THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspectors, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, 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.

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Appellant/Proposed Intervenor Mt. Hawley Insurance Company ("Mt. Hawley") petitions this Court to issue a writ of certiorari to review the decision of the Court of Appeals in the above-captioned matter: Opinion No. 2018-UP-420 (S.C. Ct. App. filed Nov. 7, 2018) ("the Opinion"). For the reasons stated herein, this Court should grant Mt. Hawley's petition, and issue a writ of certiorari to review and reverse the Court of Appeals' opinion.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on February 21, 2019.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the circuit judge's ruling on the intervention motion, when the circuit judge had no jurisdiction to rule on it because another circuit judge had been assigned exclusive jurisdiction over the entire matter by the Chief Administrative Judge pursuant to this Court's Administrative Order on Complex Case Designation?
2. Did the Court of Appeals err by failing to apply the proper standards and analysis when considering Mt. Hawley's motion to intervene?
3. Did the Court of Appeals err by affirming the circuit court judge's ruling that Mt. Hawley's motion to intervene was untimely?
4. Did the Court of Appeals err by relying on a purported alternative forum available to Mt. Hawley in affirming the denial of intervention?

STATEMENT OF THE CASE

This appeal arises from a construction defect lawsuit brought by Respondents related to the Twelve Oaks at Fenwick Plantation project. On June 9, 2009, Respondents filed their Second Amended Complaint, which named North Florida Framing ("NFF") as an additional defendant.

NFF was a subcontractor for the project who helped frame the buildings. (*See* NFF's Trial Brief, App. 101.) At various times NFF obtained insurance coverage from several different carriers, including Mt. Hawley. When the claim was tendered to Mt. Hawley, it informed NFF that there was no coverage under its policies, and it declined to undertake any defense of NFF. Other carriers opted to assume the defense and hired counsel to represent NFF, which counsel continued to represent NFF until it settled. (*See* E-Mail Settlement, App. 110.)

On August 5, 2010, NFF filed a Third Party Complaint against its subcontractor, Nava Guzman Construction, Inc. ("Nava") asserting several claims, including for full indemnify. (*See* NFF's Third-Party Complaint, App. 87-88.)

On September 9, 2010, the Chief Judge of the Ninth Circuit at the time, Judge R. Markley Dennis, designated the case as complex and assigned exclusive jurisdiction to Judge Roger Young to hear all matters pertaining to the case. (Complex Case Order, App. 95) Judge Young later unilaterally purported to assign jurisdiction to Judge Kristi Harrington for the purpose of conducting the "date certain trial to begin on Monday, May 9, 2011." (Order of Judge Young, App. 97.) Judge Harrington proceeded to hear pre-trial matters, conduct the trial, and later hear various matters wholly unrelated to the trial, including Mt. Hawley's motion to intervene and to set aside the judgment.

At the time of trial, Respondents had settled with many defendants. However, the claims against Nava and NFF remained. Although Respondents asserted no direct claim against Nava, ahead of trial they entered into a settlement agreement wherein Nava paid Respondents a sum of money in exchange for Respondents agreeing to defend and indemnify Nava from any and all claims made by NFF against it. (Trial Tr. at 63:13-64:13, App. 118-119.)

Three days prior to trial, Respondents then entered into a preliminary settlement agreement with NFF via email. Pursuant to the terms, NFF agreed to assign its rights against all other parties

(which would have included the right to enforce NFF's indemnify claim against Nava) to Respondents in exchange for a covenant not to execute. (Email Settlement, App. 110.) On the morning of trial, Respondents' counsel represented to the court that they had settled with NFF, and—from the record without the presence of NFF's counsel—presented an order relieving NFF's counsel to the Court. (*See* Consent Order, App. 189; Trial Tr. at 60:21-61:5, App. 115-116.)

Immediately after presenting that order relieving NFF's counsel from any further involvement in the matter, Respondents' counsel asked the Court to place NFF in default since they were unrepresented. (Trial Tr. at 61:12-20, App. 116.) 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. at 61:21-62:20, App. 116-117.) Respondents' counsel, however, asserted that Respondents no longer had an interest against NFF, and that its liability was fully and finally settled. (Trial Tr. at 63:13-64:13, App. 118-119.) Judge Harrington then agreed to sign the Consent Order Relieving Counsel and placed NFF in default. (Consent Order, App. 189-192, Trial Tr. 64:18-21, App. 119.)

