/2011-14:57 | |
| Wagner, Barbara J. | Motion/Bifurcate trial by defendants & crt/srv | Motion | | 05/02/2011-10:00 | 05/03/2011-10:00 | |
| North Florida Framing Inc Etc | Order/Order Filing Fee | Filing | | 04/29/2011-16:44 | 05/03/2011-16:44 | |
| Aps Enterprises Unlimited Inc Etc | Pretrial Brief & crt/srv | Filing | | 04/29/2011-16:16 | 05/03/2011-16:16 | |
| Professional Plastering & Stucco Inc Etc | Notice/Filing Original Deposition Transcripts & crt/srv | Filing | | 04/29/2011-14:49 | 05/03/2011-14:49 | |
| Nava Guzman Construction Inc Etc | Pre Trial Brief & crt/mail | Filing | | 04/29/2011-13:47 | 05/03/2011-13:47 | |
| | Response/North Florida Framing & Marquez Construction, srv | Filing | | 04/29/2011-13:44 | 05/03/2011-13:44 | |
| | Trial Brief/Nrth Florida Framing & Marquez Construction, srv | Filing | | 04/29/2011-13:41 | 05/03/2011-13:41 | |
| Professional Plastering & Stucco Inc Etc | Return to APS Enterprises Unlimiteds Mot/Smmry Jdgmnt & srv | Filing | | 04/29/2011-13:38 | 05/03/2011-13:38 | |
| | Letter/Atty C Mahon re Remove motion/compel from roster | Filing | | 04/28/2011-15:02 | 05/03/2011-15:02 | |
| | Notice/Filing Original Depo Transcript by Pintffs & crt/srv | Filing | | 04/27/2011-15:15 | 05/03/2011-15:15 | |
| | Notice/Filing Original Depo Transcript by dfndnt & crt/srv | Filing | | 04/26/2011-10:49 | 05/03/2011-10:49 | |
| | Memo/Spprt/Mot/Smmry Jdgmnt Best Masonry LP/INC, Magna & srv | Filing | | 04/25/2011-13:39 | 05/03/2011-13:39 | |
| | Notice/Plaintiffs Filing Original Depo Transcripts, crt/mail | Filing | | 04/25/2011-09:42 | 05/03/2011-09:42 | |
| Daigle, Jason Alan | Motion/Amend Pleadings (Amended Answers) by defendant & srv | Motion | | 04/22/2011-16:05 | 05/03/2011-16:05 | |
| Professional Plastering & Stucco Inc Etc | Return to plaintiffs motion/summary judgment & crt/srv | Filing | | 04/22/2011-16:04 | 05/03/2011-16:04 | |
| | Affidavit/Affidavit of Jim Rafftery | Filing | | 04/22/2011-16:02 | 05/03/2011-16:02 | |
| Cobb, David Starr | Motion/Summary Judgment by defendant & crt/srv | Motion | | 04/22/2011-16:01 | 05/03/2011-16:01 | |
| Kirchner, Jesse A. | | Motion | | | | |

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| | Motion/In Limine by the plaintiffs & crt/srv | | | 04/22/2011-15:59 | 05/03/2011-15:59 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee-motion in limine | Filing | | 04/22/2011-13:29 | 05/03/2011-13:29 | |
| General Aluminum Company Of Texas Lp Etc | Motion/Motion Filing Fee | Filing | | 04/22/2011-11:16 | 05/03/2011-11:16 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-motion to amend pleadings | Filing | | 04/22/2011-09:56 | 05/03/2011-09:56 | |
| | Order/Preliminarily approving class action partial | Order | | 04/21/2011-11:10 | 05/03/2011-11:10 | |
| Barnes, Robert Bryan | Motion/Summary Judgment by defendant & crt/srv | Motion | | 04/20/2011-11:02 | 05/03/2011-11:02 | |
| Maybank, Roy Pearce | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| McCants, John Lucius | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Travis, M. Brittain | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Anderson, Jonathan J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Jones, Michal Cooper | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Scott, William A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Waltz, Robert David | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Mims, Kevin W. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Kirchner, Jesse A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Lucey, Justin O'Toole | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Jowers, M. Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Smith, Bachman S. IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Leath, W. Jefferson Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Chakeris, John T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Inflinger, Marvin D. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Segul, Phillip Ward Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Mahon, Christy Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Bruorton, James Atkinson IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Daigle, Jason Alan | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Cobb, David Starr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Wagner, Barbara J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Cannon, Kelley S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Adams, Christopher M. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Cheek, Ellen S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Rothschild, Amy B. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Stubbs, Sidney Markey | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Halio, Andrew Steven | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Wilkes, Michael B.T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| O'Neal, John Blanton IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Hollingsworth, Dunn Denson | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Blackburn, Charles Grant | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Osborn, James Geoffrey Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Stoney, Randell C. Jr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Kendall, Everett Augustus II | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:41 | 05/03/2011-09:41 | |
| Blackburn, Charles Grant | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Kendall, Everett Augustus II | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Stoney, Randell C. Jr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
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| Osborn, James Geoffrey Jr. | Roster/Notice of Motions Roster Publication Sent | | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Hollingsworth, Dunn Denson | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| O'Neal, John Blanton IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Wilkes, Michael B.T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Hallo, Andrew Steven | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Rothschild, Amy B. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Cheek, Ellen S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Adams, Christopher M. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Cannon, Kelley S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Wagner, Barbara J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Cobb, David Starr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Stubbs, Sidney Markey | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Daigle, Jason Alan | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Bruorton, James Atkinson IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Mahon, Christy Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Segul, Phillip Ward Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Infinger, Marvin D. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Chakeris, John T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Smith, Bachman S. IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Kirchner, Jesse A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Leath, W. Jefferson Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Jowers, M. Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Lucey, Justin O'Toole | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Mims, Kevin W. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Waltz, Robert David | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Scott, William A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Jones, Michal Cooper | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Anderson, Jonathan J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Travis, M. Brittain | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| McCants, John Lucius | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Maybank, Roy Pearce | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:40 | 05/03/2011-09:40 | |
| Maybank, Roy Pearce | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| McCants, John Lucius | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Anderson, Jonathan J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Travis, M. Brittain | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Scott, William A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Jones, Michal Cooper | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Waltz, Robert David | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Lucey, Justin O'Toole | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| O'Neal, John Blanton IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Jowers, M. Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Kirchner, Jesse A. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Leath, W. Jefferson Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Smith, Bachman S. IV | | Action | | | | |

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| | Roster/Notice of Motions Roster Publication Sent | | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Infinger, Marvin D. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Chakeris, John T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Segui, Phillip Ward Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Mahon, Christy Elizabeth | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Daigle, Jason Alan | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Mims, Kevin W. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Stubbs, Sidney Markey | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Cobb, David Starr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Wagner, Barbara J. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Cannon, Kelley S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Bruorton, James Atkinson IV | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Adams, Christopher M. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Cheek, Ellen S. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Rothschild, Amy B. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Wilkes, Michael B.T. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Hallo, Andrew Steven | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Hollingsworth, Dunn Denson | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Osborn, James Geoffrey Jr. | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Stoney, Randell C. Jr | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Kendall, Everett Augustus II | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Blackburn, Charles Grant | Roster/Notice of Motions Roster Publication Sent | Action | | 04/20/2011-09:39 | 05/03/2011-09:39 | |
| Best Masonry & Tool Supply L P As Successor Etc | Motion/Motion Filing Fee-motion for summary judgment | Filing | | 04/20/2011-08:44 | 05/03/2011-08:44 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Motion Filing Fee-summary judgment | Filing | | 04/15/2011-15:46 | 05/03/2011-15:46 | |
| Aps Enterprises Unlimited Inc Etc | Motion/Summary Judgment & cert/serv | Motion | | 04/15/2011-12:12 | 05/03/2011-12:12 | |
| | Order/Dismissal w/out prej of APS Enterprises cr/claim | Order | | 04/11/2011-12:59 | 05/03/2011-12:59 | |
| Tesenlar, Mark F | Motion/Motion Filing Fee-preliminary approval | Filing | | 04/07/2011-16:19 | 05/03/2011-16:19 | |
| Tesenlar, Mark F | Motion/Preliminary approval/prtl settlement by Pintffs & srv | Motion | | 04/07/2011-11:31 | 05/03/2011-11:31 | |
| H2l Consulting Engineers Etc | Order/Order Filing Fee-order of dismissal | Filing | | 04/06/2011-16:39 | 05/03/2011-16:39 | |
| | Settlement agreement/H2L Consulting & APS Enterprises & srv | Filing | | 04/06/2011-12:02 | 05/03/2011-12:02 | |
| Tesenlar, Mark F | Order/granting Pintffs' mot to Quash Subpoena | Order | | 03/30/2011-10:50 | 05/03/2011-10:50 | |
| | Order/Denying Defnt General Aluminum Co mot for sum judg | Order | | 03/30/2011-10:30 | 05/03/2011-10:30 | |
| Tesenlar, Mark F | Order/Granting Protective Order to Limit Examination (2) | Order | | 03/30/2011-10:13 | 05/03/2011-10:13 | |
| Tesenlar, Mark F | Order/Allowing Pintffs Leave to Amend Cmpint | Order | | 03/17/2011-16:41 | 05/03/2011-16:41 | |
| | Order/Order of Commission | Order | | 03/11/2011-08:17 | 05/03/2011-08:17 | |
| National Fire & Marine Insurance Company | Motion/rqust f/ spec or gen verdict form & intrrgtrs & srv | Motion | | 03/10/2011-16:52 | 05/03/2011-16:52 | |
| McCants, John Lucius | Motion/Motion Filing Fee-request for a special verdict form | Filing | | 03/09/2011-10:46 | 05/03/2011-10:46 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion to Compel & Cert/Serv | Motion | | 03/02/2011-14:14 | 04/28/2011-14:14 | |
| Professional Plastering & Stucco Inc Etc | Motion/Motion Filing Fee | Filing | | 03/02/2011-14:09 | 05/03/2011-14:09 | |
| Tesenlar, Mark F | Order/Order of Commission | Order | | 03/02/2011-08:43 | 05/03/2011-08:43 | |
| | FORM4 IN RE:MSORD 20110214 9940 MAILED FIRST CLASS | Order | | 02/17/2011-00:00 | 05/03/2011-00:00 | |

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|---|---|---|---|---|---|---|
| | FORM4 IN RE:MSORD 20110214 9950 MAILED FIRST CLASS | Order | | 02/17/2011-00:00 | 05/03/2011-00:00 | |
| | MASTERS ORDER GRANTING CONTINUANCE OF HEARING | Order | | 02/14/2011-00:00 | 05/03/2011-00:00 | |
| | MASTERS ORDER CASE CONTINUED | Order | | 02/14/2011-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20110125 9990 MAILED FIRST CLASS | Order | | 01/29/2011-00:00 | 05/03/2011-00:00 | |
| | ORDER OF COMMISSION (6) | Order | | 01/25/2011-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR SUM JUDG AS TO PROFESSIONAL PLASTERING;LEATH, W | Filing | | 01/21/2011-00:00 | 05/03/2011-00:00 | |
| | 3RD PARTY DEFNT C&N STUCCO & PLASTERING INC'S;SCOTT, W | Filing | | 01/19/2011-00:00 | 05/03/2011-00:00 | |
| | PLNTF MEMO IN OPPOSITION TO DEFNT MOTION FOR | Filing | | 01/19/2011-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF ROBERT SHELLBERG | Filing | | 01/19/2011-00:00 | 05/03/2011-00:00 | |
| | C&N STUCCO & PLASTERING INC'S AMENDED ANSWER TO | Filing | | 01/18/2011-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 01/14/2011-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF MYLES I GLICK, AIA | Filing | | 01/13/2011-00:00 | 05/03/2011-00:00 | |
| | MEMO IN OPPOSITION TO PLTFFS MOTION TO LIMIT | Filing | | 01/04/2011-00:00 | 05/03/2011-00:00 | |
| | MEMO IN OPPOSITION TO PLTFFS MOTION TO QUASH | Filing | | 01/04/2011-00:00 | 05/03/2011-00:00 | |
| | REPLY BRIEF OF H2L CONSULTING ENGINEERS IN SUPPORT | Filing | | 01/04/2011-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101220 9990 MAILED FIRST CLASS | Order | | 01/01/2011-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR SUMMARY JUDGMENT ON BEHALF OF DEFNT;COBB, D (30) | Motion | | 12/23/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR SUMMARY JUDGMENT ON BEHALF OF DEFNT;COBB, D (30) | Motion | | 12/23/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDIS 20101214 9990 MAILED FIRST CLASS | Order | | 12/22/2010-00:00 | 05/03/2011-00:00 | |
| | CONSENT ORDER FOR SUBSTITUTION OF COUNSEL | Order | | 12/20/2010-00:00 | 05/03/2011-00:00 | |
| | MEMO IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT | Filing | | 12/17/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF ROBERT SISNROY | Filing | | 12/16/2010-00:00 | 05/03/2011-00:00 | |
| | MEMO OF H2L CONSULTING ENGINEERING IN SUPPORT OF | Filing | | 12/14/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF DISMISSAL AS TO CERTIAN DEFNTS WITH | Order | | 12/14/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF 3RD PARTY DEFNT C&N STUCCO & PLASTERING;SCOTT, W | Filing | | 12/03/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101122 9990 MAILED FIRST CLASS | Order | | 12/01/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101119 9990 MAILED FIRST CLASS | Order | | 11/30/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER-CASE ASSIGNED TO JUDGE KRISTI LEA | Order | | 11/22/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDIS 20101110 9990 MAILED FIRST CLASS | Order | | 11/20/2010-00:00 | 05/03/2011-00:00 | |
| | CONSENT ORDER OF DISMISSAL WITH PREJ AS TO CLAIMS | Order | | 11/19/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101109 9990 MAILED FIRST CLASS | Order | | 11/18/2010-00:00 | 05/03/2011-00:00 | |
| | STIPULATION OF DISMISSAL AS TO TWELVE OAKS AT | Filing | | 11/15/2010-00:00 | 05/03/2011-00:00 | |
| | CONSNET ORDER OF DISMISSAL WITH PREJ ONLY AS TO | Order | | 11/10/2010-00:00 | 05/03/2011-00:00 | |
| | WITHDRAWAL OF OPPOSITION OF DEFNT H2L CONSULTING | Filing | | 11/10/2010-00:00 | 05/03/2011-00:00 | |
| | FINAL ORDER APPROVING CLASS ACTION PARTIAL | Order | | 11/09/2010-00:00 | 05/03/2011-00:00 | |
| | | Filing | | | | |

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|---|---|---|---|---|---|---|
| | DEFNT KMAC'S ANSWER TO 4TH AMENDED CMPLNT &;WALTZ, R | | | 11/08/2010-00:00 | 05/03/2011-00:00 | |
| | MOTION FOR ORDER OF DISMISSAL W/ PREJUDICE OF ALL | Motion | | 11/05/2010-00:00 | 11/05/2010-00:00 | |
| | MOTION FOR DISMISS W/PREJUDICE OF ALL CLAIMS;JOWERS, M (15) | Motion | | 11/02/2010-00:00 | 11/02/2010-00:00 | |
| | MOTION HEARING | Filing | | 11/01/2010-09:30 | 05/03/2011-09:30 | |
| | AFFIDAVIT OF CHRISTINE PETIT | Filing | | 10/29/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO LIMIT EXAMINATION & CERT/SERV;LEATH, W (30 MIN) | Motion | | 10/22/2010-00:00 | 10/22/2010-00:00 | |
| | DEFTN H2L CONSULTING ENGINEERS OPPOSITION | Filing | | 10/22/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:OREF 20101014 9990 MAILED FIRST CLASS | Order | | 10/22/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO AMEND COMPLAINT & CERT/SERV;CHAKERIS, J | Filing | | 10/19/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101005 9980 MAILED FIRST CLASS | Order | | 10/15/2010-00:00 | 05/03/2011-00:00 | |
| | Order/Referred to Master | Order | | 10/14/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF REFERENCE W/ FINALITY | Order | | 10/14/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20101001 9980 MAILED FIRST CLASS | Order | | 10/09/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF COMMISSION-DEPOSITION OF SKYETEE | Order | | 10/05/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF PUBLICATION | Filing | | 10/05/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF COMMISSION (7) | Order | | 10/01/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDEF 20100923 9980 MAILED FIRST CLASS | Order | | 10/01/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO LIMIT EXAMINATION & CERT/SERV | Motion | | 09/27/2010-00:00 | 09/27/2010-00:00 | |
| | DEFNT H2L CONSULTING ENGINEERS' MOT FOR ORDER | Motion | | 09/24/2010-00:00 | 09/24/2010-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 09/24/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF DEFAULT | Filing | | 09/23/2010-00:00 | 05/03/2011-00:00 | |
| | ENTRY OF DEFAULT | Order | | 09/23/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF PUBLICATION | Filing | | 09/20/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 09/20/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:COMP 20100910 9990 MAILED FIRST CLASS | Order | | 09/16/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20100909 9970 MAILED FIRST CLASS | Order | | 09/15/2010-00:00 | 05/03/2011-00:00 | |
| | 3RD PARTY DEFNT NAVA GUZMAN CONSTRUCTION INC'S;TRAVIS, M | Filing | | 09/14/2010-00:00 | 05/03/2011-00:00 | |
| | COMPLEX CASE DESIGNATION ORDER TO JUDGE YOUNG | Filing | | 09/10/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO DISMISS THE PLNTFFS' 4TH AMENDED;O'NEAL, J (20) | Filing | | 09/09/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER PRELIMINARILY APPROVING CLASS ACTION PARTIAL | Order | | 09/09/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT DEVELOPMENT COMPLIANCE &;O'NEAL, J | Filing | | 09/09/2010-00:00 | 05/03/2011-00:00 | |
| | ACCEPTANCE OF SERVICE | Filing | | 08/30/2010-00:00 | 05/03/2011-00:00 | |
| | ACCEPTANCE OF SERVICE | Filing | | 08/30/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT NEO CORP TO PLNTFFS' 4TH AMENDED;ADAMS, C | Filing | | 08/25/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20100817 9980 MAILED FIRST CLASS | Order | | 08/24/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE & SHERIFFS RETURN OF SERVICE | Filing | | 08/24/2010-00:00 | 05/03/2011-00:00 | |

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| | NOT/MOT FOR PRELIMINARY APPROVAL OF A PARTIAL | Motion | | 08/18/2010-00:00 | 08/18/2010-00:00 | |
| | FORM4 IN RE:ORPUB 20100812 9960 MAILED FIRST CLASS | Order | | 08/18/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPUB 20100812 9980 MAILED FIRST CLASS | Order | | 08/18/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPUB 20100811 9980 MAILED FIRST CLASS | Order | | 08/17/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER DENYING DEFNT JOHNSON COMPANIES INC'S MOTION | Order | | 08/17/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR SERVICE BY PUBLICATION FOR MIQUEL | Order | | 08/12/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR SERVICE BY PUBLICATION FOR VILLAGOMEZ | Order | | 08/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT IN SUPPORT OF ORDER FOR SERVICE BY | Filing | | 08/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT IN SUPPORT OF ORDER FOR SERVICE BY | Filing | | 08/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT IN SUPPORT OF ORDER FOR SERVICE BY | Filing | | 08/11/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR SERVICE BY PUBLICATION FOR C&N STUCCO | Order | | 08/11/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20100730 9990 MAILED FIRST CLASS | Order | | 08/06/2010-00:00 | 05/03/2011-00:00 | |
| | SUMMONS & NORTH FLORIDA FRAMING INC'S 3RD PARTY | Filing | | 08/05/2010-00:00 | 05/03/2011-00:00 | |
| | PLNTFFS' MOTION TO COMPEL AGAINST DEFNT;SEGUI, P (15) | Motion | | 08/02/2010-00:00 | 08/02/2010-00:00 | |
| | NOTICE OF APPEARANCE OF ATTY J ANDERSON ON BEHALF | Filing | | 08/02/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER-CASE REMOVED FROM JUDGE BAXLEY & THE | Order | | 07/30/2010-00:00 | 05/03/2011-00:00 | |
| | LETTER FR/ ATTY S STUBBS IN RE: PARTY HAS SETTLED | Filing | | 07/27/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT JOHNSON COMPANIES INC D/B/A JOHNSON ROOFING | Filing | | 07/23/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR SUM JUDG & CERT/SERV;STUBBS, S | Filing | | 07/19/2010-00:00 | 05/03/2011-00:00 | |
| | PLNTFF'S NOT/MOT TO QUASH SUBPOENA & CERT/SERV | Filing | | 07/16/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT H2L CONSULTING ENGINEERS' MOT FOR SUM JUDG;WILKES, M | Filing | | 07/16/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR SUMMARY JUDGMENT ON BEHALF OF DEFNT;JONES, M | Filing | | 07/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE UPON NEO CORPORATION | Filing | | 07/09/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO COMPEL COMPLETE RESPONSES TO SUMMIT'S | Motion | | 07/06/2010-00:00 | 07/06/2010-00:00 | |
| | TWELVE OAKS FENWICK PROPERTY OWNERS ASSOC INC'S;HALIO, A | Filing | | 07/02/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT A M JACOBS INC'S AMENDED ANSWER TO PLNTFFS';MIMS, K | Filing | | 06/21/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE UPON NEO CORP & KMAC OF THE | Filing | | 06/21/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT A M JACOBS INC'S ANSWER TO SUMMIT;MIMS, K | Filing | | 06/18/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT H2L CONSULTING ENGINEERS TO APS;WILKES, M | Filing | | 06/17/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPRO 20100608 9990 MAILED FIRST CLASS | Order | | 06/16/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT JOHNSON COMPANIES INC D/B/A JOHNSON;BLACKBURN, C | Filing | | 06/14/2010-00:00 | 05/03/2011-00:00 | |
| | STIPULATION AMONG SUMMIT CONTRACTORS GROUP INC, | Filing | | 06/14/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO LIMIT EXAMINATION & CERT/SERV;SEGUI, P (45 MIN) | Filing | | 06/10/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF PROTECTION | Order | | 06/08/2010-00:00 | 05/03/2011-00:00 | |
| | | Order | | 06/05/2010-00:00 | 05/03/2011-00:00 | |

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| | FORM4 IN RE:ORDER 20100526 9990 MAILED FIRST CLASS | | | | | |
| | DEFNT PROFESSIONAL PLASTERING & STUCCO INC'S;MAHON, C | Filing | | 05/28/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT PROFESSIONAL PLASTERING & STUCCO INC'S;MAHON, C | Filing | | 05/27/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT PROFESSIONAL PLASTERING & STUCCO INC;MAHON, C | Filing | | 05/27/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNT PROFESSIONAL PLASTERING & STUCCO INC'S;MAHON, C | Filing | | 05/27/2010-00:00 | 05/03/2011-00:00 | |
| | CONSENT ORDER OF UNIT OWNERS TO PRODUCE VISUAL | Order | | 05/26/2010-00:00 | 05/03/2011-00:00 | |
| | DEFNTS SUMMIT CONTRACTORS GROUP INC & SUMMIT;SMITH, JAMES | Filing | | 05/25/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF APS ENTERPRISES UNLIMITED INC TO;DAIGLE, J | Filing | | 05/20/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF APS ENTERPRISES UNLIMITED INC;DAIGLE, J | Filing | | 05/20/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF APS ENTERPRISES UNLIMITED INC TO;DAIGLE, J | Filing | | 05/20/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT A.M. JACOBS INC TO PLNTFFS' 4TH;MIMS, K | Filing | | 05/18/2010-00:00 | 05/03/2011-00:00 | |
| | SUMMONS TO C&N STUCCO AND PLASTERING INC | Filing | | 05/17/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT APS ENTERPRISES UNLIMITED INC TO;DAIGLE, J | Filing | | 05/17/2010-00:00 | 05/03/2011-00:00 | |
| | FUGELBERG KOCH ARCHITECTS INC'S VOLUNTARY | Filing | | 05/14/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT JOHNSON COMPANIES INC D/B/A;BLACKBURN, C | Filing | | 05/13/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO COMPEL RESPONSES TO SUMMIT'S;SMITH, J (10) | Motion | | 05/11/2010-00:00 | 05/11/2010-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 05/05/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 05/04/2010-00:00 | 05/03/2011-00:00 | |
| | PLNTFFS' NOT/MOT TO COMPEL MEDIATION;KIRCHNER, J (15) | Motion | | 05/03/2010-00:00 | 05/03/2010-00:00 | |
| | ANSWER OF DEFNT SUMMIT CONTRACTORS GROUP INC TO;SMITH, J | Filing | | 05/03/2010-00:00 | 05/03/2011-00:00 | |
| | MOTION TO DISMISS AS TO FEDERAL INSURANCE CO'S | Motion | | 04/30/2010-00:00 | 04/30/2010-00:00 | |
| | MOTION TO AMEND PLEADINGS & CERT/SERV;WAGNER, B (30 MIN) | Motion | | 04/29/2010-00:00 | 04/29/2010-00:00 | |
| | MOTION TO AMEND CASE MANAGEMENT ORDER & CERT/SERV | Filing | | 04/29/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF PROFESSIONAL PLASTERING & STUCCO INC TO;MAHON, C | Filing | | 04/29/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT LOS CAMPOS INC TO FEDERAL INS CO'S | Filing | | 04/26/2010-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT ALL-SOUTH VINYL PRODUCTS INC TO | Filing | | 04/26/2010-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT J.R. HOBBS COMPANY-ATLANTA LLC & | Filing | | 04/26/2010-00:00 | 05/03/2011-00:00 | |
| | SUMMONS ON CROSS-CLAIM | Filing | | 04/22/2010-00:00 | 05/03/2011-00:00 | |
| | PROFESSIONAL PLASTERING & STUCCO INC SUMMONS | Filing | | 04/22/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT FEDERAL INSURANCE COMPANY TO 4TH;BRUORTON, J | Filing | | 04/22/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF NON-SERVICE | Filing | | 04/22/2010-00:00 | 05/03/2011-00:00 | |
| | LOS CAMPOS INC'S ANSWER TO SUMMIT'S CR/CLAIMS | Filing | | 04/22/2010-00:00 | 05/03/2011-00:00 | |
| | | Filing | | 04/20/2010-00:00 | 05/03/2011-00:00 | |

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| | ANSWER OF DEFNTS SUMMIT CONTRACTORS INC & SUMMIT;SMITH, J | | | | | |
| | REPLY TO CROSS-CLAIMS OF SUMMIT CONTRACTORS GROUP | Filing | | 04/19/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER & CR/CLAIMS OF CERTAIN DEFNTS TO PLNTFFS';OSBORN, J | Filing | | 04/16/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE & PROOF OF SERVICE | Filing | | 04/13/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT H2L CONSULTING ENGINEERS TO;WILKES, M | Filing | | 04/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF NON-SERVICE | Filing | | 04/12/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 04/09/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF NON-SERVICE | Filing | | 04/08/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 04/01/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20100322 9980 MAILED FIRST CLASS | Order | | 04/01/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20100322 9990 MAILED FIRST CLASS | Order | | 04/01/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT SCOTT FERGUSON TO PLNTFFS' 3RD;ADAMS, C | Filing | | 03/31/2010-00:00 | 05/03/2011-00:00 | |
| | SUPPLEMENTAL ANSWER OF DEFNT FUGLEBERG KOCH;JOWERS, M | Filing | | 03/31/2010-00:00 | 05/03/2011-00:00 | |
| | SUMMONS AS TO 3RD PARTY COMPLAINT & CERT/SERV | Filing | | 03/31/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT FUGLEBERG KOCH ARCHITECT INC TO;JOWERS, M | Filing | | 03/30/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT ALL-SOUTH VINYL PRODUCTS INC TO;JONES, M | Filing | | 03/29/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT LOS CAMPOS INC TO THE 4TH AMENDED | Filing | | 03/29/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT GENERAL ALUMINUM COMPANY TO 4TH;COBB, D | Filing | | 03/24/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE (2) & PROOF OF SERVICE | Filing | | 03/24/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPRO 20100312 9970 MAILED FIRST CLASS | Order | | 03/23/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT NORTH FLORIDA FRAMING INC TO;STONEY, R | Filing | | 03/23/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT MARQUEZ CONSTRUCTION INC TO;STONEY, R | Filing | | 03/23/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT BEST MASONRY & TOOL SUPPLY L.P AS;OSBORN, J | Filing | | 03/23/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 03/22/2010-00:00 | 05/03/2011-00:00 | |
| | MOTION TO DISMISS FEDERAL INSURANCE COMPANY'S;MAHON, C | Motion | | 03/22/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR ADMISSION PRO HAC VICE | Order | | 03/22/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR ADMISSION PRO HAC VICE | Order | | 03/22/2010-00:00 | 05/03/2011-00:00 | |
| | VERIFIED APPLICATION FOR ADMISSION PRO HAC VICE | Filing | | 03/18/2010-00:00 | 05/03/2011-00:00 | |
| | VERIFIED APPLICATION FOR ADMISSION PRO HAC VICE | Filing | | 03/18/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPRO 20100310 9990 MAILED FIRST CLASS | Order | | 03/16/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPRO 20100310 9990 MAILED FIRST CLASS | Order | | 03/16/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT JOHNSON COMPANIES INC D/B/A;BLACKBURN, C | Filing | | 03/15/2010-00:00 | 05/03/2011-00:00 | |
| | 4TH AMENDED SUMMONS & 4TH AMENDED COMPLAINT | Filing | | 03/15/2010-00:00 | 05/03/2011-00:00 | |
| | LETTER FROM SUPREME CRT-CERTIFY THAT THE | Filing | | 03/12/2010-00:00 | 05/03/2011-00:00 | |

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| | LETTER FROM SUPREME CRT-CERTIFY THAT THE OFFICE | Filing | | 03/12/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF PROTECTION & CERT/SERV | Order | | 03/12/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT ALL-SOUTH VINYL PRODUCTS TO;CANNON, K | Filing | | 03/11/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT CHRIS COBBS TO PLNTFFS' COMPLAINT;ADAMS, C | Filing | | 03/10/2010-00:00 | 05/03/2011-00:00 | |
| | ORDER OF PROTECTION | Order | | 03/10/2010-00:00 | 05/03/2011-00:00 | |
| | LOS CAMPOS INC'S ANSWER TO FEDERAL INS CO'S | Filing | | 03/04/2010-00:00 | 05/03/2011-00:00 | |
| | MOTION TO DISMISS FEDERAL INSURANCE COMPANY'S;STUBBS, S (15) | Filing | | 03/01/2010-00:00 | 05/03/2011-00:00 | |
| | 3RD PARTY AMENDED SUMMONS & 3RD PARTY AMENDED | Filing | | 03/01/2010-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT NORTH FLORIDA FRAMING INC TO | Filing | | 02/25/2010-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT MARQUEZ CONSTRUCTION INC TO | Filing | | 02/25/2010-00:00 | 05/03/2011-00:00 | |
| | STIPULATION OF DISMISSAL W/OUT PREJ AS TO J T | Filing | | 02/22/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING & STUCCO;MAHON, C | Filing | | 02/22/2010-00:00 | 05/03/2011-00:00 | |
| | SUMMONS AS TO 3RD PARTY COMPLAINT & CERT/SERV | Filing | | 02/19/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER AND CROSS-CLAIMS OF DEFNT FEDERAL INSURANCE | Filing | | 02/19/2010-00:00 | 05/03/2011-00:00 | |
| | AMENDED ANSWER OF DEFNT PROFESSIONAL PLASTERING;MAHON, C | Filing | | 02/19/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNTS SUMMIT CONTRACTORS INC & SUMMIT;SMITH, J | Filing | | 02/12/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNTS BEST MASONRY & TOOL SUPPLY LP AS;OSBORN, J | Filing | | 02/08/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 02/05/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING AND STUCCO;MAHON, C | Filing | | 02/05/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT H2L CONSULTING ENGINEERS TO;CHEEK, E | Filing | | 02/04/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 02/04/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT GENERAL ALUMINUM COMPANY TO 3RD;COBB, D | Filing | | 02/02/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT FUGLEBERG KOCH ARCHITECTS INC TO;JOWERS, M | Filing | | 01/28/2010-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT & MEMO IN SUPPORT OF DISMISSING PLNTFFS' | Motion | | 01/28/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT PROFESSIONAL PLASTERING & STUCCO;MAHON, C | Filing | | 01/21/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF LOS CAMPOS INC TO 3RD AMENDED CMPLNT | Filing | | 01/20/2010-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 01/19/2010-00:00 | 05/03/2011-00:00 | |
| | AMENDED ANSWER OF DEFNT J.R. HOBBS COMPANY ATLANTA;STUBBS, S | Filing | | 01/19/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT JOHNSON COMPANIES INC D/B/A;BLACKBURN, C | Filing | | 01/15/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT J.R HOBBS COMPANY-ATLANTA LLC TO;STUBBS, S | Filing | | 01/11/2010-00:00 | 05/03/2011-00:00 | |
| | CERTIFICATE OF SERVICE | Filing | | 01/11/2010-00:00 | 05/03/2011-00:00 | |
| | MOTION TO DISMISS & CERT/MAIL;HALIO, A (15) | Motion | | 01/11/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT NORTH FLORIDA FRAMING INC TO;WAGNER, B | Filing | | 01/08/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT MARQUEZ CONSTRUCTION INC TO;WAGNER, B | Filing | | 01/08/2010-00:00 | 05/03/2011-00:00 | |

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| | AMENDED ANSWER OF DEFNT MARQUEZ CONSTRUCTION INC;WAGNER, B | Filing | | 01/07/2010-00:00 | 05/03/2011-00:00 | |
| | 3RD AMENDED SUMMONS & 3RD AMENDED COMPLAINT | Filing | | 01/07/2010-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT LOS CAMPOS INC TO SUMMIT'S CROSS- | Filing | | 01/06/2010-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:OMWTD 20091221 9990 MAILED FIRST CLASS | Order | | 12/30/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF LOS CAMPO INC & CERT/SERV;HOLLINGSWORTH, D | Filing | | 12/21/2009-00:00 | 05/03/2011-00:00 | |
| | ORDER FOR MULTI WEEK TRIAL DOCKET & CASE | Order | | 12/21/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 12/14/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORPRO 20091120 9990 MAILED FIRST CLASS | Order | | 11/25/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER & CROSS-CLAIMS OF DEFNT BEST MASONRY & TOOL;OSBORN, J | Filing | | 11/23/2009-00:00 | 05/03/2011-00:00 | |
| | ORDER OF PROTECTION | Order | | 11/20/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF PROCESS SERVER | Filing | | 10/27/2009-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO AMEND COMPLAINT & CERT/SERV;SEGUI, P | Motion | | 10/16/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 10/08/2009-00:00 | 05/03/2011-00:00 | |
| | DEFNT JOHNSON COMPANIES INC D/B/A JOHNSON;BLACKBURN, C | Filing | | 10/05/2009-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT MARQUEZ CONSTRUCTION INC TO PLNTFFS | Filing | | 09/24/2009-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT MARQUEZ CONSTRUCTION INC TO | Filing | | 09/24/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT JOHNSON COMPANIES D/B/A JOHNSON;BLACKBURN, C | Filing | | 09/21/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT GENERAL ALUMINUM TO 2ND AMENDED;COBB, D | Filing | | 08/31/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT GENERAL ALUMINUM COMPANY TO SUMMIT;COBB, D | Filing | | 08/31/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 08/25/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT NORTH FLORIDA FRAMING INC TO;STONEY, R | Filing | | 08/17/2009-00:00 | 05/03/2011-00:00 | |
| | REPLY OF DEFNT NORTH FLORIDA FRAMING INC TO | Filing | | 08/17/2009-00:00 | 05/03/2011-00:00 | |
| | AMENDED ANSWER OF DEFNT J.R HOBBS COMPANY-ATLANTA;STUBBS, S | Filing | | 08/17/2009-00:00 | 05/03/2011-00:00 | |
| | NOTICE OF APPEARANCE OF ATTY A ROTHSCHILD FOR | Filing | | 08/06/2009-00:00 | 05/03/2011-00:00 | |
| | REPLY & CROSS-CLAIM OF J R HOBBS COMPANY-ATLANTA | Filing | | 08/03/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT SUMMIT CONTRACTORS GROUP INC TO;SMITH, J | Filing | | 08/03/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF J R HOBBS COMPANY - ATLANTA LLC TO 2ND;STUBBS, S | Filing | | 07/24/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 07/20/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090714 9950 MAILED FIRST CLASS | Order | | 07/17/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090714 9960 MAILED FIRST CLASS | Order | | 07/17/2009-00:00 | 05/03/2011-00:00 | |
| | LETTER FR/ ATTY L ELMORE TO ATTY LEATH IN RE: 30 | Filing | | 07/16/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090709 9980 MAILED FIRST CLASS | Order | | 07/15/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 07/14/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT SUMMIT CONTRACTORS GROUP INC TO;SMITH, J | Filing | | 07/14/2009-00:00 | 05/03/2011-00:00 | |
| | | Order | | | | |

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| | CONSENT ORDER TO WITHDRAW ATTYS MARVIN D INFINGER, | | | 07/14/2009-00:00 | 05/03/2011-00:00 | |
| | ORDER-CASE IS TRANSFERRED TO THE MULTI-WEEK ROSTER | Order | | 07/14/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 07/10/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 07/09/2009-00:00 | 05/03/2011-00:00 | |
| | CONSENT ORDER FOR SUBSTITUTION OF PARTY DEFNT | Order | | 07/09/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT H2L CONSULTING ENGINEERS TO;CHEEK, E | Filing | | 07/01/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT FUGLEBERG KOCH ARCHITECTS INC TO;JOWERS, M | Filing | | 06/29/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE (5) | Filing | | 06/26/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 06/24/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE (2) | Filing | | 06/19/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT TWELVE OAK AT FENWICK PLANTATION;HALIO, A | Filing | | 06/12/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090602 9990 MAILED FIRST CLASS | Order | | 06/10/2009-00:00 | 05/03/2011-00:00 | |
| | 2ND AMENDED SUMMONS & 2ND AMENDED COMPLAINT | Filing | | 06/09/2009-00:00 | 05/03/2011-00:00 | |
| | CONSENT ORDER ALLOWING PLTFF LEAVE TO AMEND CMPLT | Order | | 06/02/2009-00:00 | 05/03/2011-00:00 | |
| | MOTION HEARING | Filing | | 04/28/2009-10:00 | 05/03/2011-10:00 | |
| | FORM4 IN RE:ORDSC 20090415 9990 MAILED FIRST CLASS | Order | | 04/23/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF MYLES I GLICK AIA | Filing | | 04/20/2009-00:00 | 05/03/2011-00:00 | |
| | SCHEDULING ORDER | Order | | 04/15/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090403 9990 MAILED FIRST CLASS | Order | | 04/09/2009-00:00 | 05/03/2011-00:00 | |
| | ORDER OF PROTECTION | Order | | 04/03/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT TWELVE OAKS AT FENWICK PLANTATION;HALIO, A | Filing | | 02/26/2009-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20090205 9980 MAILED FIRST CLASS | Order | | 02/12/2009-00:00 | 05/03/2011-00:00 | |
| | ORDER VACATING ORDER OF DEFAULT AS TO | Order | | 02/05/2009-00:00 | 05/03/2011-00:00 | |
| | EXCLUSION REQUEST FORM (2) | Filing | | 01/21/2009-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF JOHN T CHAKERIS | Filing | | 01/21/2009-00:00 | 05/03/2011-00:00 | |
| | LETTER FR/ ATTY LEATH IN RE: LIFTING STAY | Filing | | 01/15/2009-00:00 | 05/03/2011-00:00 | |
| | LETTER FR/ ATTY L APPLEGATE IN RE: DEFNTS FENWICK | Filing | | 01/14/2009-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF PROFESSIONAL PLASTERING & STUCCO INC;KENDALL, E | Filing | | 01/04/2009-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO SET ASIDE ENTRY OF DEFAULT & ORDER OF | Motion | | 12/30/2008-00:00 | 12/30/2008-00:00 | |
| | AFFIDAVIT OF STEPHEN H PECK & CERT/SERV | Filing | | 12/30/2008-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDEF 20081210 9990 MAILED FIRST CLASS | Order | | 12/17/2008-00:00 | 05/03/2011-00:00 | |
| | ORDER OF DEFAULT AS TO TWELVE OAKS AT FENWICK | Order | | 12/10/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF DEFAULT | Filing | | 12/08/2008-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT H2L CONSULTING ENGINEERS TO;WILKES, M | Filing | | 12/03/2008-00:00 | 05/03/2011-00:00 | |
| | NOTICE OF CLASS ACTION | Filing | | 12/02/2008-00:00 | 05/03/2011-00:00 | |
| | | Filing | | | | |

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| | ANSWER OF DEFNT SUMMIT CONTRACTORS GROUP TO;SMITH, J | | | 11/26/2008-00:00 | 05/03/2011-00:00 | |
| | MOTION TO DISMISS BY DEFNT FUGLEBERG KOCH;JOWERS, M (15) | Motion | | 11/24/2008-00:00 | 11/24/2008-00:00 | |
| | ANSWER OF DEFNT FUGLEBERG KOCH ARCHITECTS TO;JOWERS, M | Filing | | 11/24/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE | Filing | | 11/12/2008-00:00 | 05/03/2011-00:00 | |
| | ANSWER OF DEFNT FENWICK PLANTATION TARRAGON TO;SMITH, B | Filing | | 11/10/2008-00:00 | 05/03/2011-00:00 | |
| | MOTION HEARING | Filing | | 11/04/2008-16:00 | 05/03/2011-16:00 | |
| | LETTER FR/ ATTY WILKES TO ATTY LEATH | Filing | | 11/03/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SERVICE (2) | Filing | | 10/31/2008-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO ALTER & AMEND THE ORDER OF;INFINGER, M (30 MIN) | Motion | | 10/30/2008-00:00 | 10/30/2008-00:00 | |
| | FORM4 IN RE:ORDER 20081023 9980 MAILED FIRST CLASS | Order | | 10/29/2008-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20081020 9980 MAILED FIRST CLASS | Order | | 10/28/2008-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20081020 9990 MAILED FIRST CLASS | Order | | 10/28/2008-00:00 | 05/03/2011-00:00 | |
| | NOTICE OF APPEAL, APPEALING ORDER FR/ 10/23/08 | Filing | | 10/27/2008-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT FOR TEMPORARY INJUNCTION & CERT/SERV | Motion | | 10/23/2008-00:00 | 10/23/2008-00:00 | |
| | ORDER DENYING MOTION FOR TEMPORARY INJUNCTION | Order | | 10/23/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF JAMES R HELMAN | Filing | | 10/23/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF ROBERT G SISNROY P.E | Filing | | 10/22/2008-00:00 | 05/03/2011-00:00 | |
| | AMENDED SUMMONS & AMENDED COMPLAINT | Filing | | 10/22/2008-00:00 | 05/03/2011-00:00 | |
| | ORDER CERTIFYING CLASS | Order | | 10/20/2008-00:00 | 05/03/2011-00:00 | |
| | ORDER OF CONSOLIDATION & AMENDMENT-CASE 08-1758 | Order | | 10/20/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF SCOTT FERGERSON & ROBERT J BURRIDGE | Filing | | 09/08/2008-00:00 | 05/03/2011-00:00 | |
| | PLNTFFS' MEMO IN OPPOSITION TO DEFNTS' MOTION TO | Filing | | 09/04/2008-00:00 | 05/03/2011-00:00 | |
| | MEMO IN SUPPORT OF MOTION TO DISMISS & CRT/SRV | Filing | | 08/25/2008-00:00 | 05/03/2011-00:00 | |
| | MEMO IN SUPPORT OF MOTION FOR CLASS CERTIFICATION | Filing | | 08/22/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF MARK TESENIAR | Filing | | 08/22/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF ROBERT SISNROY | Filing | | 08/21/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF JERRY WATSON | Filing | | 08/21/2008-00:00 | 05/03/2011-00:00 | |
| | MOTION TO CERTIFY A CLASS & APPROVE PLTFFS AS;SEGUI, P (45) | Motion | | 08/15/2008-00:00 | 08/15/2008-00:00 | |
| | AFFIDAVIT OF NAN TESENIAR | Filing | | 08/15/2008-00:00 | 05/03/2011-00:00 | |
| | AFFIDAVIT OF MARK TESENIAR | Filing | | 08/15/2008-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20080512 9990 MAILED FIRST CLASS | Order | | 05/15/2008-00:00 | 05/03/2011-00:00 | |
| | SCHEDULING ORDER | Order | | 05/12/2008-00:00 | 05/03/2011-00:00 | |
| | FORM4 IN RE:ORDER 20080410 9990 MAILED FIRST CLASS | Order | | 04/12/2008-00:00 | 05/03/2011-00:00 | |
| | ORDER OF SUBSTITUTION OF COUNSEL-MARVIN INFINGER | Order | | 04/10/2008-00:00 | 05/03/2011-00:00 | |
| | PROOF OF SERVICE | Filing | | 04/07/2008-00:00 | 05/03/2011-00:00 | |
| | NOT/MOT TO DISMISS OR ALTERNATIVELY STAY;TIBBALS, J (30) | Motion | | 03/10/2008-00:00 | 03/10/2008-00:00 | |

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|---|---|---|---|---|---|---|
| | AFFIDAVIT OF SERVICE (3) | Filing | | 01/29/2008-00:00 | 05/03/2011-00:00 | |
| | RECEIPT #08-189 | Filing | | 01/04/2008-00:00 | 05/03/2011-00:00 | |
| | SUMMONS & COMPLAINT | Filing | | 01/04/2008-00:00 | 05/03/2011-00:00 | |
| Tesenlar, Mark F | Civil Converted Cost | Filing | | 01/04/2008-00:00 | 05/03/2011-00:00 | |

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**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

---

CASE NO. 2008-CP-10-0049

Appellate Case No. 2016-000185

---

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, A South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors,, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

---

**CERTIFICATE OF COUNSEL PURSUANT TO RULE 210(g) SCRAP**

---

The undersigned certifies that the Record on Appeal contains all material proposed to be

included by any of the parties and not any other material.

ANDREW K. EPTING, JR., LLC

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Dated this 6 day of January, 2017
Charleston, South Carolina

RECEIVED
JAN 10 2017
SC Court of Appeals

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By _____
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***Attorneys for Appellant/Intervenor***

Dated this 6 day of January, 2017
Charleston, South Carolina

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

---

**PROOF OF SERVICE**

---

I certify that I have served the Record on Appeal on all counsel of record for Respondents by depositing a copy in the United States Mail, Postage prepaid, on January 9, 2017, addressed to as follows:

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**THE STATE OF SOUTH CAROLINA**
In The Court of Appeals

RECEIVED
JAN 31 2017
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**APPEAL FROM CHARLESTON COUNTY**
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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND THE JUDGMENT AGAINST MT. HAWLEY'S INSURED VOID UNDER SCRCP 60(b)(4) & (5), WHERE: THE JUDGMENT WAS ENTERED AGAINST NORTH FLORIDA FRAMING AFTER IT WAS ALREADY DISMISSED WITH PREJUDICE; WHERE THE DEFAULT ORDER, DEFAULT JUDGMENT, AND DENIAL OF MT. HAWLEY'S MOTIONS WERE ENTERED WITHOUT JURISDICTION; WHERE RESPONDENTS WERE JUDICIALLY ESTOPPED FROM SEEKING THE DEFAULT JUDGMENT; AND WHERE RESPONDENTS WITHELD MATERIAL INFORMATION FROM THE MASTER-IN-EQUITY?

2. DID THE TRIAL COURT ERR IN DENYING MT. HAWLEY'S MOTION TO INTERVENE, WHERE RESPONDENTS PROCURED A DEFAULT JUDGMENT AGAINST MT. HAWLEY'S INSURED (NORTH FLORIDA FRAMING) TWO YEARS AFTER ENDING THEIR CLAIMS AGAINST THE INSURED WITH PREJUDICE?

## STATEMENT OF THE CASE

This controversy arises from a construction lawsuit brought by Mark F. Teseniar, Nan M. Teseniar, and Twelve Oaks at Fenwick Property Owners Association, Inc. (collectively "Respondents") against multiple defendants, including North Florida Framing, Inc. ("North Florida Framing"), regarding alleged construction defects at the Twelve Oaks at Fenwick Plantation project located on John's Island, South Carolina.[1] On June 9, 2009, Respondents filed their Second Amended Complaint, naming North Florida Framing as an additional defendant.[2] North Florida Framing's insurance carriers assumed its defense and hired counsel to represent North Florida Framing in this case; its defense counsel answered the Second Amended Complaint on August 17, 2009.[3]

---

[1] Mark and Nan Teseniar originally filed this action on January 4, 2008. Shortly thereafter, Twelve Oaks at Fenwick Property Owners Association, Inc. filed a separate suit on March 28, 2008. The cases were consolidated and certified as a class action matter on October 20, 2008.

[2] Respondents served North Florida Framing with the complaint on June 17, 2009.

[3] North Florida Framing's responsive pleadings have never been withdrawn.

On September 9, 2010, then-Chief Judge for Administrative Purposes in the 9th Circuit Court of Common Pleas, Judge Markley Dennis ("Judge Dennis"), designated this case as complex and assigned exclusive jurisdiction of the case to Judge Roger Young ("Judge Young"). Whether proper or not, as at this time Judge Dennis was still the Chief Administrative Judge, Judge Young then referred solely the date certain trial to begin on May 9, 2011 to Judge Kristi Harrington ("Judge Harrington").

Prior to trial, Respondents drafted a proposed settlement agreement with North Florida Framing. (The settlement extinguished all of North Florida Framing's liability and assigned *all of its rights and claims* in the case to Respondents. As a result, neither North Florida Framing nor its counsel appeared for trial on May 9, 2011. However, on the morning of trial, *counsel for Respondents* presented Judge Harrington with a Consent Order Relieving Counsel *for North Florida Framing* ("Consent Order Relieving Counsel") that left North Florida Framing without counsel to represent it. Respondents, after moving *on behalf of North Florida Framing* to relieve its counsel, stepped back into their adversarial shoes and asked the court to place North Florida Framing in default for not appearing at trial. Although Professional Plastering and Stucco, Inc. ("Professional Plastering"), the only defendant actually proceeding to trial against Respondents, objected to the proposed default, Respondents' counsel assured the court that North Florida Framing no longer had any interest in the litigation. Thereafter, Judge Harrington granted Respondents' requests and signed the Consent Order Relieving Counsel.

After a two-day trial in which Respondents obtained a $7,723,225.00 verdict against Professional Plastering, Respondents filed a motion asking the trial court to preliminarily approve its final settlement with North Florida Framing. The court issued an order preliminarily approving the settlement on June 3, 2011 and entered a final order approving the settlement on

June 10, 2011. The final order directed Respondents to execute general releases or stipulations ending this case and all claims against North Florida Framing with prejudice.[4] Despite the dismissal with prejudice, and three months after representing to the court that Respondents had no interest against North Florida Framing, Respondents presented the court with an Order of Default against North Florida Framing. The order was signed by the court and subsequently filed on August 9, 2011.