The matter proceeded to trial. Respondents succeeded in obtaining a substantial judgment against the sole remaining defendant, Professional Plastering.

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.[1] The proposed order, which the court entered on June 3, 2011, stated that Respondents had entered into a "full, final and

[1] Despite the purported reassignment of the matter to Judge Harrington solely for the date certain trial, she continued to hear aspects of the case beyond the trial, including the approval of the class settlement and, later, Mt. Hawley's motion to intervene and for relief from the judgment. In almost every document presented to the court, Respondents inserted a provision stating that she retained jurisdiction. (*See, e.g.*, Final Order Approving Class Action Partial Settlement ¶ 6(d), App. 217 ("This Court shall retain jurisdiction of this matter until it is concluded."); Order Preliminarily Approving Class Action Partial Settlement ¶ 6, App. 202 (same)).

complete settlement" with NFF and the other settling defendants, and provided that it "ends the claims" against those defendants. (Proposed Order, App. 197-198 .) The court later entered a final order approving the settlement on June 10, 2011, 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, App. 210, 216-217.)

Respondents then presented to the court ex parte an Order of Default as to NFF, which the court granted on August 9, 2011. (Order of Default, App. App. 236.) Nearly two years later, on May 14, 2013, the court held a damages hearing.[2] (Order Granting Default Judgment, App. 245.) At Respondents' counsel's request, the court entered a $15,748,225.56 judgment against NFF relying on the information presented at the hearing. (*Id.*) This amount represented the total estimated damages attributable to the project as a whole for all defendants combined. (*See* Trial Tr. at 86:12-89:24, 651:14-20, 662:7-663:7, 700:10-22, App. 125-127, 139, 150-151, 188 (Respondents' counsel's opening statement stated that the "overall estimate . . . for the total repairs to this project" was "about $15,718,000" and closing statement explained that this estimate "applied to everybody who was in the case").) Mt. Hawley had no notice of the entry of default against NFF or of the related default judgment proceedings.

Finally, on May 26, 2015, more than two years after obtaining the default judgment against NFF, Respondents brought a collection against Mt. Hawley seeking satisfaction of the judgment. (Decl. J. Compl., App. 248-282.) It was only upon being served with this lawsuit that Mt. Hawley learned of the events surrounding the procurement of the judgment against NFF. Prior to this time,

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[2] In the order of default, Judge Harrington purported to reassign jurisdiction to the Master-in-Equity to conduct the damages hearing on the default judgment. (*See* Order of Default, App. 236-238.) Judge Mikkel Scarborough conducted the damages hearing and entered judgment against NFF. (*See* Order Granting Judgment against North Florida Framing, App. 245-248.)

Mt. Hawley had no notice of the order relieving counsel for NFF, the default of NFF, the default order, the damages hearing, or the default judgment against NFF.

On July 28, 2015, Mt. Hawley timely moved to intervene in this matter in order to raise concerns about the circumstances giving rise to the uncontested default judgment against NFF. (*See* Mot. to Intervene, App. 40-46.) Mt. Hawley's motion sought leave to intervene and to seek to set aside the judgment as void. (*See generally id.*) This matter was still active at the time of Mt. Hawley's motion, as the Court was in the process of giving consideration to Respondents' settlement with Professional Plaster.

Judge Harrington heard Mt. Hawley's motion on January 12 and January 14, 2016. On January 19, 2016, she issued a Form 4 Order denying Mt. Hawley's motion. (Order, App. 7.) Mt. Hawley timely appealed that ruling on January 19, 2016.

After consideration of the briefing, the Court of Appeals issued its per curiam Opinion affirming the trial court on November 7, 2018. Mt. Hawley petitioned for rehearing, which the Court of Appeals denied via Order dated February 21, 2019. This Petition followed.

SUMMARY OF GROUNDS FOR CERTIORARI

Certiorari is appropriate for several reasons. First, the meaning of "exclusive jurisdiction" under this Court's Complex Case Administrative Order is a novel question of law warranting certiorari. The Court of Appeals' failure to consider the threshold jurisdictional question respecting Judge Harrington's authority conflicts with this Court's prior precedent. Certiorari is also appropriate because, although this Court has adopted a general abuse of discretion standard when reviewing a motion to intervene, it has not addressed the novel question of what standard should apply where intervention is sought to set aside a void judgment. Furthermore, certiorari is proper to address the Court of Appeals' erroneous application of the intervention standard, which conflicts with existing precedent. Likewise, the Court of Appeals' finding that Mt. Hawley's

motion was untimely also conflicts with this Court's precedent. In particular, the Court of Appeals improperly relied on findings that Mt. Hawley owed a duty to defend NFF and/or monitor these proceedings after disclaiming coverage in finding that Mt. Hawley's motion was untimely. Finally, the Court of Appeals erred in relying on the availability of an alternative forum as a ground for denying Mt. Hawley's motion. No South Carolina precedent supports that this is a valid ground for denying intervention, and therefore certiorari is also appropriate to address this novel question.