Two years later, with no notice to Mt. Hawley, and defective notice as to North Florida Framing, a damages hearing was held on May 14, 2013 in which Respondents' counsel asked the Master in Equity for a $15,748,225.56 joint and several judgment against North Florida Framing.[5] Respondents failed to disclose material facts to the Master in Equity at that hearing. However, relying on the representations of Respondents' counsel, the Master in Equity issued a $15,748,225.56 joint and several default judgment against North Florida Framing.

On May 26, 2015, more than two years after procuring the default judgment against North Florida Framing, Respondents filed a judgment creditor suit against Mt. Hawley. Prior to being served with this suit,[6] Mt. Hawley had no notice of a default order, default hearing, or default judgment against North Florida Framing. On July 28, 2015, while final approval of the settlement with Professional Plastering was still pending, and this case quite active, Mt. Hawley moved to intervene and for relief from judgments in this case.

Mt. Hawley argued its motions to intervene and to set aside the judgment as void on January 12, and January 14, 2016. On January 19, 2016, a Form 4 judgment denying Mt.

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[4] This order still stands and has not been modified in any way.

[5] This $15,748,225.56 figure represented the total estimated damages attributable to every defendant in this case.

[6] Respondents served the South Carolina Department of Insurance on June 2, 2015, who then mailed process to Mt. Hawley. Respondents filed the acceptance of service on July 2, 2015.

Hawley's motions was filed. Only ten days after its motions were denied, on January 29, 2016, Mt. Hawley appealed the denials to this Court. Before Mt. Hawley's initial brief was due, Respondents filed a motion to dismiss Mt. Hawley's appeal on May 4, 2016, arguing that the case had already ended before Mt. Hawley filed its intervention and SCRCP 60(b)(4) & (5) relief motions—despite the fact that Respondents were still actively seeking final approval of a settlement agreement with Professional Plastering at that time. This Court denied Respondents motion on August 1, 2016, allowing this appeal to proceed.

## FACTS

### I. BACKGROUND AND PARTIES

Respondents represent the interests of the Twelve Oaks at Fenwick Property Owners Association and the individual homeowners of the units at Twelve Oaks at Fenwick Plantation. Respondents filed this action in 2008 against numerous defendants alleging design and construction defects in the buildings at Fenwick Plantation. (*See* Respondents' Class Action Complaint, R. p. 44). North Florida Framing, named as a defendant in 2009, was a subcontractor for the project who contracted to help frame the buildings. (*See* North Florida Framing's Trial Brief at 4(1), R. p. 98).

At various times alleged in the complaints, North Florida Framing obtained insurance policies from multiple carriers. When Mt. Hawley was tendered this claim, it asserted a reservation of rights setting forth its coverage defenses. Other carriers retained Barnwell Whaley Patterson & Helms to handle North Florida Framing's defense. North Florida Framing's counsel continued to defend North Florida Framing until it settled out. (*See, e.g.*, North Florida Framing's May 2, 2011 Motion to Bifurcate Trial, R. p. 102; E-mail Settlement, R. p. 107).

### II. DESIGNATION AS A COMPLEX CASE

On September 9, 2010, Judge Dennis, then-Chief Judge for Administrative Purposes, "ORDERED that this case be designated as complex and that the trial of the case take place at a time to be determined." (Complex Case Designation Order, R. p. 92). Furthermore, Judge Dennis "ORDERED that this case be assigned to the Honorable Roger Young to hear and handle all pre-trial motions and other matters pertaining to this case." (*Id.*). Thereafter, and perhaps without authority to do so as he was not the Chief Administrative Judge, on November 18, 2010, Judge Young signed an order assigning this case to Judge Harrington for one limited purpose—"a date certain trial to begin on Monday, May 9, 2011." (Trial Assignment Order, R. p. 94). Despite this limited grant of jurisdiction, Respondents made concerted efforts to have Judge Harrington hear every aspect of this case, up to and including Mt. Hawley's motions to intervene and for relief from judgments. In almost every document presented to the court, Respondents inserted the following provision stating that she retains jurisdiction. (*See e.g.*, Final Order Approving Class Action Partial Settlement, R. p. 214, ¶6(d) ("This Court shall retain jurisdiction of this matter until it is concluded."); Order Preliminarily Approving Class Action Partial Settlement, R. p. 199, ¶6 (same)).

## III. THE PROPOSED PRE-TRIAL SETTLEMENTS

On August 5, 2010, North Florida Framing filed a Third Party Complaint against its subcontractor, Nava Guzman Construction, Inc. ("Nava"), asserting several causes of action, including a claim for full indemnity in the case. (North Florida Framing's Third Party Complaint, R. pp. 84–85). Respondents entered into many pre-trial settlement agreements, leaving only a few parties remaining in the time leading up to the trial, including Nava and North Florida Framing. Although Respondents had asserted no claims against Nava, they eventually entered into a settlement agreement prior to trial with the third party defendant wherein Nava paid

Respondents $137,500 in exchange for Respondents agreeing to *defend and indemnify Nava from any and all claims made by North Florida Framing against them.* (Jury Trial – Volume 1 Transcript, R. pp. 116-17, lines 25–10); *see also* Joint Stipulation of Dismissal in *Teseniar v. Atlantic Cas. Ins. Co.*, Civil Action No.: 2:11-cv-00860-RMG, (D.S.C. 2011). This fact became important in light of the subsequent settlement proposal with North Florida Framing and Respondents the day of trial.

On May 6, 2011, three days before trial, counsel for North Florida Framing and Respondents drafted a preliminary settlement agreement via e-mail. (*See* E-mail Settlement, R. p. 107). Under "the proposed settlement: [Respondents] ha[d] settled with Crum & Forster and Scottsdale [(two of North Florida Framing's insurers)] ***on behalf of North Florida Framing***" for $400,000 and "an assignment of those *rights and claims belonging to [North Florida Framing]* . . . ***against all other parties***." (*Id.*, ¶3) (emphasis added). In exchange for the assignment of *every right North Florida Framing had in the case*, including, but not limited to the right to enforce its indemnity claim against Nava, Respondents covenanted "not to execute" against North Florida Framing. (*See id.* at ¶2). Respondents further agreed that they "*will* satisfy and *retire any outstanding judgment(s) . . . and shall file a Stipulation of Dismissal with Prejudice* in favor of [North Florida Framing]" after completing "their collection of funds *from non-settling parties* and carriers, to whatever extent they may collect funds."[7] (*Id.* at ¶4) (emphasis added). Finally,

[7] It is unclear whether this was intended to be read as "non-settling parties and [their] carriers" or "non-settling parties and [non-settling] carriers." While the former phrase is logically consistent, the latter is an error of law. Respondents did not file any direct claims against insurance companies in this action. Accordingly, if Respondents settle its claims *in this case* they are settled against that party, the liability for those claims is extinguished. It cannot then pursue those *same claims against non-party insurance carriers*. Thus, a non-settling carrier is a misnomer. Respondents consistently muddled this distinction because they were attempting to adjudicate the liability of absent non-parties in hopes of limiting their defenses in any subsequent proceedings.

under the proposed settlement, Respondents "consent[ed] to counsel for [North Florida Framing] . . . withdrawing from the case." (*Id.* at ¶5). Importantly, there was no mention of notifying Mt. Hawley that Respondents had been assigned all of North Florida Framing's rights in this case or that Respondents would move to relieve North Florida Framing's counsel and place them in default to pursue a $15,748,225.56 joint and several judgment.

## IV. THE MORNING OF TRIAL: RELIEVING AN "ADVERSARY'S" COUNSEL AND MOVING FOR ITS DEFAULT

On the morning of the trial on May 9, 2011, Respondents' counsel represented to the court that it had "reached a settlement with North Florida Framing." (Jury Trial – Volume 1 Transcript, R. p. 112, lines 21–22). At this time, ***counsel for Respondents, not North Florida Framing nor its absent counsel***, presented to the court the Consent Order ***Relieving Counsel for North Florida Framing***, that purportedly allowed North Florida Framing's counsel to withdraw, *(Id.),* as the liability of North Florida Framing had been extinguished by their settlement. (E-mail Settlement, R. p. 107). Although no motion to relieve counsel had ever been filed by North Florida Framing or Respondents prior to this time, and although neither North Florida Framing nor its counsel was present at the trial, the Consent Order Relieving Counsel stated that "**On motion of North Florida Framing, Inc.** . . . it is hereby ordered that Barnwell Whaley Patterson and Helms, LLC and attorneys Randell C. Stoney, Jr. and Barbara J. Wagner are relieved as counsel for North Florida Framing, Inc." (Consent Order Relieving Counsel, R. p. 186). The Consent Order Relieving Counsel was *neither signed by North Florida Framing nor its counsel.* Instead, only Respondents' counsel signed the order and one of Respondents' attorneys, Justin Lucey, signed for North Florida Framing's counsel. (*Id.*).

Implicit in these actions is that Respondents were attempting to exercise North Florida Framing's rights in this case—rights that were purportedly subject to assignment in the proposed

e-mail settlement—by acting on behalf of their former adversary and motioning to relieve its counsel. The trial transcript shows that despite the fact that neither North Florida Framing nor its counsel were present to make the motion, and despite the fact that neither North Florida Framing nor its counsel actually signed the Consent Order Relieving Counsel, Judge Harrington signed the order on the morning of trial. (*Id.*).

Immediately after presenting the Consent Order Relieving Counsel to the court, Respondents' counsel, Attorney Justin Lucey ("Mr. Lucey"), asked the court to place North Florida Framing in default, reasoning that no one showed up to represent its interests, including its counsel which Respondents had just relieved:

> MR. LUCEY: With that, ma'am, North Florida Framing is actually still in the case but they have a covenant. They -- it is the call of the case. They're not here. We ask the Court to place them in default. We have one other defendant that's already in default and there's a default hearing set in front of Judge Scarborough in several weeks' time. We would ask that North Florida Framing be referred to that same default hearing for a final resolution.[8]

(Jury Trial – Volume 1 Transcript, R. p. 113, lines 12–20). In response, Professional Plastering, the only co-defendant left in the case, sought to prevent Respondents from placing North Florida Framing in default. Specifically, Professional Plastering's counsel, Attorneys J. J. Anderson ("Mr. Anderson") and Christy Mahon ("Ms. Mahon"),[9] objected on the grounds that Respondents should not be allowed to assert that North Florida Framing was still a part of the

[8] Accordingly, it appears that once Respondents exercised North Florida Framing's assigned rights by motioning on its behalf to relieve its counsel, Respondents then stepped back into their own shoes and declined to exercise both North Florida Framing's assigned *right to defend itself* in this case and its assigned *right to pursue its indemnity claim against Nava—a claim against which Respondents had agreed to defend and indemnify Nava.*

[9] The trial transcript incorrectly spelled Ms. Mahon's name as "Christi Mann" or "Ms. Mann."

trial, or to place them in default, because Respondents had already reached a settlement with North Florida Framing:

> THE COURT: All right. Does anyone-- I'll be happy to hear -- have any position? Mr. Anderson?
>
> MR. ANDERSON: As I understand it, he's indicating that North Florida Framing is still part of this trial, although they have-- he's trying to place them in default; is that correct? We would --
>
> THE COURT: Mr. Lucey?
>
> MR. ANDERSON: Simply put, we would object to that. Either -- we believe that they -- ***if they've got a settlement, they've got a settlement.***

(*Id.*, R. pp. 113, line 21–p. 114, line 6) (emphasis added). Importantly, Professional Plastering also cautioned that Respondents were likely trying to manufacture a joint and several liability verdict against North Florida Framing:

> MS. MA[HO]N: Your Honor, I believe -- it comes down to this. The nuts and bolts of it is whether what -- what they're doing is, I assume, would be to ***keep them in as name only so that they can have a joint and several liability verdict***[.][10]

(*Id.*, R. p. 114, lines 16–20) (emphasis added). Respondents' counsel denied this allegation and assured the court that Respondents no longer had any interest against North Florida Framing and that its liability was fully, finally, and completely settled:

> MR. LUCEY: We're not seeking to keep them in this trial. We're asking for our default and we're asking that they be referred to the default hearing that's already been scheduled for the other default defendants, which is the developer and the developer entities.
>
> MS. MA[HO]N: Then no objection, Your Honor. ***As long as they are not trying to keep them in for a joint and several liability in this case, we have no objection*** to that at all.
> . . .

[10] Professional Plastering was correct.

> MR. LUCEY: In the present context, ***North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them*** in this proceeding. And ***the two active carriers that were defending have agreed to pay us a substantial sum of money to settle the current liability***[.][11]

(*Id.*, R. p. 115, lines 13–21, p. 116, lines 7–13) (emphasis added). Notwithstanding the conflicting positions on the record, Judge Harrington granted Respondents' requests and signed the Consent Order Relieving Counsel (and every other order requested by Respondents, *see* Facts § II *supra*).

## V. PROFESSIONAL PLASTERING'S TRIAL AND JUDGMENT

Having orchestrated North Florida Framing out of the case, Respondents proceeded to trial against the lone remaining defendant, Professional Plastering.[12] In Respondents' opening statements, Attorney Jeff Leath ("Mr. Leath") repeatedly represented in court that the only liability remaining as of the date of the trial was that of the stucco applicator, that every other party and their attendant liabilities had been satisfied, and that the settling parties had paid their "fair share":

> [W]hen we started this case it was much, much larger than just having this stucco issue. We had many other issues and many other defendants. They had roofing problems, they had framing problems, windows, and mechanical problems, and happily we've been able to resolve those problems with these other defendants. *And that's why they're not here right now.*[13]

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[11] Respondents have not argued that there was any "future" liability incurred in this case, nor could there have been any "future" liability. In other words, all of the liability was "current" and therefore all of the liability was settled.

[12] In Professional Plastering's later appeal, this court also noted that "[w]hile the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, *settled with Respondents. Thus, the trial focused solely on the exterior stucco installed by Professional and the resulting damage. See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 88, 754 S.E.2d 267, 269 (Ct. App. 2014).

[13] Admissions in an opening statement qualify as judicial admissions, and, in so admitting, a litigant may give up its right to argue inconsistently with its opening statement. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 678 (U.S. 2010) (quoting

> You'll hear that we have an overall estimate . . . for the total repairs to this project of about $15,718,000.
>
> The other parties have already resolved this for approximately *eight million, their part of it.* What's left, that has not been resolved by the entity largely, if not wholly, responsible for these stucco problems which is the bulk of the building envelope with these associated damages – is about 7.2 million dollars.
>
> . . .
>
> [T]he second question you will answer is how much will it cost to remedy those problems to which Professional Plastering contributed. And we believe it will be the difference between the estimate we will prove to you of the overall damages and what the other persons paid. *They paid their fair share.*

(Jury Trial – Volume 1 Transcript, R. p. 123, line 12–p. 125, line 23) (emphasis added). Later in the trial, Respondents had their expert, Robert Gallagher ("Mr. Gallagher"), testify that $8,761,443.00 of their $15.7 million dollar total damages estimate was exclusively caused by the defective stucco work of Professional Plastering:

> Q. Mr. Gallagher, did I ask you to go through your estimate and break out the items, the cost items that would ***be allocable to just the stucco repair alone -- not these other items that were included in the $15.7 Million dollars, but just the stucco issue***? Did I ask you to do that?
> A. Yes, sir.
>
> . . .
>
> Q. So ***what is your total number for just stucco-related repairs***, putting all those elements together that are necessary?
> A. ***$8,761,443 dollars***.

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*Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881)) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel [in its opening statement] is as plain as its power to act upon the evidence produced."); *Id.* at 676 (quoting *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905) ("Litigants, we have long recognized, '[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established.'"); SCRCP 41(b)-(c) (involuntary dismissal for plaintiff's failure to show right to relief on claim against a party).

(Portion of Jury Trial of May 11–13, 2011, R. p. 126, line 23–p. 127, line 5, p. 133, lines 15–18) (emphasis added). In its closing statements, Respondents' counsel, Justin Lucey, reiterated these positions:

> Everybody did wrong that was in the suit." The only difference is – huge difference, huge difference – the only difference is all the other parties have stepped up to the plate and taken responsibility for what they did wrong.
>
> . . .
>
> As I said, there's only one party left in this case. Eight million has been paid by those other participants that they want to blame for some of the problems. *And we're good with that, that eight million has been paid.* ***And we're not going to ask you for it again.***
>
> . . .
>
> We have an estimate in evidence, Plaintiff's Exhibit Number 15, the ProCon estimate, $15.7 Million. *This is an older estimate. It applied to everybody who was in the case.* You have frankly been told repeatedly this week that the plaintiffs have been paid $8 Million dollars.
>
> . . .
>
> Just to make sure that everybody was correct about the numbers, Mr. Gallagher also produced what's been admitted into evidence as Plaintiff's Exhibit 14. It itemized the ***stucco-related-only damages in this case***. It totals $8.7 Million, a million dollars more than what we have remaining on the original estimate.

(*Id.*, R. p. 136, lines 1–6 & 14–20, p. 147, line 8–p. 148, line 14, p. 148, lines 20–22) (emphasis added). Finally, Respondents' counsel, Mr. Leath, offered his last remarks, confirming these facts:

> Now, if you'll recall, the analysis done by Mr. Gallagher was that *the stucco itself, just that portion of it, repair would cost $8.7 Million.* But we're not asking for that. We're asking for less than that, and Mr. Lucey explained that.
>
> And why is that? *Because it wouldn't be fair and wouldn't be appropriate for us to ask you for more than the total repair on these buildings, which is $15,778.00 as you'll see in Mr. Gallagher's estimate.* And, yes, some of the other folks have paid some part of Professional Plastering's part.

(*Id.*, R. p. 185, lines 10–22) (emphasis added). On May 13, 2011, after a two-day jury trial, Respondents obtained a $7,723,225.00 "stucco-only" judgment against Professional Plastering. However, Professional Plastering would later appeal this judgment.

## VI. THE CLASS ACTION SETTLEMENT

On May 19, 2011, six days after receiving its favorable verdict against Professional Plastering, Respondents filed a motion and proposed order asking the trial court to preliminarily approve its settlement with North Florida Framing and other ***settled*** co-defendants. Respondents proposed order, *which they drafted*, states that "[o]n Monday, May 9, 2011, counsel indicated [to the Court] that Plaintiffs ha[d] reached a ***full, final and complete settlement*** with the following Defendants: . . . ***North Florida Framing, Inc.*** . . . (hereinafter referred to as the 'Settling Defendants'"). (Proposed Order Preliminarily Approving Partial Class Action Settlement, R. pp. 194–95) (emphasis added). The proposed order also stated that the settlement "***ends the Plaintiff's claims against the Settling Defendants***." (*Id.*, R. p. 195) (emphasis added). The court granted Respondents' motion and signed their proposed order preliminarily approving the settlement on June 3, 2011. Notice was sent to all class members.

After no class members objected, the court entered a final order approving the settlement on June 10, 2011. (Final Order Approving Class Action Partial Settlement, R. p. 207). This final order held that "Settling Defendants are . . . ***North Florida Framing, Inc.***" and that "[a]s a result of lengthy, arms-length negotiations, Plaintiffs have reached a ***full, final and complete settlement*** *with the Settling Defendants* ***in the amount of One Million Two Hundred Eighty-Seven Thousand Five Hundred and No/100 Dollars*** ($1,287,500.00)." (*Id.*, R. p. 208, n.1, p. 209) (emphasis added). Following payment of the $1,287,500 in settlement proceeds (which was paid) by the Settling Defendants, the order directed Respondents to "execute a general release(s)

as to the Settling Defendants, and/or settlement agreement(s) on behalf of the Class and an order(s) or stipulation(s) **ending this case and all claims *with prejudice against the Settling Defendants***." (*Id.*, R. p. 213–14, ¶6) (emphasis added). In other words, the class action settlement ended the case against North Florida Framing with prejudice.

## VII. A COVENANT NOT TO EXECUTE.

Although Respondents and North Florida Framing had already entered into a Court-approved dismissal with prejudice, *Respondents* then drafted and signed a "Covenant Not to Execute" on July 7, 2011. (Covenant Not to Execute, R. p. 218). The agreement stated that:

> WHEREAS, the [Respondents] have settled ***all claims against NFF's carriers***[14]. . . .
>
> . . .[Respondents] do covenant not to execute on NFF [(North Florida Framing)]'s assets except insurance policies (and related rights) issued by carriers which have not contributed to the within settlement, specifically including Mt. Hawley Insurance Co.
>
> Upon the completion of all collection activity . . . Plaintiffs *shall dismiss NFF from this suit with prejudice and satisfy any outstanding judgments against NFF and shall release and forever discharge NFF*, their officers, directors, employees, agents, heirs, personal representatives, successors and assigns, *and their insurers* and indemnitors, or and from any and all claims, demands, damages, actions, causes of action, or suits of law or in equity, of whatsoever kind or nature[.]"

(*Id.*, R. pp. 218–19) (emphasis added). It is unclear whether North Florida Framing or the court reviewed or signed this agreement, but in any event, it is void on several grounds.

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[14] Respondents never made any claims against North Florida Framing's carriers in this case, their claims were filed against North Florida Framing. This language indicates a common theme: that Respondents were attempting to litigate the liability of insurers instead of the liability relevant to their claims in this case. This is impossible "[s]ince the rights and liabilities of persons not parties cannot be adjudicated." 49 C.J.S. Judgments § 34; *See Branham v. Ford Motor Co.*, 390 S.C. 203, 238–39, 701 S.E.2d 5, 23–24 (2010) (reversing award of punitive damages award where it was based on defendant's conduct against non-parties because they were "strangers to the litigation."); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 350, 353 (2007) (same).

## VIII. THE ORDER OR DEFAULT AND THE DEFAULT JUDGMENT

On July 22, 2011, Professional Plastering filed an appeal of its stucco judgment alleging six reversible errors. Only twelve days after Professional Plastering filed its appeal, but three months after representing to the court that it had no interest against North Florida Framing, Respondents—apparently *ex parte*—presented the court with an Order of Default against North Florida Framing. (Order of Default, R. p. 233). No notice was given to North Florida Framing or Mt. Hawley of this *ex parte* correspondence. Nonetheless, the order was signed by the court and subsequently filed on August 9, 2011. (*Id.*).

Almost two years later, with no notice to Mt. Hawley, and defective notice as to North Florida Framing, a damages hearing was held on May 14, 2013 in which Respondents' counsel asked the Master in Equity for a $15,748,225.56 joint and several judgment against North Florida Framing. Respondents failed to disclose several material facts to the Master in Equity, including that: (1) they had already settled with North Florida Framing; (2) that they had motioned before the trial court to relieve North Florida Framing's counsel; (3) that they had already represented to the trial court that they had no interest against North Florida Framing and that they would not be seeking a joint and several verdict in a default proceeding; (4) that they asked the trial court to place their adversary in default immediately after making a motion on its behalf to relieve its counsel; (5) that they had already received approximately $8,025,000.00 in settlements; (6) that even though Respondents had already had the same expert testify under oath that at least $8,761,443.00 of the $15,748,225.56 was caused exclusively by Professional Plastering's stucco work, the expert's report that they provided to the Master was the initial report covering *all the damages attributable to every defendant in the case.*

Relying on the representations of Respondents' counsel, the Master in Equity issued a $15,748,225.56 joint and several default judgment against North Florida Framing. (Order Granting Default Judgment, R. p. 242).

## IX. PROFESSIONAL PLASTERING'S SUCCESSFUL APPEAL

On January 8, 2014, this Court held that Judge Harrington thrice abused her discretion. *See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. at 88, 754 S.E.2d at 269. Accordingly, this Court reversed and remanded the case against Professional Plastering for a new trial. *Id.* A request for rehearing on this Court's opinion was denied on February 20, 2014, and the Supreme Court denied certiorari on August 21, 2014. *Id.* Respondents eventually reached a preliminary settlement agreement with Professional Plastering pursuant to a March 26, 2015 mediation between the parties. (Notice of Proposed Settlement with Professional Plastering, R. p, 280). The settlement they reached was for $92,500.00; approximately $7,630,725.00 less than their initial verdict. (*Id.*).

## X. THE JUDGMENT CREDITOR SUIT, MOTIONS TO INTERVENE AND FOR RELIEF FROM JUDGMENTS, AND MT. HAWLEY'S APPEAL

On May 26, 2015, more than two years after procuring a default judgment against North Florida Framing, and only two months after settling with Professional Plastering for $92,500.00, Respondents decided it was time to file a judgment creditor suit against Mt. Hawley. (*See* Complaint in *Teseniar v. Mt. Hawley Insurance Co.*, Case No. 2015-CP-10-2994 (S.C. Comm. Pleas), R. p. 249). Prior to being served with the complaint, Mt. Hawley had no notice of a default order, default hearing, or default judgment against North Florida Framing. With limited time to prepare a strategy for protecting its interests in this complex case, on July 28, 2015, while final court approval of Respondents' settlement with Professional Plastering was still pending, Mt.

Hawley quickly moved to intervene *in this case, which was still pending as an active case on the Charleston County docket.*

A hearing on Mt. Hawley's motion was scheduled for January 12, 2016 in front of Judge Harrington. On January 12, the court commenced the hearing and then rescheduled it for another day. (*See* January 12 Motions Hearing Transcript, R. p. 5). Mt. Hawley argued the remainder of its motion on January 14, 2016. (*See* January 14 Motions Hearing Transcript, R. p. 15). On January 19, 2016, a Form 4 judgment denying Mt. Hawley's motions was filed. (Order Denying Intervention and Relief, R. p. 4). This appeal timely followed.

## ARGUMENTS

### I. STANDARD OF REVIEW

In this appeal, Mt. Hawley seeks reversal of the trial court's order denying its motion to intervene under SCRCP 24(a)(2) & (b)(2) and its motion for relief from judgments under SCRCP 60(b)(4) & (5), both heard and denied by the trial court. Reversal is necessary to ensure that Respondents cannot assert that Mt. Hawley is precluded from litigating the validity of the default judgment obtained in this case. In the suit against Mt. Hawley, Respondents have sued as a judgment creditor, claiming that Mt. Hawley is directly liable for the void judgment. Respondents claim Mt. Hawley's interests have been adjudicated in this current action in which it was not a party.

Appellants ask this Court to review the lower court's ruling denying its SCRCP 60(b)(4) & (5) motions; as to such motions, this Court has not articulated a standard of review, although most every judicial circuit, including the Fourth Circuit, uses a *de novo* review of decisions on the federal parallel of Fed. R. Civ. P. 60(b)(4).[15] *See Wendt v. Leonard*, 431 F.3d 410, 412 (4th

[15] This Court should adopt such a standard.

Cir. 2005); *Cent. Vermont 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."); *see also Vinten v. Jeantot Marine Alliances, S.A.*, 191 F. Supp. 2d 642, 649–50 & nn.12–13 (D.S.C. 2002) (collecting cases). The principle behind this is sound: "a deferential standard of review is not appropriate because if the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001). Moreover, when a ruling indicates no discretion was exercised, an error of law has occurred and reversal is required. *Roesler v. Roesler*, 396 S.C. 100, 110, 719 S.E.2d 275, 281 (Ct. App. 2011). As this Court is being asked to set aside a judgment for, inter alia, want of jurisdiction, it is an abuse of discretion[16] to fail to grant intervention so as to set aside a void judgment.

## II. THIS CASE BELOW WAS ACTIVE ON THE CHARLESTON COUNTY DOCKET AND HAD NOT ENDED.

Despite Respondents previous assertions to the contrary, the case below continued until November 6, 2015, after Mt. Hawley's motions to intervene and for relief from judgments:

(a) On May 13, 2015, the Court granted APS Enterprises' Motion to Reconsider and denied C&N Stucco & Plastering's Motion for Summary Judgment.

(b) On June 24, 2015, Respondents themselves filed a Notice of and Motion for Preliminary Approval of a Settlement of a Class Action and also requested a hearing on this motion.

[16] However, the majority of federal authorities have determined that a denial of a motion to intervene *as of right* on any ground besides timeliness must be reviewed non-deferentially for legal correctness. *See, e.g.*, *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298 (11th Cir. 2008); *Haspel & Davis Milling & Planting Co. v. Bd. Of Levee Comm'rs*, 493 F.3d 570 (5th Cir. 2007); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), *as amended* (May 13, 2003); *South Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783 (8th Cir. 2003). This Court should hold this is the law in South Carolina.

(c) On June 25, 2015, the Court issued an Order Preliminarily Approving Class Action Partial Settlement, Attorneys' Fees, Approving Settlement Notice Program, and *Setting Final Hearing.*

(d) On July 21, 2015, a returned Notice of Order Preliminarily Approving Class Action Partial Settlement for Robert David Waltz was filed with the Court.

(e) On July 27, 2015, Respondents filed the Affidavit of J. Ashley Garrett.

(f) ***On July 28, 2015, Mt. Hawley filed its Motion to Intervene & For Relief from Judgments.***

(g) On July 29, 2015, the Settlement Agreement between Respondents, Professional Plastering, and Professional Plastering's insurance carrier, National Fire and Marine Insurance Company, was filed with the Court.

(h) On August 4, 2015, the Court issued the Final Order Approving Class Action Settlement.

(i) On October 19, 2015, a returned Notice of Final Order Approving Class Action Settlement for Robert David Waltz was filed with the Court.

(j) On November 6, 2015, Respondents and Professional Plastering filed a Stipulation of Dismissal with Prejudice as to Professional Plastering and Stucco, Inc.

(Docket for 2008CP1000049, R. p. 285) (emphasis added). By reference to the docket, it is apparent from Respondents' own activity that this case continued, not even considering Mt. Hawley's motions, through November 6, 2015, when Professional Plastering was dismissed from the case. (*Id.*). Therefore, the entire case had not ended on the date Mt. Hawley filed its motions. Furthermore, because this is a case involving multiple claims against multiple parties, an order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), SCRCP. Pursuant to the plain language of the South Carolina Rules of Civil Procedure, this case was not terminated prior to

Mt. Hawley's motion, and the orders Mt. Hawley seeks to void are subject to revision even *as to North Florida Framing*, *see, e.g., Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), *reversed on other grounds* (allowing a motion to intervene in an appeal), and would remain subject to revision until the lower court denied Mt. Hawley's motion on January 19, 2016.

Further, whether Mt. Hawley's motions to intervene and for relief from judgments were timely must be analyzed in the context of the time permitted to *set aside the judgment* and not for North Florida Framing to appeal a judgment.[17]

## III. BECAUSE THE DEFAULT JUDGMENTS WERE ENTERED AGAINST A PARTY THAT HAD BEEN COMPLETELY SETTLED OUT OF THE CASE AND BECAUSE THE JUDGMENTS WERE ENTERED BY JUDGES WITHOUT PROPER JURISDICTION, THE JUDGMENTS WERE VOID AB INITIO, AND THE TRIAL COURT ERRED IN DENYING MT. HAWLEY'S MOTION FOR RELIEF FROM THESE JUDGMENTS AND ITS MOTION TO INTERVENE TO ACCOMPLISH THAT RELIEF.

### A. Mt. Hawley's Right to Intervene in This Case Is Based Upon Its Interest in Setting Aside a Void Judgment Under Its Contemporaneous SCRCP 60(b)(4) & (5) Motions.

As set forth in § IV below, one of—and likely the most important of—the elements of an intervention as of right is that the intervenor claim an interest in the subject matter of the litigation. Without first understanding the interest which Mt. Hawley is seeking to protect, it is unlikely that this Court could fully analyze the validity of Mt. Hawley's motion to intervene. Because Mt. Hawley's interest—i.e., setting aside a void judgment—is best understood in the context of its motions for relief under SCRCP 60(b)(4) & (5), Mt. Hawley presents the SCRCP 60(b) issues first. Accordingly, Mt. Hawley will first show how the lower court erred in denying

[17] North Florida Framing was relieved of liability and likely could not appeal as it is not an "aggrieved party." Rule 201(b), SCACR. ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

Mt. Hawley's motions for relief under SCRCP 60(b)(4) & (5) and in failing to find that the judgments were in fact void.

**B. SCRCP 60(b)(4) is the Appropriate Means of Attacking a Void Judgment.**

As an initial matter, "[t]he proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP." *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985); *see also Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) (insurer successfully moving under SCRCP 60(b) to set aside default judgment against its insured). SCRCP 60(b)(4) provides that "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." "A void judgment [under SCRCP 60(b)(4)] is one that, from its inception, is a complete nullity and is without legal effect." *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (citation omitted). Void judgments include those "from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *see also Ex parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 663 (1993) (finding that a trial judge was divested of subject matter jurisdiction such that it could not enter any valid judgment after an automatic stay had been initiated upon the filing of a bankruptcy petition); *Chapliski v. Churchill Coal Corp.*, 503 A.2d 1 (Pa. Super. Ct. 1985) (order entered after debtor files bankruptcy petition is a legal nullity *even though based on pre-petition settlement*). Furthermore, "[a] valid judgment cannot be rendered where there is a want of necessary or indispensable parties, and an adjudication made without joining such a party to the litigation is null and void." 49 C.J.S. Judgments § 33.

This case also concerns issues such as those recently decided by the South Carolina Supreme Court in *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 36, 775 S.E.2d 37, 38 (2015), and involves a "potential for collusion and inflated consent judgments [which] undermines the very nature of the jury system." Ultimately, Rule 60 "need not necessarily be read as depriving the court of the power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than a motion." *United States v. Jacobs*, 298 F.2d 469, 472 (4th Cir. 1961). Like smell infuses taste, the facts and conduct in this case should infuse the result; and here, it is quite a bitter result.

### C. Mt. Hawley's Motion Was Made Within a Reasonable Time After Receiving Notice of the Default Judgment Via Respondents' Judgment Creditor Action.

Motions to intervene and to set aside a judgment often occur after the procedural time limit for a party to appeal that judgment.[18] *See generally McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) (intervention granted to attack, via SCRCP 60(b)(1) & (3), a default judgment entered approximately three and a half months prior to the motion); *see also Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991) ("[T]he fact that a motion to intervene is filed after judgment may prove relevant . . . [b]ut the applicant need not plead extraordinary . . . circumstances to show that the intervention motion itself was timely."); *Redmond v. Devine*, 504 N.E.2d 138, 143 (Ill. App. Ct. 1987) (granting motion to intervene twenty months after a default judgment, where attacking the judgment as void was necessary to protect the rights of the intervenor). This time limit is more flexible because it is fact and circumstance specific, and the purpose of a SCRCP 60(b)(4)

[18] Even if it were true that the case had ended, any judgment in the case can be challenged in that case pursuant to Rule 60 SCRCP. Respondents err not just on the ground that the case had ended, as it had not, but on the mistaken ground that if ended, a Rule 60 motion would always be untimely.

motion is to set aside a void, inequitable, fraudulent, or otherwise defective judgment that never had any legal effect to begin with.

Accordingly, a SCRCP 60(b) motion must only be made, at most, within a reasonable time,[19] unless it is made for the reasons under 60(b)(1)-(3), in which case it cannot be made "more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP. Although more than one year has passed since the judgment, Mt. Hawley is not pursuing relief from the default judgment under the reasons enumerated under 60(b)(1)–(3). Mt. Hawley's motion to intervene is for the purpose of setting aside a judgment that is void under 60(b)(4) & (5). Therefore, it must only be made within a reasonable time. Generally, the facts of each case determine what is a reasonable time for Rule 60 motions, but leniency may be appropriate when a judgment is prospective in nature. *See United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (five year delay reasonable under Rule 60); *Clarke v. Burkle*, 570 F.2d 824 (8th Cir. 1978) (six-year delay not unreasonable in bringing Rule 60 motion); *see also Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 610 (5th Cir. 1963) ("While this award of damages sounds in the past, rather than the future, no judgment has yet been paid, and in practical effect

[19] This Court noted, however, that "[t]here [wa]s inconsistency among the decisions of South Carolina appellate courts as to whether the 'reasonable time' requirement applies to Rule 60(b)(4) motions," and while deciding to follow a reasonable time constraint, also noted that requiring a reasonable time is "what can best be described as the minority view" across other state and federal jurisdictions. *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 642, 643 n.1, 478 S.E.2d 868, 870, 870 n.1 (Ct. App. 1996). The majority view is that "a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception." *Id.* This Court should so hold and adopt this as law. This majority view is consistent with the majority federal principles mandating a *de novo* review of a denial of a 60(b)(4) motion. *See, e.g., Jalapeno Prop. Mgmt.,* LLC, 265 F.3d at 515. Regardless, Mt. Hawley made its motion within a reasonable time. This Court should adopt the majority view that there is no time limit when attacking a void judgment.

we are dealing with the prospective application of the judgment, not the unscrambling of the past.").

Because Mt. Hawley's SCRCP 60(b)(4) motion was made within a reasonable time, the court erred in failing to find the judgment void for the reasons enumerated in Subsections D-J below.

### D. North Florida Framing Was Dismissed with Prejudice by the Class Action Settlement Before the Default Judgment Was Entered.

Mt. Hawley sought to have the default judgment lifted as the Court had, prior to entering default on August 9, 2011, and prior to the default judgment on May 14, 2013, dismissed North Florida Framing with prejudice on June 10, 2011. (Final Order Approving Class Action Partial Settlement, R. pp. 213–14, ¶6). Mt. Hawley contended below that there was no case or controversy and thus no subject matter jurisdiction when the default judgment was entered. Respondents at no time ever sought to lift the dismissal with prejudice.[20] It is not disputed by Respondents that North Florida Framing had no liability after May 9, 2011. Counsel for Respondents, Mr. Lucey, stated this on the record: "In the present context, North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them in this proceeding." (Jury Trial – Volume 1 Transcript, R. p. 116, lines 7–10).

When the Order of Default was signed on August 9, 2011, Judge Harrington had no defaulting party before her as this party was dismissed with prejudice by her final settlement order on June 10, 2011—two months earlier. If an order ending a case is entered, then that case is ended, there is no further controversy, and the judge cannot enter an order barred by a standing order in place. *See Green v. Green*, 327 S.C. 577, 491 S.E.2d 260 (Ct. App. 1997) (finding trial

[20] As this dismissal with prejudice involved distribution of funds to and from multiple parties, including class members in a class action, the order likely cannot be altered.

judge was without authority to issue a "final order" modifying the judge's previously issued and standing order approving a settlement agreement, where the settlement agreement stated that it was "a complete and final settlement of all claims" between the parties); *Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986) (explaining that while a court may correct errors or mistakes in its own process, the trial judge cannot change the scope of a settlement order *ex parte*).

"A dismissal with prejudice acts as an adjudication on the merits and therefore precludes subsequent litigation just as if the action had been tried to a final adjudication." *Laughon v. O'Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004) (citing *Jones v. City of Folly Beach*, 326 S.C. 360, 366, 483 S.E.2d 770, 773 (Ct. App. 1997)); *see also Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*, 280 Ga. App. 207, 211, 633 S.E.2d 614, 618 (2006) ("[N]o judgment may be obtained if the defendant has been dismissed."); *Howell v. TS Commc'ns, Inc.*, 209 S.W.3d 921, 924-25 (Tex. App. 2006) (where plaintiff has dismissed "the defendant whose conduct is directly at issue, [] a judgment cannot be entered against him."). The case as to North Florida Framing ended on June 10, 2011 when the lower court dismissed North Florida Framing with prejudice or when North Florida Framing had no liability. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). As North Florida Framing was dismissed or had no liability, the controversy ended as to North Florida Framing. Accordingly, Judge Harrington was without jurisdiction to enter an order of default, and Judge Scarborough was without jurisdiction to enter a judgment of default, and therefore these judgments have no practical legal effect.

### E. While The Class Action Settlement Ended Respondents' Claims Against North Florida Framing in and of Itself, the Initial Proposed Settlement and the Covenant Not to Execute Would Have Also Ended the Case Against North Florida Framing Before the Default Judgment Was Entered.

The issue presented here is not whether a covenant released a joint tortfeasor, but whether the agreement ended the liability of the actual party to the covenant. The covenant would have ended North Florida Framing's liability and no further judicial proceeding against it could have moved forward. In the entire line of cases involving joint tortfeasors, no case even raises the notion that the party to the covenant remains liable. While Respondents have disguised their claims, releases, and arguments as if they were asserted against insurers, the insurers are not parties to this case and are not joint tortfeasors. *See Cobb v. Benjamin*, 325 S.C. 573, 579, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding that a liability carrier was not a joint tortfeasor and was not directly liable for its insured's damages).

Under a liability policy, "an insurance company is only obligated to pay 'those sums which the insured becomes legally obligated to pay.'" *Id.* at 579, 482 S.E.2d at 592 (quoting *Smalls v. Blackmon*, 269 S.C. 614, 617, 239 S.E.2d 640, 641 (1977)). A liability insurance policy is a contract of indemnity and the carrier is placed in the same position as its insured.[21] *Id.* As in *Cobb*, when Respondents removed the obligation to pay a judgment from North Florida Framing, they also relieved Mt. Hawley of its liability to pay under North Florida's policy. *See*

[21] Respondents should be familiar with the concept of indemnity, as they took control of North Florida Framing's indemnity claim against Nava and forfeited it by relieving its counsel and seeking a default. Of course, the reason behind this was that Respondents had already settled with Nava despite not having any claims against them, and agreed to defend and indemnify Nava against claims made by North Florida Framing. Once they took control of North Florida Framing's rights against the other parties in this case, they then forfeited its claim for full indemnity against Nava by putting North Florida Framing in default.

*id.* at 578-79, 482 S.E.2d at 591-92; *Howell*, 209 S.W.3d at 925 ("In the absence of any possibility of a binding finding of liability, proving up [ ] damages would be meaningless.").

**F. Assuming, *Arguendo*, that the Subsequent Covenant Not to Execute is Given Effect, so as to Trump a Class Action Settlement, and Assuming Further that it Could Somehow Be Interpreted as to Allow a Plaintiff to Relieve its Defendant's Counsel and Shepard That Defendant into a Joint and Several Default Judgment, the Agreement Itself Would Be Invalid.**

There is no judgment that might be obtained to use against a carrier in this case as such judgment would be invalid for this very purpose. Although South Carolina case law has not fully addressed this issue, the Fourth Circuit Court of Appeals has interpreted South Carolina law in similar situations. Those cases hold that a party should be prevented from seeking proceeds from a liability carrier for amounts that the insured never intends to pay out of its own pockets. *See Stonehenge Eng'g Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 306 (4th Cir. 2000).. "[A] settlement agreement between an insured and an injured party in which the insurer remains liable while the insured is insulated from any personal liability is presumptively unreasonable and therefore invalid." *St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519, 521 (D.S.C. 2006); *see also Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (recognizing that an individual released from liability will have no incentive to negotiate favorable terms for another party who may be potentially affected by a settlement).

If the end result is that the insured will never have to pay the judgment pursuant to an agreement with the injured party, but that the insurer becomes and remains liable on that judgment, the result is unreasonable and the judgment is a nullity. If the end result is a nullity, the means to that end must fail.

### G. Even if The Covenant Not to Execute Was Given Respondents' Post-Settlement Interpretations, the Default Order, the Default Judgment, and the Denial of Mt. Hawley's Motions Were Entered by Judges Who Did Not Have the Proper Jurisdiction to Enter Those Judgments in This Case.

#### 1. Judge Harrington Did Not Have Jurisdiction to Enter a Default Order, to Transfer Any Part of This Case, or to Hear and Deny Mt. Hawley's Motions.

Under the South Carolina Constitution, the grant of power to assign circuit court judges within the unified judicial system and jurisdiction therewith belongs exclusively to the Chief Justice of the Supreme Court of South Carolina. *See* S.C. Const. art. V, § 4 ("The Chief Justice . . . shall have the power to assign any judge to sit in any court within the unified judicial system."). As such, this power may only be divested through Administrative Orders or Rules issued by the Chief Justice. *See State ex rel. Riley v. Martin*, 274 S.C. 106, 112, 262 S.E.2d 404, 407 (1980) (affirming the Legislature's general authority to create the South Carolina Court of Appeals, but striking certain portions of the Act attempting to divest the power to assign circuit court judges). Accordingly, unless the power to assign is specifically divested to another by an Administrative Order of the Chief Justice of the Supreme Court, any act of assigning exclusive jurisdiction to a judge by someone other the Chief Justice is unconstitutional and void. As is relevant to this case, the assignment of judges and the grant of exclusive jurisdiction in complex cases is governed by the July 26, 2006 Administrative Order of the Chief Justice of the Supreme Court of South Carolina ("Administrative Order for Complex Cases"):

> IT IS ORDERED that the following procedures shall be followed in the management and disposition of all complex common pleas cases now pending or hereafter filed in each circuit: . . . [T]he Chief Administrative Judge can 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.** . . . The Chief Administrative Judge will assign the case to a judge assigned to the circuit . . . and **all pretrial motions and other matters pertaining to that case will be under the exclusive**

> **jurisdiction of the judge assigned to the case.** When appropriate, the case should be given a date certain for trial with the trial of the case also handled by the assigned judge.

*available at* http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=339 (emphasis added). The policy behind this is rooted in the desirability of having one judge handle all the issues in a complex case. The background and the facts of complex cases can become a procedural mess of multiple tortfeasors and multiple settlements.

In this case, Judge Dennis assigned exclusive jurisdiction to Judge Young, who then purported to assign the trial to Judge Harrington. (*See* Complex Case Designation Order, R. p. 92; Trial Assignment Order, R. p. 94). Presumably, Judge Harrington was exercising jurisdiction based on this November 18, 2010 order from Judge Young assigning her ***the trial*** of the case. (*See* Trial Assignment Order, R. p. 94). All of the jurisdictional orders in this case themselves distinguish between the assignment of jurisdiction for trial and the grant of exclusive jurisdiction for all other matters. (*See* Complex Case Designation Order, R. p. 92; Trial Assignment Order, R. p. 94). Notwithstanding this fact, in any event, the Administrative Order for Complex Cases, the South Carolina Constitution, and *State ex rel. Riley v. Martin* are controlling law. While it appears that Judge Young lacked authority to delegate any portion of this case because he was not the Chief Judge for Administrative Purposes, certainly Judge Harrington's jurisdiction, if any, was limited to conducting the date certain trial. Nor was Judge Harrington the Chief Administrative Judge or the judge with exclusive jurisdiction over this "complex case." Having acquired jurisdiction for a limited purpose, she could not confer further jurisdiction upon herself to enter an order three months after trial.[22] Also relevant to this case are Respondents' efforts to

[22] Mt. Hawley Objected to Judge Harrington hearing the motion to intervene and for relief from judgments for the same reason that Judge Harrington could not have entered the default against North Florida Framing. (*See* Transcript of Hearing, R. p. 20).

have Judge Harrington hear every aspect of this case, up to and including Mt. Hawley's motion to intervene and for relief from judgments, by inserting a provision stating that she retains jurisdiction. (*See e.g.*, Final Order Approving Class Action Partial Settlement, R. p. 214, ¶6(d) ("This Court shall retain jurisdiction of this matter until it is concluded."); Order Preliminarily Approving Class Action Partial Settlement, R. p. 199, ¶6 (same)). These instruments could not confer jurisdiction because "[s]ubject matter jurisdiction may not be waived *even with consent of the parties*." *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (citing *Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943)). Therefore, the Order of Default was entered without jurisdiction.

**2. The Master in Equity Did Not Have Jurisdiction to Enter the Default Judgment.**

Unlike Judge Young, neither Judge Harrington nor Judge Scarborough had exclusive jurisdiction over this case.[23] Moreover, Judge Harrington did not have the authority to assign the case for a damages trial, as only Judge Dennis had that authority. Accordingly, just as Judge Harrington did not have jurisdiction to enter the default, she did not have jurisdiction to transfer the case to the Master-in-Equity, Judge Scarborough. As such, Judge Harrington never had the power to assign the default hearing to Judge Scarborough because she never had jurisdiction to assign any part of this case. Because Judge Harrington lacked jurisdiction to enter and assign the default hearing to Judge Scarborough, Judge Scarborough likewise had no jurisdiction to enter any judgment. Even though North Florida Framing was purportedly in default, "[s]ubject matter

[23] Furthermore, neither Judge Harrington nor Judge Scarborough was the Chief Judge for Administrative Purposes for Common Pleas or the Chief Justice of the Supreme Court of South Carolina.

jurisdiction may not be waived *even with consent of the parties. Id.*[24] Therefore, the default judgment is void as it was entered without subject matter jurisdiction.

### H. Notwithstanding the Arguments Above, Respondents Were Also Judicially Estopped from Seeking an Adverse Judgment Against North Florida Framing.

#### 1. Because Respondents Represented to the Court That They No Longer Had Any Interest Against North Florida Framing in This Case and That They Had Completely and Finally Settled with It, They Were Judicially Estopped from Thereafter Changing These Pre-Trial Positions to Obtain a Multi-Million Dollar Judgment Against North Florida Framing.

Litigants must approach the judicial process in a professional manner for it to function properly. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–52, 489 S.E.2d 472, 477 (1997). "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine is intended to protect the integrity of the judicial process by precluding litigants from misrepresenting facts to gain an unfair advantage. *Carrigg v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 771 (Ct. App. 2001). If a litigant has formally asserted one version of the facts, he cannot change the very same facts in a later proceeding simply because the first version no longer suits his interests. *Id.* The truth-seeking function of the judicial system "is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by *newly-discovered* evidence." *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477 (emphasis added). Accordingly, judicial estoppel penalizes litigants "who take the truth-seeking function of the

[24] The judgment was also void because service of process was not proper. There was no valid service of process on North Florida Framing because the certified letter was returned. There was no service on Mt. Hawley. To the extent Respondents claim that Mt. Hawley is solely liable for this judgment, the judgment is also void for failure to serve notice of the default motion or the damages hearing on the proper party.

system lightly." *Id.* There are generally five elements that must be satisfied for judicial estoppel to apply:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

*Wright v. Craft*, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct. App. 2006).

In this case, Respondents' first took a position that they had no interest against North Florida Framing:

> MR. LUCEY: In the present context, *North Florida Framing no longer has any interest in this proceeding, nor do we have any interest against them* in this proceeding. And the two active carriers that were defending have agreed to pay us a substantial sum of money to settle the current liability and get their attorneys out of the cases.

(Jury Trial – Volume 1 Transcript, R. p. 114, lines 16–20) (emphasis added). Furthermore, when questioned by Professional Plastering about their intentions, and whether they were actually trying to orchestrate a joint and several judgment, Respondents specifically denied this. (*Id.*, R. p. 115, line 9–p. 116, line 14). However, despite their representations, Respondents then did *exactly* that, and pursued a $15,748,225.56 joint and several judgment against North Florida Framing at the default hearing before the Honorable Mikell R. Scarborough:

> MS. HIGGISON: For North Florida Framing they were engaged in framing the buildings. . . . And Mr. Gallagher's repair estimate for all of the damages at Twelve Oaks is 15,748,225.56.
>
> THE COURT: 15,748,225.56?
>
> MS. HIGGISON: Yes, sir.

THE COURT: Okay. Damages sought.

. . .

THE COURT: All right. I'm assuming, is that joint and several?

MS. HIGGISON: Yes, Your Honor.

(Default Hearing Transcript R. p. 237, line 2–p. 238, line 20).