ARGUMENT

I. The Court of Appeals erred in affirming Judge Harrington's ruling on Mt. Hawley's motion to intervene because she had no jurisdiction in light of the complex case order assigning exclusive jurisdiction over the entire matter to a different judge.

The Court should grant certiorari on the jurisdictional question for two reasons. First, it raises a novel question of law, namely, what is the meaning of "exclusive jurisdiction" under the Complex Case Administrative Order? Additionally, the Court of Appeals' failure to consider the jurisdictional question prior to considering the merits conflicts with longstanding precedent of this Court. Both of these issues warrant certiorari and review of the Court of Appeals' decision.

The Complex Case Designation Administrative Order originated with this Court, which drew upon constitutional powers in issuing it. The Chief Administrative Judge, likewise, issued his jurisdiction complex case order, sending the entirety of the case to Judge Young. Judge Young was simply not, respectfully, empowered to further delegate or change that designation order from the Chief Administrative Judge. Judge Harrington lacked jurisdiction to hear Mt. Hawley's motion to intervene. Therefore, certiorari is appropriate.

A. The meaning of the Complex Case Order's jurisdictional provision is a novel question of law.

It is undisputed that pursuant to the Complex Case Administrative Order of this Court, the Chief Administrative Judge involved here—Judge Dennis—issued an order designating this case

as complex and assigning the matter to Judge Young. (Complex Case Order, App. 96.) The Order provided that Judge Young will "hear and handle all pre-trial motions and other matters pertaining to this case." (*Id.*) The Order assigning exclusive jurisdiction to Judge Young was never modified. However, after handling the case for over two years as the complex case judge, Judge Young purported to assign jurisdiction to Judge Harrington (who had no familiarity or prior experience with the case) "for a date certain trial to begin on Monday May 9, 2011." (Order, App. 97.)[3] Judge Harrington not only conducted the trial, but also considered several matters relating to the settlement between Respondents and NFF. Subsequently, Judge Harrington purported to reassign jurisdiction to yet another judge, Master-in-Equity Mikkel Scarborough, to conduct a damages hearing on NFF's default. (*See* Order of Default, App. 236-237.) It is undisputed that the Orders challenged in this appeal were issued by Judge Harrington and Judge Scarborough. This, case, therefore raises a fundamental and novel question of South Carolina law: what does "exclusive jurisdiction" mean under this Court's Complex Case Administrative Order?

This Court issued its Complex Case Administrative Order on February 26, 2006 pursuant to its Constitutional authority under S.C. Constitution, Article V, § 4. *See* Administrative Order, No. 2006-07-26-01 (S.C. Sup. Ct. dated July 26, 2006). This Administrative Order 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.***" *Id.* (emphasis added). If the case is designated complex, "all pretrial

[3] Arguably, this ran afoul of the settled premise that "one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985). Judge Young's order reassigning the case to Judge Harrington for a date certain trial was improper as it modified/reversed the order of the Chief Administrative Judge.

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).

The meaning of "exclusive jurisdiction" as described in this Administrative Order has not been addressed by the appellate courts of this state. On two occasions not involving the Complex Case Administrative Order, however, 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. 11, 2005) (vacating order of judge on issue of attorney's fees where another judge retained exclusive jurisdiction over the matter). However, again, neither of these cases were interpreting the Complex Case Administrative Order. Moreover, neither of these decisions were published and, therefore, they lack precedential value. They are cited for background only.

On this basis alone, the Court should grant certiorari. The very purpose of this Court's Complex Case Administrative Order was to ensure continuity, familiarity, and uniformity in complex cases. The point is to have one judge preside over 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 a difficult case. The judge's specialized knowledge also furthers judicial economy and the interests of justice by avoiding having multiple judges waste judicial resources to learn the complexities of a complex, time-intensive matter each time an issue warranting court attention arises. When the case is passed to a different judge, and—like in this case—later passed to yet another judge, the purpose of the rule is vitiated.