Judicial estoppel was used to prevent litigants from making similar arguments in *Hayne*.[25] On one hand, Respondents claimed that they had no interest against North Florida Framing. On the other hand, they claimed to have a $15,748,225.56 interest against North Florida Framing. Therefore, Appellees have taken two inconsistent positions. Furthermore, the positions were taken in the same case. Respondents' first position in its motion to place North Florida Framing in default was asserted before trial against Professional Plastering. Thereafter, Respondents attempted to change their position in the default hearing in front of Judge Scarborough. Unlike *Hayne*, where the proceedings were related but not the part of the same case, Respondents' positions were taken in different phases of *the exact same case*. Therefore, like *Hayne*, but perhaps more appropriately, these positions must be considered as taken in the same or related proceedings.

Respondents were also successful. Their intention was to relieve North Florida Framing's counsel and to put it in default to obtain a judgment for millions of dollars. They represented to the court that they had no interest against North Florida Framing and that they

[25] In *Hayne*, a creditor commenced a foreclosure action on a piece of real property that an individual, Bailey, claimed to own by virtue of a resulting trust. *Id.* at 248, 489 S.E.2d at 475. However, six years prior, Bailey had answered his then-wife's divorce petition stating that he "ha[d] no legal interest" in the property. *Id.* at 252, 489 S.E.2d at 477. When questioned about the divorce pleadings in the foreclosure action, Bailey admitted that he actually had an interest in the property at the time of his prior statement and that his statements in those pleadings were made to protect his own interests. *Id.* The Supreme Court of South Carolina held that under the doctrine of judicial estoppel, Bailey was estopped from asserting that he now had a legal interest in the property. *Id.*

were not seeking a joint and several judgment. They successfully moved to place North Florida Framing in default based on these representations. Yet, Respondents then gamed the system by pursuing a default judgment.

Respondents' change in position was also part of an effort to mislead the court. Respondents' counsel led everyone, including the trial court, Professional Plastering, North Florida Framing, and this Court, to believe that they had no further interest against North Florida Framing. This position was explicitly asserted before the trial court in Respondents' pre-trial motions. Furthermore, on appeal from the judgment against Professional Plastering, this Court was led to believe that at the time of the trial, "[w]hile the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, settled with Respondents." *Teseniar*, 407 S.C. at 87, 754 S.E.2d at 269. Therefore, this Court concluded that the trial appropriately "focused solely on the exterior stucco installed by Professional and the resulting damage." *Id.* Respondents should not be permitted to mislead this Court and to impair the truth seeking function of the judicial system. Accordingly, the fourth element has been satisfied.

Finally, Respondents' positions were totally inconsistent. Initially, they claimed to "have no interest against [North Florida Framing] in this proceeding." Two years later, they claimed to have an interest in the form of a $15,748,225.56 judgment. This was a joint and several judgment, the exact type of scenario counsel for Professional Plastering warned about. (Jury Trial – Volume 1 Transcript, R. p. 114, lines 16–20). Respondents indicated that this was not their intention in attempting to relieve North Florida Framing's counsel and put it into default. Accordingly, Respondents' positions were inconsistent; therefore, Respondents were judicially estopped from seeking a money judgment against North Florida Framing.

**2. Even if Respondents Could Somehow Seek a Judgment Against a Party with No Liability, They Were Also Judicially Estopped from Changing Their Position at Trial that $8,761,433.00 was Solely Attributable to the Stucco-Related Work of Professional Plastering and that All of the Other Defendants Had Paid Their Fair Share.**

A further inconsistency is revealed in the Respondents' trial against the stucco applicator, Professional Plastering. Respondents, in the trial of the co-defendant Professional Plastering conducted on May 9, 2011, first claimed that $8,761,443.00 of the $15,748,225.56 was exclusively caused by the stucco applicator:

> **Q.** Mr. Gallagher, did I ask you to go through your estimate and break out the items, the cost items that would be allocable to just the stucco repair alone -- not these other items that were included in the $15.7 Million dollars, but just the stucco issue? Did I ask you to do that?
> **A.** Yes, sir.
> . . .
> **Q.** So what is your *total number for just stucco-related repairs*, putting all those elements together that are necessary?
> **A.** *$8,761,443 dollars.*

(Portion of Jury Trial of May 11–13, 2011, R. p. 126, line 23–p.127 line 5; R. p. 133, lines 15–18) (emphasis added). Then, as explained above, Respondents took a drastically different position and were successful in obtaining a $15,748,225.56 judgment against North Florida Framing by the Master in Equity. Thus, there were two different positions taken by the same party in the same case. Furthermore, they were successful in that at the time they argued their second inconsistent position before the Master in Equity, their over $7 million trial verdict was valid. Their first position helped them secure that verdict from the jury. Finally, as shown throughout this brief, this was part of a plan to vex the system. Therefore, judicial estoppel applied to bar their second inconsistent position before the Master in Equity.

## I. Even Assuming, *Arguendo*, That the Covenant not to Execute—as Interpreted by Respondents Post-Settlement—Could Have Trumped a Class Action Settlement, that the Judges Below Could Have Divested the Exclusive Jurisdiction of Judge Young, and That Respondents Were Not Judicially Estopped from Seeking an Adverse Judgment Against North Florida Framing, the Judgment is Still Void Because Respondents Withheld Mandatory Set Off and Settlement Information from the Master in Equity.

### 1. The Judgment is Void for Failure to Disclose the Details of the Final Order Approving Partial Class Settlement or the Invalid Covenant not to Execute.

Respondents failed to disclose to Judge Scarborough the existence or details of the Final Class Action Settlement and the invalid Covenant not to Execute. "Settlement agreements must be carefully scrutinized in order to determine their . . . impact upon the integrity of the judicial process." *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987). In procuring a judgment, "[o]penness and fairness . . . are essential to preserving the effectiveness of our judicial system." *Id.* at 265, 363 S.E.2d at 890. "[A]ny settlement device which does not fully release a defendant, while purporting to do so, is subject to disclosure." *Id.*, 363 S.E.2d at 890 (holding that the fact a covenant not to execute, which was essentially a façade that allowed a defendant to remain as a party defendant while escaping liability, was not disclosed to jury "facilitates inequity and injustice in the judicial process."). To hold otherwise would be to deprive the judge of crucial information to "which it was entitled as to the sources of remuneration available to the plaintiff and by whom such remuneration would be paid." *Id.*, 363 S.E.2d at 890. Because Respondents failed to disclose either the Final Class Action Settlement dismissing North Florida Framing with Prejudice or the invalid Covenant not to Execute, Respondents prevented Judge Scarborough from analyzing his jurisdiction for the default as well as the propriety of Respondents' assertion of North Florida Framing's "liability." For these reasons, the judgment is void.

### 2. The Judgment is Void for Failure to Disclose the Amount Collected from Other Tortfeasors.

Notwithstanding that the judgment is void for the reasons stated above, Respondents also failed to inform Judge Scarborough of the settlements it had received and therefore the set-off required for the judgment. *See Rutland v. S. Carolina Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). South Carolina's relevant set-off statute, enacted as part of the South Carolina Contribution Among Tortfeasors Act ("SCCATA"), provides that:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

S.C. Code Ann. § 15-38-50. By statute, a claim against remaining defendants must be reduced by the amount of the settlement obtained, *Ellis v. Oliver*, 335 S.C. 106, 109–12, 515 S.E.2d 268, 270–71 (Ct. App. 1999), here $9,577,500. (*See* August 4, 2015 Final Order Approving Class Action Settlement). Because it is statutorily mandated, the set-off arises by operation of law. *Ellis*, 335 S.C. at 109-12, 515 S.E.2d at 270–71.

Prior to the enactment of this statute in 1988, courts utilized set-offs strictly as discretionary equitable remedies intended to prevent injured parties from obtaining a double recovery of damages. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (explaining that the set-off remedy has existed in South Carolina's common law for over 100 years). The subsequent codification of the set-off statute "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Id.* at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010)). Accordingly, "[b]ecause [SCCATA] is in derogation of the common law, it must be strictly

construed." *G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). Therefore, because the set-off is now statutorily mandated, it applies automatically when the statute is invoked, so the court need not determine whether there is an independent equitable need for a set-off. *See Ellis*, 335 S.C. at 113, 515 S.E.2d at 272. Having failed to disclose the amount collected, the default judgment of $15,748,255.56 is void.

**J. The Judgment is Also Void Under SCRCP 60(b)(4) Because the Amount Collected Exceeds the Amount of Damages that can be Claimed.**

Having said $8,761,443.00 of the $15,748,255.56 was the exclusive fault of the stucco applicator, the amount for which Respondents could sue would be $6,986,782.56. Having already collected $9,577,500, more than what could even be claimed, Respondents have no lawsuit. Accordingly, the default judgment is void.

**K. Not Only is the Judgment Void under SCRCP 60(b)(4), but the Trial Court Also Erred as a Matter of Law When It Denied Mt. Hawley's Motion for SCRCP 60(b)(5) Relief Because the Default Judgment Had Already Been Satisfied, Released, and Discharged.**

Relief from judgment under SCRCP 60(b)(5) is proper when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." SCRCP 60(b)(5) relief is available "in cases of fraud upon the court or 'rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake,'" *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d 249, 254 (Ct. App. 2012) (quoting *Mr. T v. Ms. T*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008)), or in cases where giving a money judgment prospective application would be inherently inequitable. *See* SCRCP 60(b)(5); *see also Bros. Inc.*, 320 F.2d at 610 ("While this award of damages sounds

in the past, rather than the future, no judgment has yet been paid, and in practical effect we are dealing with the prospective application of the judgment, not the unscrambling of the past.").

Respondents obtained a $15,748,255.56 default judgment against North Florida Framing. However, $8,761,443.00 of this judgment was exclusively related to stucco work, of which North Florida Framing had no part. Thus, with only $6,986,782.56 collectable and $9,577,500.00 already collected, the judgment has been satisfied. (*See also* E-mail Settlement, R. p. 107, ¶2) (wherein Respondents agreed to *"satisfy . . . any outstanding judgment(s)"* after collection of the $400,000, which was in fact collected)). Furthermore, the judgment has been released, (*See* Final Order Approving Class Action Partial Settlement, R. pp. 213–14, ¶6) (directing Respondents to "execute a general release(s)" as to North Florida Framing after collecting the $400,000—which was paid and collected)), and discharged. (*See* Covenant not to Execute, R. p. 219) ("Upon the completion of all collection activity . . . Plaintiffs shall . . . satisfy any outstanding judgments against NFF and shall release *and forever discharge NFF . . . and their insurers*."). This judgment has been satisfied, released, and discharged, and it would be inequitable to let it stand. Accordingly, the lower court committed error by: not setting aside a void judgment under SCRCP 60(b)(4); and not setting aside a judgment that had been satisfied, released, and discharged under SCRCP 60(b)(5). For these reasons, Mt. Hawley has a substantial interest in this case and the trial court erred as a matter of law by denying Mt. Hawley's motion for relief and its motion to intervene as explained more thoroughly below.

## IV. BECAUSE RESPONDENTS HAVE SUED MT. HAWLEY AS A CREDITOR ON A JUDGMENT AFTER EXTINGUISHING NORTH FLORIDA FRAMING'S LIABILITY, THE TRIAL COURT ERRED WHEN IT DENIED MT. HAWLEY'S MOTION TO INTERVENE BECAUSE MT. HAWLEY'S INTEREST IN SETTING ASIDE THE VOID JUDGMENT IS NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

Intervention as of right is dictated by SCRCP 24(a)(2), which provides that:

> Upon timely application *anyone shall be permitted to intervene* in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(emphasis added). In South Carolina, courts interpret the rules so as "to permit liberal intervention particularly where . . . judicial economy will be promoted." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Accordingly, in deciding whether to grant a motion to intervene, the court "must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24." *Id.* Under South Carolina law, an applicant must satisfy the four "*Sagebrush*" elements for intervention as of right: (A) make a timely application; (B) claim an interest relating to the property or transaction which is the subject of the action; (C) show that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest as a practical matter; and (D) demonstrate that the existing parties are not adequately representing its interest. *Id.* at 189, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)).

### A. Mt. Hawley Made a Timely Application After Receiving Notice That Respondents Had Procured This Default Judgment.

"[W]hen a case has been settled, the fact that a motion to intervene is filed after judgment may prove relevant . . . [b]ut the applicant need not plead extraordinary . . . circumstances to

show that the intervention motion itself was timely." *Davis*, 304 S.C. at 505, 405 S.E.2d at 603. Specifically, in determining whether a motion for intervention is timely, a court *must consider the following factors*: 1) the amount of time that has passed since the applicant either knew or should have known *of the interest it is seeking to protect*; 2) the reasons for the delay; 3) the stage of the litigation; and 4) *the prejudice the applicant would suffer if intervention is denied* and the prejudice that the original parties would suffer if the applicant's intervention is granted. *Ex parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (emphasis added). As to the first element, Mt. Hawley promptly moved to intervene and for relief from judgments *once it received notice* of the default judgment against its insured by way of a judgment creditor's action filed against Mt. Hawley for $15,748,225.56. Furthermore, process was mailed to Mt. Hawley on June 2, 2015, and, despite the years of litigation to sort through, Mt. Hawley moved to intervene and for relief from judgments within 60 days. Because there was no delay, there was no delay to explain for element two.[26]

As to the third element of timeliness, while it is true that the litigation had progressed to a relatively late stage by the time Mt. Hawley moved to intervene, this element is not dispositive. Even if the case *as to North Florida Framing* had ended, this does not mean that Mt. Hawley cannot intervene to attack the default judgment. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742, *reversed on other grounds* (allowing a motion to intervene in an appeal). Nor is the time for Mt. Hawley to intervene in this case limited by the time for a party to appeal a judgment, as previously asserted by Respondents in its motion to dismiss which was denied by

[26] North Florida Framing was dismissed with prejudice on June 10, 2011, Respondents obtained a default judgment before the Master in Equity on May 14, 2013 and filed suit against Mt. Hawley on May 26, 2015. This entire chronology of events and the timing are the actions of Respondents and not Mt. Hawley.

this Court. *See* Order Denying Respondents' Motion to Dismiss; *see also Avery v. Moseley*, 19 Ill. App. 3d 1001, 313 N.E.2d 274 (1974) (holding that time to intervene is not limited by time to appeal).

Finally, as to the prejudice element, Respondents assert the judgment against Mt. Hawley. *See Teseniar v. Mt. Hawley Insurance Co.*, Case No. 2015-CP-10-2994 (S.C. Comm. Pleas). Without intervention, Respondents will be able to assert as binding what is a void judgment. Therefore, Mt. Hawley's motion to intervene was timely.

**B. Mt. Hawley Claimed an Interest Relating to the Subject of the Judgment.**

The second question of whether an applicant asserted an interest warranting intervention "must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court." *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 190, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc.*, 713 F.2d 525). As a defendant in a separate suit on a joint and several judgment purporting to satisfy the total claimed damages ($15,748,225.56), and thus by implication all the claims in this case, and as an insurer of a defendant in this case, Mt. Hawley asserts an interest in the overall subject matter of the action. An interested third party may move to intervene under SCRCP 24 for the purpose of setting aside a default judgment under SCRCP 60(b). *See, e.g.,* McClurg, 380 S.C. 563, 671 S.E.2d 87, *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (employer intervening for the purpose of setting aside a default judgment entered against its employee). As set forth in § III above, Mt. Hawley has offered a sufficient interest warranting intervention in this case.

**C. Mt. Hawley is so Situated that the Disposition of the Action May as a Practical Matter Impair or Impede its Ability to Protect This Interest.**

In showing that the disposition of the case *may* impair or impede its ability to protect its interest, "a party need not prove that it would be bound in a res judicata sense by the judgment,

only that it would have difficulty adequately protecting its interests if not allowed to intervene. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 190–91, 394 S.E.2d at 715 (citing *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir. 1980)). Here, Mt. Hawley moved to intervene for fear that if it tried to contest the judgment in the separate action, Respondents would claim there can be no collateral attack in a separate action. The South Carolina Supreme Court has recognized that it would "be extremely difficult for [an intervenor] to collaterally attack any ruling adverse to them if not made a party to the original action." *Id.* at 191, 394 S.E.2d at 715. Accordingly, not allowing Mt. Hawley to intervene and contest this judgment *may* impair or impede Mt. Hawley's ability to protect its interest.

**D. Mt. Hawley's Interest is Not Adequately Represented by Existing Parties.**

"The burden to show that the representation may be inadequate is on the applicant." *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). However, "[t]his burden is minimal and the applicant need only show that the representation of his interests 'may be' inadequate. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 (1972)). South Carolina has adopted the following *Sagebrush* factors for determining whether existing parties can adequately represent an applicant's interest:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

*In re Horry Cty. State Bank*, 361 S.C. 503, 508–09, 604 S.E.2d 723, 726 (Ct. App. 2004) (quoting *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715).

Here, there is no existing party that will make, or that is otherwise capable and willing to make, Mt. Hawley's arguments. Having orchestrated North Florida Framing's counsel out of the case and having ended North Florida Framing's liability, there is no party to assert the interest of Mt. Hawley or North Florida Framing. Mt. Hawley has a right to intervene in this case.[27] Mt. Hawley also offers a different perspective and an opportunity for this Court to address attempted litigation against a nonparty by litigating against a party who can have no liability or exposure. Therefore, for the reasons stated above, the lower court committed an error when it denied Mt. Hawley's motion to intervene for the purpose of setting aside the void judgments in this case.

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

January 27, 2017

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[27] Therefore, while Mt. Hawley's SCRCP 24(a)(2) motion to intervene as of right should have been granted, the court also abused its discretion by not, in the alternative, granting its SCRCP 24(b)(2) permissive intervention motion.

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

RECEIVED
JAN 31 2017
SC Court of Appeals

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CASE NO. 2008-CP-10-0049

Appellate Case No. 2016-000185

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, A South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors,, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

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**CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b) SCRAP**

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The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b)

SCRAP.

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

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
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And Mt. Hawley Insurance Company is the Appellant/Proposed Intervenor.

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**PROOF OF SERVICE**

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I certify that I have served the Record on Appeal, Final Brief of Appellant and Final Reply Brief of Appellant on all counsel of record for Respondents by depositing a copy in the United States Mail, Postage prepaid, on January 30, 2017, addressed to as follows:

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January 30, 2017

RECEIVED
JAN 31 2017
SC Court of Appeals

VIA FEDEX

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Enclosed for filing please find 1 (unbound) original and 16 (bound) copies of the Final Brief of Appellant and Final Reply Brief of Appellant together with the Proof of Service of same in the above-referenced Appeal. Enclosed please also find 1 (unbound) and 15 (bound) copies of the Record on Appeal. I would greatly appreciate your filing the originals and returning a file-stamped copy of each pleading to me in the self-addressed, stamped envelope

Thank you for your consideration in this matter.

With kindest regards,

ANDREW K. EPTING, JR., LLC

s/*Drew*

Andrew K. Epting, Jr.

AKE,Jr./agg
Enclosures – as stated
cc: Phillip W. Segui, Jr., Esquire
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**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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The Honorable Kristi Lea Harrington, Circuit Court Judge

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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 Vava Guzman Construction Company, Inc.,.....Defendants,

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

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# FINAL BRIEF OF RESPONDENTS

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## STATEMENT OF THE ISSUES

I. **Did the Circuit Court properly deny an insurance carrier's motion to intervene where that carrier refused to defend its insured in the underlying action and instead sought to intervene for the purpose of collaterally attacking a final judgment more than two years after it was entered, and more than six years after the carrier received notice of the claim against its insured?**

## STATEMENT OF THE CASE

Respondents Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated ("Teseniar"), along with the Twelve Oaks Property Owners Association, Inc. ("Respondents"), commenced this class action lawsuit for construction defects on January 4, 2008. North Florida Framing, Inc. ("NFF") was added to the case by an amended complaint on June 17, 2009. Two of NFF's three insurance carriers retained defense counsel to defend it. Appellant Mt. Hawley Insurance Company ("Mt. Hawley") also provided coverage to NFF and upon receiving notice of the claim issued a reservation of rights asserting coverage defenses, but refused to participate in NFF's defense. (Br., p. 4).

The case was designated as complex, and assigned to the Honorable Roger Young for all pre-trial motions and other matters pertaining to the case. (R. pp. 92-94). Judge Young then issued an order assigning the case to the Honorable Kristi L. Harrington and set a date certain trial before her on May 9, 2011. (R. p. 94).

On the morning of trial before Judge Harrington, Respondents informed the court they had reached an agreement to settle with the two liability carriers defending NFF. In essence, Respondents accepted $400,000 paid by the two defending carriers, along with various assignments discussed more fully herein, and gave NFF a Covenant Not to

Execute against any of its assets except insurance policies issued by carriers that did not participate in the settlement, specifically including Mt. Hawley.

Respondents did not dismiss NFF from the action. However, at the defending carriers' request, Respondents consented to a motion made by NFF's defense attorneys to be relieved as counsel, which the circuit court granted. (R. pp. 186-89). Because no one appeared for NFF at the call of the trial and its defense counsel was relieved, Respondents requested that NFF be placed in default and referred to the Master in Equity for a damages hearing.

On August 9, 2011, the circuit court filed an order memorializing its prior oral rulings placing NFF in default and referring the matter to the Master in Equity for a damages hearing. (R. pp. 233-234). On, May 14, 2013, the Master in Equity, the Honorable Mikell R. Scarborough, held the damages hearing, and found NFF jointly and severally liable for construction defect damages in the amount of $15,748,225.56. (R. pp. 242-244). As contemplated in the settlement, Respondents thereafter sought to collect the judgment from NFF's non-participant carrier, Mt. Hawley. (R. pp. 245-253). (hereinafter the "Collection Action").

In addition to defending the separate Collection Action, on July 28, 2015, Mt. Hawley moved to intervene in this action for the sole purpose of collaterally attacking the Order of Default and Default Judgments entered against NFF. Following hearings on January 12, 2016, and January 14, 2016, the circuit court denied the motion to intervene. (R. p. 4). Mt. Hawley did not file a motion under Rule 59, SCRCP, to request a ruling from the circuit court with regard to the arguments it makes to this Court under Rule 60. This appeal follows.

## STATEMENT OF THE FACTS

Mt. Hawley provided liability insurance to NFF at times relevant to the claims asserted by Respondents in this construction defect action.[1] Despite having time on the risk for these claims, at no time during the pendency of the lawsuit did Mt. Hawley provide a defense to NFF. Mt. Hawley concedes it had notice of Respondents' lawsuit against NFF because the claims were tendered to it. (Br., pp. 4-5). Rather than defend NFF, Mt. Hawley acknowledged notice of the claim and asserted a reservation of rights and coverage defenses. (*Id.*). Thus, Mt. Hawley consciously chose not to involve itself in this action in any manner, despite knowing of its pendency, as far back as 2009. These facts are undisputed.

Two of NFF's **other** insurance carriers, specifically, Crum & Forster Insurance Company and Scottsdale Insurance Company (the "Participating Carriers"), did participate, hiring attorneys from Barnwell Whaley Patterson & Helms, LLC ("Barnwell Whaley") to defend NFF. Mt. Hawley did not share in the defense provided by Barnwell Whaley. This, too, is undisputed.

More than six years after NFF tendered the claims to Mt. Hawley, and without any involvement by it during the pendency of the action, Mt. Hawley moved to intervene in this action in order to collaterally challenge certain judgments that were entered against NFF.

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[1] The coverage provided by Mt. Hawley is implicated by the continuous trigger theory in South Carolina. *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (1997) (holding "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage[]").

For clarity and the convenience of the Court, a procedural timeline of relevant events is helpful:

**May 6, 2011** – Settlement Email: Confirming the terms of the proposed partial resolution with NFF. (*See* R. pp. 107-109).

**May 9, 2011** – The Morning of Trial

- Motion to Relieve Barnwell Whaley is granted. (R. pp. 186-189).
- Respondent's explain conditions of NFF's partial settlement and covenant not to execute. (R. pp. 112-116).
- Motion to Place NFF in default and refer them to Master in Equity for Damages Hearing is orally granted. (*See* R. p. 116, line 18).

**May 19, 2011** – Respondents file Motion for Approval of Partial Class Action Settlement. (*See* R. pp. 190-205) (emphasis added).

**June 10, 2011** – Order Approving Partial Settlement is entered by trial court, permitting parties to preform terms of their respective settlement agreements. (*See* R. pp. 207-214) (emphasis added).

**August 8, 2011** – Order of Dismissal of Certain Defendants is entered by trial court. This Order excludes NFF. (*See* R. pp. 230-232). (emphasis added).

**August 9, 2011** – Written Order of Default Against NFF and Reference to Master for Damages Hearing which confirmed the May 9, 2011, oral Order of the same. (R. pp. 233-234).

**May 14, 2013** – Damages Hearing was held before the Master in Equity (R. pp. 235-241) and an Order of Judgment by Default in amount of $15,748,225.56 was entered against NFF. (R. pp. 242-244).

Because Respondents disagree with Mt. Hawley's distortion of what occurred in the proceedings below, the true facts, as gleaned from the record, are explained here.

**A. Respondents reach an agreement with NFF and two of its carriers on the eve of trial.**

In the final days before the trial, Respondents negotiated and entered into an agreement with NFF[2] and the two Participating Carriers defending it, each pledging separate consideration. In exchange for payment from the Participating Carriers of $400,000 and various assignments, Respondents agreed not to seek any further recovery from **those two carriers** as a result of NFF's liability. Respondents also gave NFF a Covenant not to Execute. A key feature of the Covenant is that it reserved the right of Respondents to pursue a claim against any insurance proceeds that might be available from Mt. Hawley, because it did not contribute to the settlement or participate in NFF's defense. NFF was not dismissed or released by the agreement or the Covenant. Everyone participating in the lawsuit knew this. (R. p. 112, line 21 – p. 116, line 21); and *see* Covenant Not to Execute (R. pp. 218-222). Respondents made it clear to the circuit court that "[NFF] is actually still in the case but they have a covenant." (R. p. 113, lines 12-13).

There was no confusion amongst those that were present about what was happening.[3] Respondents explained it in detail:

> **There is a third carrier [Mt. Hawley] that's refusing to defend the insured,** [NFF]. [NFF] has been [given], a covenant not to execute, **except as to proceeds, if any, that are procured from that recalcitrant third carrier at some other date and time.**

(R. p. 116, lines 2-13). (emphasis added).

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[2] The circuit court also was informed of several other settlements reached with additional defendants. (R. p. 116, line 25 – p. 119, line 6).

[3] Given Mt. Hawley's lack of participation in the lawsuit, it presumably did nothing to monitor the proceedings in order to inform itself of these developments.

Having pledged $400,000 and additional consideration in the form of assignments, the Participating Carriers desired to have Barnwell Whaley, which they had paid to defend NFF for the entirety of the action, relieved of further responsibility to defend the case. As part of the agreement, Respondents consented to Barnwell Whaley's withdrawal, and the circuit court approved.[4] *See* Consent Order Relieving Counsel (R. pp. 186-189); and *see* January 14 Trans. (R. p. 26, line 9 – p. 27, line 9). Respondents further agreed they would consent to allow Mt. Hawley to substitute new defense counsel for NFF, provided this caused no delay, but it never did. (R. p. 113, lines 2-9); and *see* May 6th Settlement Email (R. pp. 107-109).

**B. The Request for an Order of Default and Reference to the Master.**

On the morning of trial, NFF did not appear, and its counsel was relieved. Thus, Respondents requested that NFF be placed in default and referred to the Master in Equity for a damages hearing.[5] (R. p. 113, lines 12-20); and (R. p. 114, lines 11-15).

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[4] Mt. Hawley remarkably argues, for the first time on appeal, that Respondents somehow took on representation of NFF to have its counsel relieved, then "stepped back into their adversarial shoes" requesting to place NFF in default. That is not true. The Consent Order Relieving Counsel is unambiguous—NFF and Barnwell Whaley "so moved" and Respondents "consented." As a matter of convenience, Barnwell Whaley authorized Respondents' trial counsel to sign the Consent Order for it, "with permission," to accomplish the same withdrawal Barnwell Whaley memorialized in its May 6th Settlement Email. Considering the several hundred pages of materials brought *day-of* to the hearing on its motion to intervene (R. p. 9, lines 5-6), surely Mt. Hawley could have obtained an affidavit from someone, whether it be NFF or Barnwell Whaley, if it truly thought the consent order was signed without authority. This is but one among a school of red herring in Mt. Hawley's Brief.

[5] One other defaulting defendant had already been referred to the Master in this action, and Respondents asked for NFF to be similarly referred for a final resolution of Respondents claims against it.

At first, counsel for Professional Plastering (who was headed to trial against Respondents) objected out of concern that Respondents would keep NFF **in the same jury trial with Professional Plastering**, in name only (i.e., as an empty-chair defendant), just to get a joint and several verdict against Professional Plastering that would "impugn [NFF]'s fault to both defendants." (R. p. 114, line 16 – p. 115, line 5). However, once Respondents explained they were not intending to try the case to the jury against both NFF and Professional Plastering, but rather intended to proceed to trial solely against Professional Plastering with NFF being referred to the Master in Equity for a separate hearing,[6] Professional Plastering withdrew its objection. (R. p. 115, line 18). This was all clear to everyone in the courtroom. (R. p. 114, line 16 – p. 115, line 5). Therefore, the circuit court approved Respondents' request, and jury trial proceeded against only Professional Plastering.[7]

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[6] Respondents clarified: "We're not seeking to keep them in this trial. We're asking for our default and we're asking that [NFF] be referred to the default hearing that's already been scheduled for the other default defendants, which is the developer and the developer entities." (R. p. 115, lines 13-17). Professional Plastering's counsel then responded, "Then no objection, Your Honor. As long as they are not trying to keep them in for a joint and several liability in **this** case [(i.e., the trial)], we have no objection to that at all. (R. p. 115, lines 18-21).

[7] Respondents also informed the circuit court of additional settlements it reached with others. Defendants APS Stucco, Magna Wall, Albert (Nava) Gooseman, and General Aluminum, for example, all reached settlement agreements with Respondents before trial, as did one of Professional Plastering's liability carriers, AIG. (R. p. 116, line 22 – p. 118, line 16).[7] Respondents placed on the record that its settlement with NFF involved a payment of $400,000 "**plus the situations that Mr. Lucey mentioned**" regarding the non-participating carrier—Mt. Hawley. *See* May 9 Trans. (R. p. 118, lines 6-7) (emphasis added); and *see* January 14 Trans. (R. p. 27, line 10 – p. 30, line 5).

**C. Respondents sought and received judicial approval of the settlements reached with NFF and others and all settling defendants except NFF were dismissed.**

Because this case proceeded as a class action, the proposed settlements required judicial approval under Rule 23, SCRCP. Therefore, on May 19, 2011, Respondents moved before the circuit court for judicial approval of the **partial** class action settlements reached with various defendants, including NFF, which were discussed at the start of the trial. (R. pp. 190-192). The request covered settlements totaling $1,287,500 and included the $400,000 promised by NFF's Participating Carriers. The circuit court approved these **partial** settlements and entered a Partial Settlement Approval Order on June 10, 2011.

Naturally, because class action settlements must be approved **prior** to commencement, the Order contemplated and required that Respondents would **later** dismiss each settling defendant upon satisfaction of their respective settlements. Contrary to Mt. Hawley's insistence, nothing in the Order requires the dismissal of any defendant **before** it had completed the obligations of its promised settlement.[8] (R. p. 213 ¶6).

The unambiguous terms of the settlement agreement and Covenant not to Execute both provide that NFF will not be dismissed until Respondents' collection efforts are completed as to any non-participating carriers, specifically Mt. Hawley. NFF was not dismissed by, nor was Respondents required to dismiss NFF until Respondents' rights

[8] For example, it provides: **Upon payment** of the settlement proceeds by the Settling Defendants, the Class Representatives **are authorized to** execute a general release(s) as to the Settling Defendants, and/or settlement agreements on behalf of the Class **and an order(s) or stipulation(s) ending this case and all class claims with prejudice** against the Settling Defendants[.] (R. p. 213 ¶6).

under the agreement and Covenant are fully exhausted by seeking recovery from Mt. Hawley. *See* Settlement Email (R. pp. 107-109); and *see* Covenant not to Execute (R. pp. 218-222).

Proof of this is clear in the record. On August 8, 2011, the circuit court entered an "Order of Dismissal as to **Certain** Defendants" (emphasis added). This Order of Dismissal covered all "Settling Defendants" listed in the Partial Settlement Approval Order, **except NFF**, which was not dismissed and which remained a defendant in the action because its settlement was not complete. (R. pp. 230-232). The existence of this Order of Dismissal demonstrates that contrary to what Mt. Hawley would have this Court believe, the Partial Settlement Approval Order did not operate to dismiss any defendant, particularly NFF. Mt. Hawley neglects to draw attention to this August 8, 2011 Order of Dismissal, presumably because it makes plain NFF was not dismissed.

Nowhere in the record is there an Order of Dismissal as to NFF. Instead, it was placed in default and referred to the Master for a damages hearing. (R. pp. 233-234); and *see* May 9 Trans. (R. p. 113, line 12 – p. 116, line 21). No one participating in the case was confused about this, and Mt. Hawley cannot rewrite the record after the fact.

**D. The circuit court enters an Order of Default and Order of Reference to the Master regarding NFF, memorializing its approval of this request from the morning of trial.**

Because NFF was not dismissed by the August 8, 2011 "Order of Dismissal as to **Certain** Defendants," on August 9, 2011, the circuit court entered a written Order of Default and Order of Reference referring NFF to the Master in Equity for a damages hearing consistent with what was previously discussed on the morning of trial. (R. pp. 233-234).

When the matter came before the Master in Equity for a damages hearing, again the record speaks for itself. NFF was not the first defendant to proceed before the Master in a damages hearing in this case. Judge Scarborough quickly recalled presiding over the default hearing against the Developer in this same action. (R. p. 236, lines 4-8). The methods of giving notice of the hearing were explained to the court, and Judge Scarborough ruled, "I'll find they've been provided with notice of the hearing for today." (R. p. 236, line 6 – p. 238, line 12). Respondents presented their expert's damages report in the amount of $15,748,225.56, which was the very same report presented to the Master in Equity during the default proceedings against the Developer. (R. p. 238, lines 4-12). The court was first informed of the nature and scope of NFF's particular work on the project, and then informed that the $15,748,225.56 figure was for all of the damages at the complex. (R. p. 237, line 24 – p. 238, line 12). The various elements of damages were broken out in the expert's report. (R. p. 238, lines 14-17). The Master, inquired "All right, I'm assuming, is that joint and several?" Respondents answered yes, because it was and the Master in Equity accepted the evidence presented and entered a joint and several judgment against NFF in the full amount of all damages presented. (R. p. 237, line 2 – p. 238, line 13); and *see* Default Order and Judgment (R. pp. 233-234).

Two years after this Default Judgment was entered against NFF, Mt. Hawley finally attempted to get involved through the filing of its motion to intervene. The circuit court, in a proper exercise of its discretion, denied Mt. Hawley's motion.

## THE STANDARD OF REVIEW

Mt. Hawley has misstated this Court's standard of review. The matter before the circuit court was Mt. Hawley's motion to intervene pursuant to Rule 24, SCRCP, and the

issue before this Court is whether the trial court properly denied Mt. Hawley's motion to intervene. Our Supreme Court has settled that "[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)).

In its appeal, Mt. Hawley also asserts that it raised a motion for relief from the judgments pursuant to Rule 60, SCRCP, and it encourages this Court to adopt a *de novo* standard of review for such matters. This is not correct. First, the only matter ruled on by the circuit court was a motion to intervene pursuant to Rule 24, not Rule 60. But further, our Supreme Court has clearly articulated that the standard of review applicable to Rule 60 is the abuse of discretion standard, not *de novo*. *See 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). Therefore, even to the extent this Court finds the trial court ruled on Mt. Hawley's purported Rule 60 motion such that it is preserved for review, it is to be

reviewed by the same abuse of discretion standard applicable to the grant or denial of a Rule 24 motion to intervene. Had the Supreme Court been inclined to adopt a *de novo* review it has certainly had the opportunity and declined to do so. *Id.*

## ARGUMENT AND CITATION OF AUTHORITY

### I. CONTRARY TO MT. HAWLEY'S SUGGESTION, JUDGE HARRINGTON AND THE MASTER IN EQUITY, HAD SUBJECT MATTER JURISDICTION TO ENTER THE ORDERS IN QUESTION, AND MT. HAWLEY CANNOT COLLATERALLY ATTACK THE ORDERS COMPLAINED OF IN THIS APPEAL.

Mt. Hawley filed its motion to intervene in the Charleston County Court of Common Pleas, which is the court presiding over the entire case. Mt. Hawley cannot sustain an argument that the circuit court where it brought its own motion lacks subject matter jurisdiction over the case and, therefore by extension, its motion. Neither NFF, nor anyone else for that matter, ever questioned the circuit court's subject matter jurisdiction, because there was no basis to do so. In fact, NFF stated in its Third-Party Complaint, "The parties, matters, and all things hereinafter alleged **are within the jurisdiction of this Court.**" (R. pp. 80-90) (emphasis added). NFF was right.

Carefully viewed, the argument made by Mt. Hawley is not that the circuit court lacked subject matter jurisdiction; rather, Mt. Hawley argues that certain **judges**, namely Judges Harrington[9] and Scarborough, lacked "subject matter jurisdiction" even though the court unquestionably does. [10] Mt. Hawley is wrong.

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[9] At the first hearing, Mt. Hawley conceded, "I don't doubt judge, that you had the authority to try this case." (R. p. 13, lines 2-3). NFF was not present for the trial of the case. In her role as trial judge, she ordered NFF in default. (R. p. 26, line 9 – p. 27, line 9). Having conceded this authority in the hearing on its motion, Mt. Hawley cannot change its position on appeal.

[10] A Master in Equity has the full power and authority of the Circuit Court sitting without a jury, to regulate all proceedings in every hearing before them, and to perform all acts and take all measures necessary or proper for the efficient performance of their duties

Mt. Hawley's ill-fated "subject matter jurisdiction" argument is surely the product of its recognition of the well-settled distinction between an order that is "void" (as in a case where subject matter jurisdiction is lacking) and an order that is merely "voidable" (where subject matter jurisdiction exists, but some other irregularity renders the order subject to being reversed on direct appeal). Because the law does not permit Mt. Hawley to collaterally attack a "voidable" judgment through Rule 60(b)(4), Mt. Hawley insists the Order of Default and Default Judgment are void despite a wealth of authorities to the contrary.

### A. Mt. Hawley confuses the key distinction between an order that is void, as opposed to one that may be voidable.

Without questioning the circuit court's subject matter jurisdiction, Mt. Hawley focuses on the jurisdiction of the particular **Judges**—i.e., Harrington and Scarborough—to claim their Orders are void, *ab initio*. But, Mt. Hawley conflates subject matter jurisdiction, which undoubtedly is present, with alleged irregularities not involving subject matter jurisdiction, which do not render a judgment void, but may render it voidable. This fundamental distinction is essential to this Court's review.

"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." *S.C. DMV v. Holtzclaw*, 382 S.C. 344, 349, 675 S.E.2d 756, 758 (Ct. App. 2009); *see also Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995). "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**

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under the order of reference. Rule 53, SCRCP. By rule this specifically includes default cases. *Id.* This includes the power to rule on all motions, require the production of evidence, and call witnesses and examine them under oath.

**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[11] in which case the court has no power to adjudicate at all, 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." *Id.* (quoting *Jackson City Bank & Trust Co. v. Fredrick,* 271 Mich. 538, 260 N.W. 908, 909 (1935) (emphasis added); *see also Petroleum Transportation Inc. v. SCPSC,* 255 S.C. 419, 179 S.E.2d 326, 329 (1976).

It is settled law in this state that irregularities not involving jurisdiction do not render a judgment void. *Thomas & Howard Co. v. T. W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect **and must be distinguished from one which is merely 'voidable.'"** *Id.* (emphasis added).[12]

"A judgment will not be vacated for a mere **irregularity** which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him." *Id.* at 291, 475 S.E.2d at 343 (citations

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[11] The South Carolina Supreme Court explained that appellate decisions sometimes use the phrase "lack of jurisdiction" to mean that the trial court simply lacks the power to act in a particular manner because, for example, the term of court has ended. Cases mentioning the term of court rule as being a rule of subject matter jurisdiction, however, are incorrect. *See State v. Campbell*, 376 S.C. 212, 216, 656 S.E.2d 371, 373 (2008) (pointing out that *State v. Davis*, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007); *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006) and *State v. Rhinehart*, 312 S.C. 36, 430 S.E.2d 536 (Ct. App. 1993), all **incorrectly** used the phrase "subject matter jurisdiction" when discussing other mistakes made in the exercise of the court's power).

[12] Mt. Hawley quotes only part of this sentence in its Initial Brief at p. 21, failing to include the key distinction given to judgments that are merely voidable.

omitted) (emphasis added). Mt. Hawley explained its view of things at the hearing, "Now, I wasn't in this case, Judge, but I've gone through this record pretty carefully. And so I'm just pointing out things that I think are **irregular**." (R. p. 13, lines 7-9). (emphasis added). It chose the right word to use. At best, and without conceding the point, any "irregularities" related to the assignments of the case and various matters to Judges Harrington and Scarborough do not implicate subject matter jurisdiction, but instead these irregularities merely leave the orders voidable, not void. Also, they are not subject to collateral attack by Mt. Hawley, and the appellate decisions of this state so hold.

"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); *see also Cosgrove v. Butler*, 1 S.C. 241, 243 (1869) ("If such departures be not excepted to, the Court may consider objection to them as *waived*. And it may be asserted, as a general rule, that where there is no want of jurisdiction . . ., [the Court's] **judgment will be binding, even although affected by irregularity which would have defeated the proceeding if objection had been timely and properly made.**") (italics in original, bold emphasis added). Any irregularities complained of by Mt. Hawley are not involving subject matter jurisdiction, and therefore are waived for want of any objection at the time.

It is undisputed that the sole reason Mt. Hawley sought to intervene was to collaterally attack the judgments against NFF. Its counsel made that clear: "I think,

Judge, you should rule that we can intervene **for the sole purpose of contesting the validity of the judgment.**" (R. p. 8, lines 22-24); and *see* Mt. Hawley Motion to Intervene (R. pp. 37-39). NFF, who is undoubtedly "the party against whom the act is done," did not object and did not appeal. Likewise, NFF has never sought to set aside the judgments. The record is devoid of any evidence from Mt. Hawley that NFF disputes the entry of the judgments against it or, that Mt. Hawley attempted to obtain such evidence but was stymied.[13] Mt. Hawley's collateral attack on the judgments rendered against its insured is wholly improper in light of the foregoing.

It boils down to this: without question the circuit court had subject matter jurisdiction over the type and class of lawsuit Respondents brought against NFF. Even assuming *arguendo*, that Judge Harrington should not have heard and decided the matters related to default, such irregularities would not divest the circuit court of subject matter jurisdiction.[14] At best, it would yield a potentially voidable result subject to direct appeal only by NFF, the party against whom the act was taken, which has not occurred. *Accord Fryer,* 369 S.C. at 399, 631 S.E.2d at 920; *Coon*, 356 S.C. at 347-48, 588 S.E.2d at 627 (noting that, if the court "acts with proper subject matter jurisdiction, but takes action

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[13] *Compare Redmond v. Devine*, 152 Ill. App. 3d 68, 72, 504 N.E.2d 138, 141 (1987) (involving a case where the insured hid the existence of the underlying lawsuit from the carrier and would not help when the carrier investigated and sought the insured's assistance). None of those facts exist here.

[14] Mt. Hawley's various arguments at times contradict each other. It first contends Judge Harrington's Partial Settlement Approval Order had the effect of dismissing NFF with prejudice (which it did not). But, Mt. Hawley contends Judge Harrington had no subject matter jurisdiction to decide any matter in the case unrelated to the trial (if even the trial). (R. p. 22, line 24 – p. 23, line 6). If Mt. Hawley were correct on this point, Judge Harrington's alleged lack of subject matter jurisdiction would, by its own argument, render the Partial Settlement Approval Order "void" and thus NFF could not have been dismissed by it regardless of its interpretation. Mt. Hawley further conceded that if Judge Harrington lacked subject matter jurisdiction, all of the arguments made to her regarding its motion to intervene are moot. (R. p. 20, line 25 – p. 21, line 10).

outside of its authority, the party **against whom the act is done** must object and directly appeal") (emphasis added).

### B. Respondents gave proper notice of the default hearing before Judge Scarborough and therefore the judgment is not void.

Mt. Hawley's argument that the Master's Default Judgment is void for lack of "service of process" or notice of the default proceeding is misplaced. Service of process is related to the summons and complaint and governed by Rule 4, SCRCP, and is not questioned in this case. On the other hand, Rule 5 governs the service of papers subsequent to the service of the summons and complaint, including "written notices." *See* Rule 5(a)(4), SCRCP. To satisfy Rule 5, service upon a party shall be made by delivering a copy to him or "by mailing it to him at his last known address . . . ." *Id.* The service of a written notice under Rule 5 is **complete** upon placing the notice in the mail. *Id.*

Respondents sent **multiple** notices of the default hearing to NFF at its last known addresses and directed to the company's registered agent, David Anderson. A notice sent by certified mail to NFF's last known street address was received and signed for by a Catherine Anderson. A copy sent by regular US mail to that same street address never came back and is presumed delivered. Respondents also sent notices to a post office box known to be associated with NFF. Only the certified mail sent to that post office box was returned unclaimed. These several efforts more than satisfy Rule 5. Judge Scarborough specifically found NFF was served with proper notice of the hearing, and this was correct. (R. p. 237, line 9 – p. 238, line 12). *Cf. Sijon v. Green*, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986) (holding a judgment must stand in the face of a challenge based on lack of notice of the hearing if it is determined that notice was given).

Consequently, Mt. Hawley has failed to demonstrate the challenged judgments are "void" for want of subject matter jurisdiction or notice. All of its numerous arguments that depend upon the challenged orders being void, rather than voidable, must fail.

## II. NORTH FLORIDA FRAMING WAS NEVER DISMISSED FROM THE LAWSUIT

The Partial Settlement Approval Order entered by Judge Harrington on June 10, 2011, does not dismiss NFF from the action. This is another example of where the record reveals what truly occurred is far different from the picture painted by Mt. Hawley.

### A. The Partial Settlement Approval Order is not an order of dismissal, which is why there was a subsequent Order of Dismissal, which leaves NFF in the case

The sole function of the Partial Settlement Approval Order was for the court to approve the agreements made so that the class and settling parties could move forward with carrying out their respective agreements. Respondents sought approval for partial settlements totaling $1,287,500, which included the $400,000 promised by NFF's Participating Carriers. For simplicity, the Settlement Approval Order included a footnote listing the "Settling Defendants," with NFF identified among them. It was necessary to get approval of NFF's agreement in order to move forward with receiving and disbursing the $400,000 that formed part of the agreement. Rule 23, SCRCP requires as much. But, the terms of the agreement with NFF did not require Respondents to dismiss NFF as a party **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); and (R. pp. 218-222).

As set forth in the Statement of Facts and materials in the record, the Partial Settlement Approval Order is **not** an order of dismissal. Naturally, until each "Settling Defendant" performed the terms of its settlement, none would be entitled to dismissal.

Once the **other** Settling Defendants, who had not special stipulations, tendered their respective settlement proceeds, the actual Order of Dismissal as to **Certain** Defendants was filed on August 8, 2011. This Order of Dismissal follows the Partial Settlement Approval Order and, as authorized, dismissed with prejudice all claims against only the "Certain Defendants" identified therein. NFF is **not** included in the Order of Dismissal and is not dismissed by it. There is no later Order of Dismissal as to NFF. 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.

**B. <u>Respondents never said they had no further claims against NFF</u>.**

It cannot be earnestly questioned that a material term of the agreement Respondents made with NFF and its Participating Carriers involved preserving Respondents' claims against NFF under a Covenant not to Execute in order to pursue recovery of available insurance proceeds from its recalcitrant insurer, Mt. Hawley. The payment of $400,000 by carriers who, unlike Mt. Hawley, actually defended their insured was only a part of the consideration for the settlement.

Regardless of how Mt. Hawley presents it, Respondent's colloquy with the trial court on this point speaks for itself. Respondents clarified, for Professional Plastering's sake, their intention to have NFF referred to the Master in Equity for a separate damages hearing rather than keeping NFF as an empty chair defendant in the jury trial against

Professional Plastering. It was clear to everyone in the courtroom what was intended, which was reiterated to the circuit court during the motion hearing. (R. p. 33, line 16 – p. 34, line 1). Conveniently, the only party who claims confusion about this is Mt. Hawley.

To be certain, the Covenant not to Execute does not release NFF, nor does it release Mt. Hawley as its insured. A covenant not to execute is treated differently than a settlement agreement which 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).

Here, the Covenant not to Execute, consistent with the Respondents' agreement with NFF and the Participating Carriers, specifically provides that Respondents agree "not to execute against on NFF's assets **except insurance policies (and related rights) issued by carriers which have not contributed to the within settlement, specifically including Mt. Hawley Insurance Co.**" (R. pp. 218-22). (emphasis added). Further, under the settlement and the Covenant not to Execute, it was agreed that Respondents would not dismiss NFF until "the completion of all collection activity pertaining to the aforementioned assignments," at which point, and only then, would Respondents then dismiss NFF and discharge any judgments against it. This agreement is unambiguous, clear, and explicit in its terms and meaning.

As this Court observed in *Cobb*, "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Cobb,* at 578. 482 S.E.2d at 591-92. This Court should find that the Covenant not to Execute given by Respondents to NFF did not release it, and, instead, reserved Respondents' rights to pursue any insurance policy proceeds recoverable from Mt. Hawley.

Finally, any suggestion that Respondents **intended** to dismiss NFF from the action with prejudice via the Partial Settlement Approval Order is belied by the host of reserved rights in the agreement and Covenant not to Execute, as well as the direct actions taken by Respondents to pursue those rights. [15] Respondents never dismissed NFF, and in fact informed Judge Harrington that NFF "is actually still in the case." *See* (R. p. 112, line 21 – p. 113, line 20). Thereafter, Respondents pursued the damages hearing before the Master in Equity, obtained a Default Judgment, commenced an action to enforce the Default Judgment, and have steadfastly pursued its reserved rights in every way contemplated and expressed under the agreement and the Covenant not to Execute. All demonstrating NFF was never dismissed. (R. pp. 245-261). The entirety of the record proves Respondents did not intend to dismiss NFF, nor did Respondents do or say anything to imply any different. Mt. Hawley's suggestion that Respondents dismissed NFF, or even represented that they had no further interest against NFF, holds no water.

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[15] As another example, it would have been wholly unnecessary to consent to have counsel relieved if the intention was to dismiss NFF as a party to the case. (R. p. 133, lines 2-5); (R. p. 115, lines 11-21); and (R. p. 116, lines 14-19). It also would have been unnecessary to consent to allow Mt. Hawley to substitute new counsel—there would been no action to get into. This further demonstrates there was no express or implied action taken to dismiss NFF.

Every step taken by Respondents has been directed toward pursuing rightful claims against a negligent contractor that caused and contributed to occurrences and substantial damages suffered by Respondents.

## III. THE TRIAL COURT PROPERLY DENIED MT. HAWLEY'S MOTION TO INTERVENE BECAUSE THE RECORD DOES NOT ESTABLISH THAT MT. HAWLEY IS ENTITLED TO INTERVENE IN THIS MATTER.

Rule, 24(a)(2), SCRCP, provides for intervention when "the applicant claims an interest relating to the property or transaction which is the **subject of the action** and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." (emphasis added). To be entitled to intervention, the applicant 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.

*Berkeley*, 302 S.C. at 189-90, 394 S.E.d2 at 714 (*citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). **"[F]ailure to satisfy any one of the four requirements precludes intervention."** *Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (ex Parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993) (emphasis added).

"Intervention controversies arise in a myriad of contexts." *Berkeley*, 302 S.C. at 189-90, 394 S.E.2d at 714. When intervention is sought for the purposes of promoting judicial economy courts will liberally construe the intervention requirements. *Id.* However, when intervention will undermine judicial economy, as is the case in the matter

at hand, our courts have espoused no preference for liberal construction. Indeed, the Court must "consider the pragmatic consequences of a decision to permit or deny intervention and . . . [e]ach case will be examined in the context of its unique facts and circumstances, [and] the granting or denial of a Rule 24(a)(2) motion, we must determine **whether the trial judge abused his discretion**" *Id.* (emphasis added).

**A. Mt. Hawley's Motion to Intervene is untimely.**

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 (1993); *Davis v. Jennings*, 304 S.C. 502; 505, 405 S.E.2d 601, 603 (1991).

The first of these considerations is fatal to Mt. Hawley, because it admittedly "knew, or should have known, of [its] interest in the suit" when it received tender of Respondents' lawsuit against NFF in 2009. The "interest" that Mt. Hawley claims in this action is as "**an insurer of a defendant in this case.**" (Br., p. 42). Of significance is that Mt. Hawley admits that it was tendered notice of the suit filed by Respondents back in 2009, and reserved its coverage defenses. (Br., pp. 4-5) (**"When Mt. Hawley was tendered this claim, it asserted a reservation of rights setting forth its coverage defenses."**) (emphasis added). Rather than exercising its alleged "interest" as "an insurer of a defendant in this case" at that point in time, Mt. Hawley refused to participate or defend its insured. One must wonder: If Mt. Hawley was unaware of NFF's potential liability for the claims alleged against it in the underlying lawsuit, how could Mt. Hawley

possibly analyze what coverage defenses to assert? Mt. Hawley plainly knew of the nature of judgment that was sought against its insured, and by extension was aware of its interest as "an insurer of a defendant in this case" back in 2009. This six-year delay supports the circuit court's decision to deny the motion to intervene. *See* January 12 Trans (R. p. 8, lines 7-16); (R. p. 25, line 23 – p. 26, line 8); and (R. p. 30, lines 6-12).

In sum, Mt. Hawley's suggestion that the "timeliness" of its motion to intervene should be measured from its receipt of Respondents' Collection Action to recover the Default Judgment is a faulty premise. The interest Mt. Hawley claims, as an insurer of Mt. Hawley in relation to Respondents' claims, is the same interest it ignored for six years despite admittedly having notice of the claim against its insured. Its motion is untimely by every measure of the word.

The second consideration of timeliness inquires of the reason for the delay. *Ex parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664. Because Mt. Hawley contends it acted promptly after being served in the separate Collection Action, it relies on the fiction that "there was no delay." (Br., p. 41). Thus, the record is devoid of any evidence from Mt. Hawley demonstrating the reason that Mt. Hawley waited six years from the correct starting point, *to wit*, when it knew of its interest as an insurer when the lawsuit was tendered to Mt. Hawley in 2009. The absence of evidence demonstrating a 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).

Turning to the third consideration of timeliness, "the stage to which the litigation has progressed," Mt. Hawley admits the litigation had progressed to a "relatively late

stage." (Br., p. 41). In fact, as far as NFF is concerned (which is the source of Mt. Hawley's alleged interest in the action), the action had ended two years before Mt. Hawley sought to intervene. The Supreme Court has recognized: "It is important to note that, particularly when a case has been settled, the fact that a motion to intervene is filed after judgment may prove relevant to the merits of the intervenor's access claim." *Davis*, 304 S.C. at 503-505, 405 S.E.2d at 603 (motion to intervene for limited purpose of seeking access to sealed records did not affect the finality of the proceedings and was therefore allowed); *see Ex Parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (addressing a post-settlement motion to intervene the court noted "in our view, **there is no ongoing judicial 'action' into which [the intervenor] can intervene**") (emphasis added). Unlike the limited purpose for intervention in *Davis*, Mt. Hawley seeks to collaterally undermine the entire merits and finality of the litigation against NFF. The sole reason Mt. Hawley seeks to intervene is to void the Default Judgment, which undermines the very strong public interest in finality of judgments. *See Raby*, 358 S.C. at 20, 594 S.E.2d at 483 (stating our Supreme Court has a "longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments") (internal quotations omitted).

Whether to allow Mt. Hawley to intervene requires balancing its alleged interest against the interest in resolution of this dispute. *Id.* Here, Mt. Hawley can certainly seek resolution of its dispute over the enforcement of the Default Judgment in the separately pending Collection Action. Intervention is untimely and unnecessary. Further, when considering the "pragmatic consequences" of allowing Mt. Hawley, an insurance carrier, to intervene after years of litigation and a final judgment, public policy must strongly

weigh against finding Mt. Hawley's application timely, or proper. Mt. Hawley's hands are not clean as a result of its utter refusal to participate in the lawsuit for its insured even after NFF gave Mt. Hawley notice of the claim. (R. p. 31, line 24 – p. 32, line 4). The result Mt. Hawley seeks would encourage carriers to engage in post-judgment gamesmanship rather than encouraging the exercise of good faith in defending claims against an insured.

In examination of the final element of timeliness—the prejudice to the parties—Respondents would suffer extreme prejudice in having to re-litigate a matter that was resolved long ago. While Mt. Hawley would have this Court believe that no further recovery would be possible against NFF given other settlements obtained from co-defendants, this simply is not correct. Notably, Professional Plastering contended that much of the damages Respondents attributed to its work at trial was, instead, caused by the faulty work of NFF. (R. p. 31, line 24 – p. 32, line 4). Regardless, this fact does not alter the total damages suffered by Respondents, which exceed $15 Million as separately found by the Master in Equity.[16]

On the other hand any prejudice believed to be suffered by Mt. Hawley is fully ameliorated first by the fact that such prejudice is the result of its own decision not to participate to protect its insured, and, secondly, by the fact that a separately pending lawsuit exists in which Mt. Hawley is free to assert whatever defenses it may have, including the coverage defenses it chose to reserve back in 2009. *See infra.*

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[16] Again, Mt. Hawley distorts the facts in an effort to belittle Respondents' claims. Mt. Hawley mistakenly asserts that Professional Plastering only paid $92,500 to settle after its appeal from the underlying judgement. In truth, Professional Plastering, though its insurers, paid that amount in addition to another $1,300,000 to settle Respondents' claims against it. (SUPP ROA p. 004).

In sum, there is no evidence in the record to support Mt. Hawley's assertion that its request for intervention is timely or warranted. Consequently, the trial court did not abuse its discretion in denying Mt. Hawley this relief.

### B. Mt. Hawley does not have an interest relating to the property or transaction which is the subject of the underlying action that Respondent brought against NFF in 2009

In order to intervene, a purported party must have standing. *Goethe*, 373 S.C. at 138, 644 S.E.2d at 702 (*citing* Rule 24, SCRCP and *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). Standing to intervene requires that a party have "a personal stake in the subject matter of the lawsuit **and** is a real party in interest." *Id.* "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, **as distinguished from one who has only** a nominal, formal, or technical interest in, or **connection** with, the action." *Id.* (emphasis added). In order to intervene a purported party must have "a real proprietary interest **in the subject matter of the proceedings**;[17] an interest which is merely peripheral and not the real interest at stake will not warrant intervention. *Id.* (internal quotations and citations omitted) (emphasis added).

Our Supreme Court rejected the idea that an insurance carrier has standing to intervene in an action in which its insured is involved, even where the outcome of that action implicates the indemnity obligations of the carrier. *Id.* at 139, 644 S.E.2d at 703. In *Goeth*, a claimant was denied coverage by an insurance carrier on the carrier's opinion

[17] Applying the timeliness analysis cited above, the standing issue presents a real problem for Mt. Hawley. To have standing, Mt. Hawley must have had an interest in the subject matter of the underlying proceedings, and if it did, such interest would have existed throughout the pendency of the case against NFF—standing did not arise suddenly by virtue of the default judgment being entered. At best it would have arisen when the suit seeking that judgment was commenced in 2009.

that the claimant was not the spouse of the named insured. The claimant filed an action in the Family Court seeking an order validating its purported common law marriage to the named insured. *Id.* The carrier moved to intervene, and the Supreme Court affirmed the denial of its motion, holding that the interest of an insurance carrier in a proceeding—even one that necessarily determines whether or not the insurance carrier may have financial exposure—is "peripheral" where the subject of the proceeding is not for the "determination of insurance benefits." *Id. Goeth* directs the result here.

Respondents' suit against NFF related to a transaction involving the defective construction of certain buildings. Mt. Hawley is as much a stranger to that "transaction" as it was this litigation for six years. Its only interest derives from its contractual relationship with its insured, NFF. The outcome of Respondents' underlying action against NFF does not impair Mt. Hawley's ability to protect or litigate its rights under its policy. *See* Rule 24(a) (providing that intervention may be allowed when "the applicant claims an interest **relating to the property or transaction which is the subject of the action)** (emphasis added); *accord Goethe*, 373 S.C. at 138, 644 S.E.2d at 702 (finding that in order to claim joinder under Rule 19, SCRCP, a party must claim an "interest relating to the subject of the action and [be] so situated that the disposition of the action in his absence may . . . impair or impede his ability to protect that interest"). As proof, Mt. Hawley stood on its rights under its policy to refuse to defend Mt. Hawley relative to the "transaction" that was the subject of suit.

Just as in *Goeth*, any interest Mt. Hawley has in this action is merely "peripheral." Even if its interest is "connected" to the underlying suit, this connection does not warrant intervention because the interest in the underlying action is not "real, actual, or material."

*See id.* ("A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, **as distinguished from one who has only** a nominal, formal, or technical interest in, or **connection** with, the action.") (emphasis added). Any collateral attack Mt. Hawley wishes to make against the judgment based the arguments presented to the circuit court must be asserted in the separately pending Collection Action, where it certainly has standing.

**C. Mt. Hawley is not in a position such that without intervention, disposition of the action will impair its ability to protect the interest it claims.**

There is no basis for Mt. Hawley's claim in this proceeding "that if it tried to contest the judgment in the separate action, Respondents would claim there can be no collateral attack in a separate action." (Br., p. 43). To be clear, Respondents claim there can be no collateral attack **in this action**; hence, intervention is improper. However, Respondents stated in the hearing on Mt. Hawley's motion to intervene that Mt. Hawley is free to assert whatever defenses it might have against the Default Judgment in the separately pending Collection Action. **"If they [i.e., Mt. Hawley] want to try to collaterally attack the judgment or argue they are entitled to a set off, all those issues can be decided in that case** [i.e., the Collection Action]." (R. p. 31, lines 18-21) (emphasis added). Rule 60 also allows an "independent action" for relief from a judgment. Rule 60(b), SCRCP ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding[.]"). Unlike here, Mt. Hawley is a proper party to the Collection Action and is free to asset every sustainable ground it believes appropriate in the Collection Action.

The record is devoid of any indication that Mt. Hawley will be prohibited from protecting whatever interest or defenses it purports to have in the separately pending Collection Action. Therefore, the trial court did not abuse its discretion and its ruling should be affirmed.

### D. To the extent Mt. Hawley alleges the interest that it claims is not adequately represented by other parties, this is a result of its own making.

Mt. Hawley is vague as to what interest is not adequately represented in the matter in which it seeks to intervene. Specifically, it is unclear whether Mt. Hawley is asserting its interest as an insurance carrier is not adequately represented or whether it arises from its apparent belief that NFF is not protecting its own interest in the judgment that resulted from its negligent construction.[18] *See* (Br., p. 42). The distinction, while seemingly minor, is significant. Logic demands that the interest an intervenor claims must naturally be the same interest that is not protected if intervention is denied.

Mt. Hawley asserts its interest in this matter is as "an insurer of a defendant in this case." (Br., p. 42). To the extent the interest Mt. Hawley claims is a contractual one, as an insurer, this right was not, and could not, be implicated in the underlying case against NFF because the issue in that case was the negligent work of NFF, among others. If it is this interest that is not adequately represented, it is of no consequence and intervention is not warranted.

On the other hand, to the extent Mt. Hawley claims the interest of NFF is not adequately represented, this is the result of Mt. Hawley's refusal to defend its insured, despite having been aware of the claim and standing on a reservation of rights for years.

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[18] Respondents assume Mt. Hawley is not arguing that NFF should have protected Mt. Hawley's Interest. Considering Mt. Hawley's refusal to defend, that would be ironic.

(Br., pp. 4-5). Consequently, this claim is waived as Mt. Hawley was aware of the right to defend NFF and voluntarily and intentionally abandoned it by refusing to defend NFF subject to its reservation of rights. *See e.g. Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015) ("Waiver is a voluntary and intentional abandonment or relinquishment of a known right, [applicable when] the party against whom waiver is asserted possessed . . . actual or constructive knowledge of his rights.").

For these reasons there is no evidence in the record to support that Mt. Hawley is entitled to intervene in the present action. Therefore, the trial court did not abuse its discretion and this Court should affirm the denial Mt. Hawley's motion to intervene.

## IV. MT. HAWLEY HAS NO BASIS IN LAW OR FACT UPON WHICH TO SET ASIDE THE JUDGEMENT AGAINST NFF UNDER RULE 60

Mt. Hawley dedicates the substantial majority of its argument to this issue because it claims setting aside the Default Judgment against NFF is the sole reason it sought intervention. For the reasons that follow, this Court should reject its arguments and affirm the circuit court's refusal to grant intervention.

### A. Mt. Hawley's Rule 60(b) motion is not preserved for appellate review

To preserve an issue for appeal it must be timely raised to the trial court with sufficient specificity, and also ruled upon by the trial court. *See* Toal, *Appellate Practice in South Carolina*, 2 ed. pp. 57-66 (2010); *see e.g. Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015). The arguments raised in Mt. Hawley's brief relating to Rule 60, SCRCP were never ruled upon and are not preserved. *See e.g., I'on, LLC, v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing that issues not ruled on by the trial court are not preserved unless raised in a

subsequent motion to alter or amend). "If a losing party has raised an issue in the lower court, but the court fails to rule upon it, **the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.**" *See* Toal, *Appellate Practice in South Carolina*, 2 ed. p. 59 (2010); *I'on,* 338 S.C. 406, 526 S.E.2d 716; *see Pelican Bldg. Centers of Horry-Georgetown, Inc., v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993).

The Order on appeal states in its entirety, "Mt. Hawley Insurance Company's **Motion to Intervene** is Denied." (R. p. 4) (emphasis added). The circuit court made no ruling whatsoever on Mt. Hawley's purported Rule 60 arguments, assuming one was made with sufficient specificity to satisfy the rule. "Where a party raises multiple arguments in support of a **single** form of relief, and the trial court issues a form order, the party is not required to file a rule 59(e) motion. *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 912 (Ct. App. 2001). Here, there are two separate forms of relief—a motion to intervene (a right that affects Mt. Hawley's status as a party) and a separate request for relief for the judgment (a right that affects the finality of the judgment against NFF). These are separate and distinct remedies under separate and distinct rules, with separate and distinct elements. Thus, Mt. Hawley was required to seek reconsideration in order to preserve its separate claim for relief under Rule 60. *Compare Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 552, 762 S.E.2d 687, 688-89 (2014) (where the trial court issued a form order "denying **all relief**" there was no need to file a rule 59(e) motion) (emphasis added). Here, the circuit court only ruled on the motion to intervene, which is clearly not all of the relief Mt. Hawley seeks on appeal.

Mt. Hawley filed no Rule 59 motion seeking a ruling on its purported Rule 60 motion, and consequently the matter is not preserved for appellate review. Because Rule 60 forms the basis for all arguments (and sub-arguments) made in Section "III" of Mt. Hawley's brief to this Court, none of these arguments are properly before the Court.

Moreover, it is also doubtful that Mt. Hawley sufficiently raised many arguments under Rule 60 to the circuit court's attention. [19] It is fundamental that an issue must be raised with sufficient clarity to bring the issue to the attention of the trial court. While no magic language is required, the argument or objection must be sufficient to bring the precise nature of the request into focus. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (holding "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge").

Although the title of Mt. Hawley's motion includes the words "relief from judgments," this is not the deciding factor considering Mt. Hawley was seeking first to intervene so that, once it was a party, it could collaterally attack the judgments against NFF. Its written motion clearly states it is made under Rules: Rule 24(a) and 24(b). (R. pp. 37-39). It makes no mention of Rule 60. *Id.* Although Mt. Hawley claimed the judgments were "invalid," it only raised a lack of "jurisdiction" as a reason why. This argument is plainly incorrect, and none of the other several arguments in its initial brief, such as judicial estoppel or Rule 60(b)(5) were ever raised to the circuit at all, and certainly not with sufficient specificity to preserve the matter. The arguments focused on

[19] The fact that there was no ruling on this issue lends support to the fact that Mt. Hawley did not raised the issue with sufficient specificity to bring the precise nature of the issue into focus for the circuit court.

the fact that Mt. Hawley needed to first be a party,[20] hence the motion to intervene, so it could then challenge the judgments. *See* January 14 Trans. (R. p. 22, lines 22-24 and p. 32, lines 7-23) (R. pp. 37-39) ("Mt. Hawley is entitled to intervene for the purpose of challenging the judgments entered against North Florida."). Thus, Mt. Hawley's arguments related to Rule 60, are not preserved.

**B. Even if preserved, Mt. Hawley's Rule 60(b) motion was properly denied**

It is undisputed that the instant motion was made more than two years after the entry of the Default Judgment. (Br., p. 24). Grounds normally available under Rule 60(b)(1), (2) or (3) are foreclosed by the one year limitation assigned to motions made on those grounds. Therefore, Mt. Hawley cannot sustain a challenge under Rule 60(b) unless it can demonstrate grounds under Rule 60(b)(4) or (5). It cannot.

A motion under Rule 60(b)(4) requires proof that the underlying judgment is void. A voidable order plainly will not suffice. *Accord Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (observing, "[A]ny problems which may exist with the October 1990 order do not fall within Rule 60(b)(4)'s definition of 'void.' The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction."). The Court in *McDaniel*

[20] It is axiomatic that a litigant must be a party to an action before it can seek relief pursuant to Rule 60. *See* Rule 60(b), SCRCP (stating that "upon motion . . . the court may relieve **a party** or his legal representative from a final judgment") (emphasis added); *see also McCLurg v. Deaton*, 308 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) (acknowledging that the party's motion to intervene was granted *prior* to the court's consideration of its motion for relief under Rule 60).

went on to find that because both subject matter jurisdiction and personal jurisdiction were present, the order in question was, at best, voidable, not void. *Id.*

As explained herein, subject matter jurisdiction existed and NFF received proper notice of the default hearing. Thus, the judgments challenged by Mt. Hawley are not void—at best, they would only be voidable. This distinction is fatal to a Rule 60(b)(4) challenge, which must be premised upon a void order. 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.* Even if the judgments below are infected by some irregularity or error, this renders them merely voidable, and only then by NFF who is the party against whom they were entered. Mt. Hawley's collateral attack is not allowed for the purpose of challenging a voidable order entered against another and, by extension, it cannot be mounted via a motion to intervene or via this appeal.

The likes of *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 775 S.E.2d 37 (2015) and *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987), do not help Mt. Hawley. *Skipper* involved a confession of judgment with no demonstrated, and also involved assignment of a legal malpractice claim between adversaries, creating a concerning "role reversal" on the issue of proving the "claim within the claim." *Skipper*, at 37, 775 S.E.2d at 39. That was the controlling issue in the case. No similar facts exist here. Respondents' damages were determined by the Master, twice in fact. Another

distinguishing factor in *Skipper* is that the carrier in that case actually undertook efforts to defend its insured. *Id.* Mt. Hawley did not.

*Poston* also is distinguishable in a manner favorable to Respondents. NFF was clearly not a "sham" defendant used at trial. Quite the opposite is true. Once Professional Plastering understood Respondents intended to refer NFF to the Master in Equity for a separate damages hearing rather than keeping them in the trial proceedings before the jury, Professional Plastering had no objection. There was nothing secret about this agreement – it was made known to all parties present and their participating carriers. If Mt. Hawley did not know, that is Mt. Hawley's own fault. Professional Plastering never requested to notify the jury in its trial of the settlement reached with NFF. In fairness, there was no need, because Respondents fully informed the jury of the settlement monies obtained prior to trial. None of the concerning facts from *Poston* exist here, and the complaining party in *Poston* was a co-defendant at trial, which in this instance was PPS who knew what was happening and had no objection. *Compare Poston*, 294 S.C. 261, 264, 363 S.E.2d 888, 890.

Equally flawed is Mt. Hawley's contention that Rule 60(b)(5), SCRCP applies. The application of Rule 60(b)(5) was **never** raised and is not preserved. Regardless, to the extent Mt. Hawley argues that the judgment against NFF was satisfied by virtue of the payment of the $400,000 by the other Participating Carriers, the record easily dispels that argument. The agreement required the $400,000 payment and also specifically reserved Respondents' claim against NFF for the additional recovery now sought against Mt. Hawley in the separate Coverage Action, and dismissal is not required until that recovery effort is complete **against Mt Hawley**. (R. pp. 107-109) and (R. pp. 218-222). If Mt.

Hawley truly believes the judgment against NFF has been satisfied as it alleges in its brief, it need not intervene into this action; rather, it need only point out this fact to the court in the Coverage Action.

It is also true that the record below is devoid of any fraud upon the court. Much to the contrary, at every stage the proceedings the circuit court and Professional Plastering was fully informed of the nature of the agreement reached with NFF and its Participating Carriers, including the Covenant not to Execute, and specifically including the key point that one of NFF's carriers, *i.e.*, Mt. Hawley, was refusing to defend and indemnify its insured. The judgment obtained against NFF was explained to the Master and understood by him to be the **total amount** of construction repair damages caused by **all defendants.**[21] Mt. Hawley cannot complain that a motion for set off was not raised by or on behalf of NFF at the damages hearing and liken that to fraud on the court. Mt. Hawley could have chosen to defend its insured and had counsel present to make such a motion—in fact, the settlement with NFF required Respondents to consent to Mt. Hawley appointing new counsel. (R. pp. 107-109). That never happened, and, as an adversary, it is not Respondents' duty to ensure that it did. To the extent Mt. Hawley demands entitlement to a set off for other settlements received, Respondents do not contest Mt. Hawley's ability to raise that very point in the Collection Action. (R. pp. 15-22). Even after a set off for the $9,986,782.00 already received, a significant balance of the judgment in the amount of $6,169,725.50 remains outstanding.

[21] The Master accepted this figure twice, actually. The same $15,747,225 repair estimate was presented and accepted as part of the damages awarded by the Master in Equity in the separate, prior, default proceeding that was conducted against the developer, Charleston Tarragon Manager, LLC. The total judgment against the Developer was even higher due to loss of use damages that also were proved in that proceeding.

It is also incorrect to suggest that Respondents are barred from recovering the full amount outstanding after application of the set off. Foremost, the claims in this case were, in fact, subject to joint and several liability. *See Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40-41, 410 S.E.2d 243, 244 (1991) (South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-10 *et seq.*, expressly applies to causes of action arising or accruing **after** the effective date of the Act **and is not to be retroactively applied**); *see also* 2005 Act No. 27, §16(4) (indicating that S.C. Code Ann. §15-38-10 shall "apply to causes of action arising on or after [July 1, 2005] **except for those causes of action relating to construction torts** . . . and apply[s] to improvements to real property that obtain . . . a certificate of occupancy" prior to July 1, 2005). In this matter, the subject certificate of occupancy issued in 2002, and therefore Respondents' claims accrued against NFF and the other defendants prior to July 1, 2005. As a result there is no prohibition on the imposition of joint and several liability on NFF as a joint tortfeasor. Instead, having contributed to the damages, NFF is liable at law for the entire sum of the damages suffered by Respondents subject only to a set off for amounts already recovered.

It matters not that Respondents contended Professional Plastering was responsible for $8,761,443 in damages for stucco only work, because Professional Plastering defended that allegation by blaming NFF for those very same damages and the Master adjudicated NFF to be at fault. Plus, as a joint tortfeasor, NFF is liable to Respondents anyway. *Branham v. Ford Motor Co.*, 390 S.C. 203, 236, 701 S.E.2d 5, 23 (2010) (reaffirming the applicability of joint and several liability among joint tortfeasors).

After losing at trial, Professional Plastering demonstrated prejudicial error on appeal arising from the exclusion of its expert, who would have testified "that **NFF was**

**responsible for the improper installation** and stated Professional would never have seen the problems when it completed its work." *See Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 93, 754 S.E.2d 267, 272 (Ct. App. 2014). Respondents settled with Professional Plastering for a significant sum after remand of the case, but much less than the amount the jury first awarded. Considering the Master in Equity twice found that Respondents suffered $15,747,225 in actual damages, and further considering that Professional Plastering and its experts attributed fault to NFF for the $8,761,443 in damages complained of against Professional Plastering at trial, it certainly is not inequitable for the judgment to stand against NFF, a joint tortfeaser, for a lesser amount of $6,169,725.50 after applying a set off for recoveries already made. The extraordinary circumstances required for relief under Rule 60(b)(5) are wholly lacking in this record.

### C. The authority relied on by Mt. Hawley does not support a finding that the trial court abused its discretion

Because this Court is limited to reviewing the circuit court's decision for an abuse of discretion, Mt. Hawley's burden is high in this case. In light of Mt. Hawley's six year delay in requesting to intervene, despite knowing all along that its insured was being sued for substantial construction defects, it's hard to conceive that any abuse in discretion occurred. The judgments below are not void, as shown herein, and Mt. Hawley's attempts to twist and contort what happened below to suggest some manner of fraud on the court is flatly disproved by the record. The judge that presided over the relevant trial and associated proceedings Mt. Hawley now attacks is the same judge that who presided over all the proceedings where Mt. Hawley pretends the fraud was committed. Yet this Judge heard and rejected Mt. Hawley's request to intervene. This was well within her discretion on the record presented.

*St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519 (D.S.C. 2006) does not help Mt. Hawley. In fact, it proves Respondents are correct. *Payne* involved a case where the settling party voluntarily selected the amount to be paid to the plaintiffs by the indemnifying carrier. Here, that did not occur. NFF's liability amount was established by an adjudication of the damages suffered by Respondents in a court of law—not by settlement. Moreover, Mt. Hawley was not a participant in the $400,000 paid by the Participating Carriers, and, in fact, demands a set off for these amounts received. The circuit court was acutely aware of the existence of the terms of the settlement with NFF and the Participating Carriers, the Covenant not to Execute, and the request for entry of default and order of reference, and the reasons why. (R. pp. 112-116). All of this was approved by the circuit court, which distinguishes the present facts from *Payne*. Finally, perhaps the most important takeaway from *Payne*, is that it was not a case involving a motion to intervene, but rather a declaratory judgment action **initiated by the carrier** to avoid the indemnity obligation. *Payne* proves that Mt. Hawley has every opportunity to litigate any defenses it may have in the separately pending Collection Action, itself a declaratory judgment proceeding. There is no need or basis for Mt. Hawley to intervene in this action, and the circuit court was proper to deny its request.[22]

Finally, and perhaps most surprising is Mt. Hawley's reliance on *Redmond v. Devine*, 152 Ill. App. 3d 68, 72, 504 N.E.2d 138, 141 (1987). In *Redmond*, the insurer proved it was **never tendered** the underlying lawsuit, and when it happened to learn

[22] Although relied on by Mt. Hawley, *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), likewise bears no resemblance to the present facts as it turned on a settlement that denied the UIM carriers right to seek a jury trial for its own benefit, when the settling at-fault driver bargained away the carrier's protected right to defend the case **for itself**. Mt. Hawley's current efforts are far from analogous to those in *Broome*.

about the accident and attempted to investigate, its own insured **concealed the existence of the lawsuit**. After a default judgment was entered against the insured, the plaintiff was given an assignment by the insured to pursue the carrier's coverage in exchange for a release from personal liability. When the carrier learned of the judgment, it sought its insured's assistance in setting aside the default, but those efforts proved futile so it moved to intervene. In *Redmond*, the carrier **first learned of the underlying lawsuit** when the bad faith action was filed. *Id.* at 71-72, 504 N.E.2d at 140-41. "Specifically, Comet points out that Devine has admitted that Comet never acknowledged receipt of any papers regarding the Redmond lawsuit[.]" *Id.*

All of the facts that aided the carrier's cause in *Redmond* cut against Mt. Hawley here. Mt. Hawley concedes it had notice of the underlying lawsuit when the claim was tendered back in 2009 as demonstrated by Mt. Hawley's reservation of rights. (Br., p. 4). Certainly NFF did not conceal the lawsuit from Mt. Hawley, as was the case in *Redmond*. Mt. Hawley makes no claim, nor does the record demonstrate, that Mt. Hawley ever sought the assistance of NFF in this action (but given Mt. Hawley's refusal to defend NFF, turnabout would seem fair play). In *Redmond*, it was the insured that refused to participate as required to. Here, it was Mt. Hawley who refused to be involved.

Because Mt. Hawley has failed to offer any sustainable argument to demonstrate an abuse of discretion by the circuit court, its appeal must fail.

## V. MT. HAWLEY'S ARGUMENT REGARDING JUDICIAL ESTOPPEL IS NEITHER PRESERVED FOR REVIEW, NOR PROPERLY BEFORE THIS COURT, AND NONETHELESS FAILS ON THE MERITS.

Mt. Hawley never raised, nor even referenced, judicial estoppel as a basis to support any part of its motion on appeal, nor did Mt. Hawley seek a ruling from the

circuit court on this newly raised theory. Thus, it is not preserved for review. *See e.g., Hailey v. Hailey*, 357 S.C. 18, 24, 590 S.E.2d 495, 498 (Ct. App. 2003) (finding the issue of judicial estoppel not preserved for review because it was not raised to and ruled upon by the trial court) (*citing Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); and *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001) (for the proposition that issues if not raised to or ruled upon by the trial court are not preserved for appellate review).

Equally as fundamental, it is significant to note that the enforceability of the subject judgment **against Mt. Hawley** was not an issue before the circuit court in order to invoke consideration of this newly raised issue. It simply has no application here.

Further still, Mt. Hawley's unsupported allegation of judicial estoppel as it applies to relief under Rule 60 is patently untimely. Judicial estoppel, to the extent it is encompassed by Rule 60, would fall within the ambit of Rule 60(b)(3), providing for relief based on "fraud, misrepresentation or other misconduct by a party." Rule 60(b)(3), SCRCP. Any request for relief pursuant this rule "**shall** be made within a reasonable time **not to exceed one year after the judgment.**" *Id.* (emphasis added). Mt. Hawley admits, as it must, that its motion to intervene was filed more than one year after the judgments in question were entered. Thus, to the extent Mt. Hawley seeks relief under Rule 60 based on judicial estoppel its claim is time-barred by the Rule.

Regardless of these procedural fatalities, Mt. Hawley's allegation of judicial estoppel fails on the merits as well, and its characterization of the proceedings below strains credulity when the record is reviewed.

Five elements are required for the application of judicial estoppel:

(1) two inconsistent positions must be taken by the same party or parties in privity with each other;
(2) the two inconsistent positions were both made pursuant to sworn statements;
(3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
(4) the inconsistency must be part of an intentional effort to mislead the court; and
(5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position.

*Wright v. Craft*, 372 S.C. 1, 38, 640 S.E.d 486, 506 (Ct. App. 2006) (citing *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474, 480 (Ct. App. 2000) (Anderson, J., concurring in result only)) (emphasis deleted).

In its brief Mt. Hawley argues that Respondent took inconsistent positions by representing to the court that it had no further claim against NFF, and then stating that it would not seek a joint and several verdict against NFF. The record proves that neither suggestion is true, and fails for all the same reasons and analysis that undermine Mt. Hawley's contention that Respondents dismissed NFF. Those points, set out in Section II above, are incorporated here. And to reiterate, Respondents informed the circuit:

> [W]e reached a settlement with NFF **with two carriers** that were insuring them and defending them in this case. And we reached a settlement **with those carriers** and **we've reached a covenant not to execute with NFF**.

(R. p. 112, line 21 – p. 113, line 1).

Respondents also made it clear: "NFF **is still in the case**, but they have a covenant." (R. p. 113, lines 12-13). Respondents requested that NFF be placed in default and referred to the Master for a damages hearing. That is what happened. Respondents' explanation that they had no further interest against NFF "in this proceedings" was, as

previously explained, simply to clear up Professional Plastering's confusion about whether Respondents were seeking to create an "empty chair" defendant with NFF "in this [trial] proceeding" in name only. (R. p. 114, line 11 – p. 115, line 21). Respondents never expressed or implied they had no further interests against NFF. The clear intent was that Respondents' interest would be pursued in a separate damages hearing before the Master. (R. p. 115, line 13 – p. 116, line 17) (referencing the intent to continue claims against NFF due to the non-participating carrier, Mt. Hawley).

This same exchange on the morning of trial is also where Mt. Hawley incorrectly claims that Respondents represented they would not seek a joint and several judgment against NFF. The record proves otherwise. When Professional Plastering first objected to having NFF placed in default, it was out of its concern that Respondents planned to keep NFF **in the jury trial proceeding** as an empty-chair defendant with the goal of holding **Professional Plastering** jointly and severally liable for NFF's negligence.

Specifically, Professional Plastering's counsel stated:

> [W]hat [Respondents] are trying to do, **I assume**, would be to keep them in as name only so that they can have a joint and several liability verdict and try to impugn North Florida Framing's fault **to both defendants** [i.e., against Professional Plastering as well]. . . Do you see what I'm saying? They're going to say [NFF] – **our [Professional Plastering's] allegation has been that North Florida Framing installed the windows where the water is intruding.** If [Respondents] keep them as a defendant in the case, they're going to be able to say that all the defendant's together are jointly and severally liable for them.

(R. p. 114, line 8 – p. 115, line 5) (emphasis added). Respondent made it clear:

> Respectfully your Honor, **I think counsel misheard me. We're not seeking to keep them in this trial.** We're asking for our default and **we're asking that they be**

**referred to the default hearing that's already been scheduled for the other default defendants.**

(R. p. 115, lines 11-17) (emphasis added). This discussion involves joint and several liability only because Professional Plastering was confused about Respondents' intentions. Once explained, Professional Plastering said " . . . we have no objection to that at all. I apologize, Your honor." (R. p. 115, lines 18-21). Respondents have never said they would not pursue a joint and several judgment against NFF. It is absurd to suggest that Respondents expressed a desire to waive a lawful remedy against a joint tortfeasor. Plainly, there is no inconsistent position taken by Respondents.

There is another point. Respondents did not attempt to impugn Professional Plastering with damages caused by NFF[23] or any other defendant for that matter, which is what Professional Plastering raised a concern about. As Mt. Hawley points out, at the trial against Professional Plastering, Respondents informed the jury of the total damages claimed ($15,747,225) and also told the jury about the settlement amounts already received (which included the partial money received for NFF). Respondents then asked the jury to award the difference between the two. This is **exactly the same** result that would have occurred if Respondents had sought a joint and several verdict against Professional Plastering for the full amount, to which a set off would have applied for the monies already received. Nothing in the manner in which Respondents tried the case or communicated with the court raises an issue for judicial estoppel. Mr. Hawley's argument has no merit. *See Wright*, 372 S.C. at 38, 640 S.E.2d at 506 (requiring two

[23] But, Professional Plastering certainly planned to defend itself by arguing that NFF was actually to blame the problems Respondents argued were caused by PPS. As already demonstrated, Professional Plastering specifically contended NFF was in fact to blame for the water intrusion around windows it installed, rather than Professional Plastering.

positions that are "totally inconsistent positions such that "the truth of one position must necessarily preclude the veracity of the other position"). Last, there is no evidence of an intent to deceive the court by Respondents, because there was no such intent. This too is fatal to the argument. *Id.* Thus, this argument should be denied.

## CONCLUSION

For the reasons set forth herein, Respondents respectfully requests this Court to affirm the circuit court's denial of Mt. Hawley's motion to intervene.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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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 Vava Guzman Construction Company, Inc.,.....Defendants,

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

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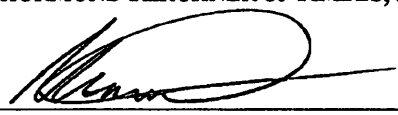
## CERTIFICATE OF COUNSEL

---

The undersigned attorney hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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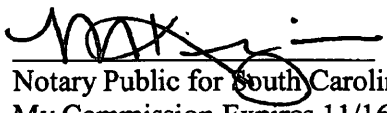
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Sworn to and subscribed before me
This 30th day of January, 2017.



Notary Public for South Carolina
My Commission Expires 11/16/2020.

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

---

**AFFIDAVIT OF SERVICE**

---

I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for Respondents, do hereby certify that I have on this date, served via U.S. Mail three (3) true and correct copies of the Final Brief to the following counsel of record:

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January 30, 2017

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

This firm represents Respondents in connection with the above appeal. Enclosed for filing, please find the following documents:

1. The original and sixteen (16) copies of the Supplemental Record on Appeal and accompanying Certificate of Counsel, including one unbound copy;

2. The original and sixteen (16) copies of the Final Brief of the Respondents and accompanying Certificate of Counsel, including one unbound copy;

3. The original and one (1) copy of the Affidavit of Service of the Supplemental Record on Appeal; and

4. The original and one (1) copy of the Affidavit of Service of the Final Brief of the Respondents.

As set forth in Rule 212, all parties have consented to supplementing the Record and therefore, no motion will be filed.

After filing the originals, kindly return any file-stamped copies to me in the self-addressed, stamped envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact me. Your assistance with this matter is appreciated.

With kindest regards, I remain,

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.

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

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# FINAL REPLY BRIEF OF APPELLANT

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## INTRODUCTION

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

1. The lower court's jurisdiction must be decided before this Court reaches the question of the standard of review (Part I, p.1);

2. This Court's standard of review for the denial of Mt. Hawley's right to intervene is *de novo* because Mt. Hawley sought to intervene as a matter of right (Part II, p. 7);

3. If the underlying judgment is void, itself a question of law, this Court's review of the lower court's failure to vacate the judgment is *de novo* (Part III.B, p. 12);

4. The judgment entered by the lower court is void as the party against whom it is entered was released from the case on a covenant not to execute, and therefore there was no case or controversy in which Respondents could continue to litigate so as to obtain a judgment so as to bind a non-party (Part III.B.1, p. 13);

5. The effort to obtain a judgment against an insurer by entering default against an insured who has no interest is repulsive to notions of justice and fair play (Part III.B.3, p. 18).

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

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

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

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

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

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

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

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

---

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

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

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

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

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

S.C. Supreme Court Admin. Order 2006-07-26-01 (hereinafter "Administrative Order") (emphasis added).[4] Thus, Judge Dennis' statement in his designation order — that "this case be assigned to the Honorable Roger Young to hear and handle *all* pre-trial motions and other matters pertaining to this case" — required Judge Young to preside over the case to the exclusion of all other judges of the Circuit Court. (Complex Case Designation Order at 2, Sept. 10, 2010, R. p. 92) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. MT. HAWLEY SHOULD BE PERMITTED TO INTERVENE

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

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

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

that case. Thus, Mt. Hawley is narrowly arguing that when a motion to intervene is denied by a court lacking jurisdiction to rule on that motion, this Court should review the denial *de novo*. However, out of an abundance of caution, Mt. Hawley will request to argue against precedent if this Court feels it is doing so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. Argument Properly Preserved for Appeal

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

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

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

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

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

In any event, "if the underlying judgment is void, it is *per se* an abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001). As discussed in Appellant's opening brief and in this Reply, the default judgment against NFF *is* void because Judge Scarborough lacked jurisdiction to enter such a judgment. Therefore, the denial of Mt. Hawley's Rule 60 motion was *per se* an abuse of discretion and must be reversed.

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

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

#### *a) Judge Scarborough Lacked Jurisdiction to Enter the Default Judgment*

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

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

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

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

In any event, a judgment that is entered without authority, "from its inception, is a complete nullity and is without legal effect." *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291 (1995). As such, the default entered by Judge Harrington and the default judgment entered by Judge Scarborough are *void* for lack of jurisdiction, not merely voidable as Respondents contend.

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

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

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

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

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

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

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

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

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

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

### 2. Mt. Hawley's Motion was Timely

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV. CONCLUSION

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

**[signature on following page]**

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

Respectfully submitted,

January 27, 2017

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

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CASE NO. 2008-CP-10-0049

Appellate Case No. 2016-000185

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, A South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors,, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

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## CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b) SCRAP

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The undersigned certifies that the Final Reply Brief of Appellant complies with Rule

211(b) SCRAP.

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***Attorneys for Appellant/Intervenor***

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

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, A South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors,, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks T Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., as successor in interest to Manga Wall Inc., All South Vinyl Products, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, Miquel Roales, APS Enterprises, Unlimited, Inc., HR Electric, A.M. Jacobs, Inc., Mickey Mason, d/b/a Mason Contractors KMAC of the Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

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**PROOF OF SERVICE**

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I certify that I have served the Record on Appeal, Final Brief of Appellant and Final Reply Brief of Appellant on all counsel of record for Respondents by depositing a copy in the United States Mail, Postage prepaid, on January 30, 2017, addressed to as follows:

**Jesse A. Kirchner**
**Michael A. Timbes**
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and have served a copy on the following counsel for Respondent by email, addressed as follows:

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ANDREW K. EPTING, JR., LLC

By: _____
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***Attorneys For Appellant / Intervenor***

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

January 30, 2017

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JAN 31 2017
SC Court of Appeals

VIA FEDEX

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Enclosed for filing please find 1 (unbound) original and 16 (bound) copies of the Final Brief of Appellant and Final Reply Brief of Appellant together with the Proof of Service of same in the above-referenced Appeal. Enclosed please also find 1 (unbound) and 15 (bound) copies of the Record on Appeal. I would greatly appreciate your filing the originals and returning a file-stamped copy of each pleading to me in the self-addressed, stamped envelope

Thank you for your consideration in this matter.

With kindest regards,

ANDREW K. EPTING, JR., LLC

s/*Drew*

Andrew K. Epting, Jr.

AKE,Jr./agg
Enclosures – as stated
cc: Phillip W. Segui, Jr., Esquire
Jefferson Leath, Esquire
Jesse Kirchner, Esquire
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

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

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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 Vava Guzman Construction Company, Inc.,.....Defendants,

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

---

**AFFIDAVIT OF SERVICE**

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I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for Respondents, do hereby certify that I have on this date, served via U.S. Mail three (3) true and correct copies of the Final Brief to the following counsel of record:

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January 30th, 2017
Charleston, South Carolina

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January 30, 2017

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

This firm represents Respondents in connection with the above appeal. Enclosed for filing, please find the following documents:

1. The original and sixteen (16) copies of the Supplemental Record on Appeal and accompanying Certificate of Counsel, including one unbound copy;

2. The original and sixteen (16) copies of the Final Brief of the Respondents and accompanying Certificate of Counsel, including one unbound copy;

3. The original and one (1) copy of the Affidavit of Service of the Supplemental Record on Appeal; and

4. The original and one (1) copy of the Affidavit of Service of the Final Brief of the Respondents.

As set forth in Rule 212, all parties have consented to supplementing the Record and therefore, no motion will be filed.

After filing the originals, kindly return any file-stamped copies to me in the self-addressed, stamped envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact me. Your assistance with this matter is appreciated.

With kindest regards, I remain,

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.

Moira Kerrigan
Paralegal to Michael A. Timbes

cc: Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
Jesse A. Kirchner, Esquire
W. Jefferson Leath, Jr.
Justin O. Lucy, Esquire
Phillip W. Segui, Jr., Esquire
John Chakeris, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspections, Inc., H2L Consulting Engineers, Twelve Oaks 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., Mickey Mason, d/b/a Mason Contractors KMAC of the

Carolinas, Inc., NEO Corporation and Vava Guzman Construction Company, Inc., Defendants,

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

Appellate Case No. 2016-000185

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Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

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Unpublished Opinion No. 2018-UP-420
Submitted April 2, 2018 – Filed November 7, 2018

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**AFFIRMED**

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Andrew K. Epting, Jr. and Michelle N. Endeman, both of Andrew K. Epting, Jr., LLC, of Charleston, and C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant/Intervenor.

Michael A. Timbes, Thomas J. Rode, and Jesse A. Kirchner, all of Thurmond Kirchner & Timbes, P.A.; W. Jefferson Leath, Jr., of Leath, Bouch & Seekings, LLP; and John T. Chakeris, of The Chakeris Law Firm, all of Charleston; Justin O'Toole Lucy, of Lucy Law Firm, and Phillip W. Segui, Jr., of Segui Law Firm, PC, both of Mount Pleasant, for Respondents.

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**PER CURIAM:** In this civil matter, Mt. Hawley Insurance Company appeals the circuit court's denial of Mt. Hawley's motion to intervene and motion for relief from judgment. First, Mt. Hawley argues the circuit court erred in denying Mt. Hawley's motion to intervene under Rule 24(a)(2) and (b), SCRCP, in a class action lawsuit brought against Mt. Hawley's insured, North Florida Framing (NFF),

by Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and by Twelve Oaks at Fenwick Property Owners Association, Inc. (collectively, Respondents). Second, Mt. Hawley argues the circuit court erred in failing to find the judgment against NFF was void under Rule 60(b)(4) and (5), SCRCP, because (a) the circuit court entered judgment against NFF after dismissing NFF's case with prejudice; (b) the judges who entered the default order and the default judgment order against NFF and denied Mt. Hawley's motion to intervene and motion to set aside the judgment lacked subject matter jurisdiction, which rendered the orders void; (c) Respondents were judicially estopped from seeking default judgment against NFF; and (d) Respondents withheld material information from the master-in-equity at NFF's damages hearing. We affirm.

1. We find the circuit court did not abuse its discretion in denying Mt. Hawley's motion to intervene pursuant to Rule 24(a)(2), SCRCP, because the motion was untimely. A party seeking intervention under Rule 24(a)(2), SCRCP, must (1) make a timely application; (2) claim an interest relating to the property or transaction at issue in the action; (3) demonstrate that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is not adequately represented by the existing parties. *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Generally, the court should liberally construe the rules of intervention when judicial economy will be promoted by declaring the rights of all affected parties. *Id.* However, failure to prove one of the four requirements for intervention under Rule 24(a)(2) precludes the party from intervening. *Ex parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993).

To determine whether a motion to intervene is timely, the court must consider (1) the time that elapsed since the applicant knew or should have known of its interest in the action; (2) the reason for the delay; (3) the stage to which the action has progressed; and (4) the prejudice the original parties to the action would suffer from granting intervention and the applicant would suffer from denying intervention. *Id.* Under Federal Rule of Civil Procedure 24(a), which is identical to Rule 24, SCRCP, in all relevant respects, "[a] motion to intervene is timely if it is filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his rights." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 8 (1st Cir. 2009).

Mt. Hawley's claimed interest on appeal, as "an insurer of a defendant in this case," is the same interest Mt. Hawley had when NFF notified it of the case in 2009. We find Mt. Hawley knew or should have known of its interest as an insurer when it

received notice of the class action in 2009 and asserted a reservation of rights and coverage defenses. When Mt. Hawley moved to intervene on July 28, 2015, the class action had progressed to a late stage in the proceedings: in 2011, settlement negotiations began, the nonsettling defendant went to trial, and the court entered default against NFF; and on May 14, 2013, the master held the damages hearing and entered default judgment against NFF. Pending court approval of one defendant's settlement agreement, the underlying class action had all but concluded when Mt. Hawley moved to intervene. Mt. Hawley's sole reason for intervening in the underlying class action was to challenge the judgment against NFF. Allowing Mt. Hawley to intervene in the proceedings would cause undue delay in the final resolution of the underlying class action and undermine the finality of the judgment, in contravention of public policy favoring finality. *See Chewning v. Ford Motor Co.*, 354 S.C. 72, 86, 579 S.E.2d 605, 613 (2003) (recognizing the "longstanding policy towards final judgments" and that "important benefits are achieved by the preservation of final judgments"). If 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. Mt. Hawley is free to collaterally attack the judgment and assert its defenses, including the coverage defenses it reserved in 2009, in the separate judgment creditor action pending against Mt. Hawley. The facts of this case do not favor construing the rules of intervention to allow an insurance company to intervene in an underlying liability case six years after its insured put it on notice of the case and two years after the master held the damages hearing and entered default judgment against its insured. *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714 (stating that, in determining whether a party has a right to intervene in a suit, the court should consider the pragmatic consequences of the decision to permit or deny intervention and must examine each case in the context of its unique facts and circumstances).

Because we find Mt. Hawley's motion to intervene untimely, we decline to address the other factors of intervention under Rule 24(a)(2), SCRCP. *See Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (finding the motion to intervene untimely and declining to consider "the remaining factors required for intervention pursuant to Rule 24(a)(2) because failure to satisfy any one of the four requirements precludes intervention"); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding an appellate court need not address remaining issues when its disposition of another issue is dispositive of the appeal). Therefore, we affirm the circuit court's denial of Mt. Hawley's motion to intervene.

2. Because we affirm the denial of Mt. Hawley's motion to intervene, Mt. Hawley is not a party or the legal representative of a party to the challenged judgment and lacks standing to seek relief under Rule 60(b). *See* Rule 60(b), SCRCP (stating "the court may relieve a *party or his legal representative* from a final judgment, order, or proceeding" (emphasis added)); *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343, 745 S.E.2d 90, 93 (2013) (finding an insurer lacked standing to bring a Rule 60(b), SCRCP, motion to set aside a judgment because the insurer was not a party or the legal representative of a party to the judgment from which it sought relief). Therefore, we decline to address Mt. Hawley's Rule 60(b), SCRCP, motion because our resolution of the prior issue is dispositive.[1] *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (concluding an appellate court need not address remaining issues when its disposition of another issue is dispositive of the appeal).

**AFFIRMED.**[2]

**LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.**

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[1] Because Rule 60(b), SCRCP, forms the basis for the entirety of section III of Mt. Hawley's brief, we find Mt. Hawley is precluded from seeking relief under Rule 60(b) for all of the issues raised in section III of the brief.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

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

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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.

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**PETITION FOR REHEARING**

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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,

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[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. CV0900028RGKAGRX, 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

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

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

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SC Court of Appeals

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):

Pleadings:

**Petition for Rehearing**

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12/11, 2018