Moreover, permitting a judge to whom a complex case is assigned to reassign the case to a different judge unilaterally would render the term "exclusive jurisdiction" meaningless. *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)); *cf. see also Davis v. Crist Indus., Inc.*, 98 S.W.3d 338, 341 n.9 (Tex. Ct. App. 2003) (explaining that if one judge "ha[s] been specifically assigned to preside" over the case, "his assignment would give him ***exclusive authority*** over the case and would have to be withdrawn before" another judge could conduct the trial (emphasis added)).

The Court should grant certiorari in light of the novel question law at issue in this case. Protecting the Complex Case Administrative Order's integrity and purpose are at issue. Here, Judge Young had no judicial power to assign any portion of the case to Judge Harrington, once the case had been designated "complex" and assigned to Judge Young by Chief Administrative Judge Dennis. Likewise, Judge Harrington had no authority to take any of the subsequent actions she took in this case. All of her actions are therefore void. The Court of Appeals erroneously failed to address this jurisdictional problem in its Opinion. This Court should thus grant certiorari and reverse the Court of Appeals, and this Court should vacate the orders of Judge Harrington, and remand this matter to Judge Young for further proceedings consistent with such a ruling.

B. The Court of Appeals failed to consider the threshold jurisdictional question before ruling on the merits of intervention.

Jurisdiction is a threshold issue because without proper jurisdiction, a judge cannot decide any issue in any case. *See Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (explaining that "[j]urisdiction is generally defined as 'the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that

of announcing the fact and dismissing the cause.'" (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))); *see also* Black's Law Dictionary (3rd pocket ed. 1996) (defining jurisdiction as "a court's power to decide a case or issue a decree").

Here, the Court of Appeals upheld the ***merits*** based ruling of the lower court without first deciding whether the lower court had jurisdiction to decide the issue ***at all***. The Court of Appeals held: "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." (Opinion at p. 2.) The Court reached this conclusion despite recognizing that Mt. Hawley challenged on appeal whether "the judges who entered the default order and the default judgment 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." (*Id.*) In its Petition for Rehearing, Mt. Hawley noted: the Court of Appeals could not decide the merits of the intervention ***without first deciding whether the lower court had jurisdiction to hear the motion to intervene.*** The Court of Appeals, however, summarily denied rehearing and did not expressly address the jurisdictional issue.

This was error, and conflicted with the well-established principles underlying South Carolina's jurisprudence on jurisdiction. Therefore, this Court should grant certiorari for this reason as well.

II. The Court of Appeals erred by failing to apply the proper standards and analysis regarding Mt. Hawley's motion to intervene.

A. The Court should grant certiorari to consider the novel question of law raised by Mt. Hawley regarding the appellate standard of review where intervention is sought to set aside a void judgment.

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. Most judicial circuits, including the Fourth Circuit, apply a *de novo* standard of review under Federal Rule 60(b)(4) when reviewing such a motion. *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. "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 and Court of Appeals should be reversed under either standard. However, under the *de novo* standard, the appellate Court can make also its own factual determinations.

The proper standard of review where a party seeks to intervene to set aside a void judgment is a novel question of South Carolina law. Therefore, certiorari is proper to address this issue. The Court should grant certiorari, apply a *de novo* standard, and reverse the Court of Appeals and the circuit court.

B. The Court should grant certiorari in light of the Court of Appeals' failure to consider the unique circumstances of this case and the judicial economy concerns raised by Mt. Hawley.

The Court of Appeals failed to consider this Court's recognition that although abuse of discretion normally governs appellate review of a motion to intervene, "each case is viewed in the context of its ***unique facts and circumstances***." *Ex Parte Gov't Emps. Ins. Co.*, 373 S.C. 132, 143, 644 S.E.2d 699, 705 (2007). Likewise, courts 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)).

The Court of Appeals' failure to consider these principles conflicts with this Court's precedent and warrants certiorari. As detailed above, the circumstances giving rise to this dispute are exceedingly unusual. Respondents and NFF entered into a settlement agreement which purported to represent a final settlement of the claims against NFF. Nevertheless, Respondents subsequently pursued a default judgment against NFF. Respondents ultimately obtained a judgment exceeding fifteen million dollars, which they now seek to hold Mt. Hawley liable for as an insurer of NFF. Mt. Hawley, however, did not receive notice of ***any*** of these developments, and was unaware of the events that occurred until it was served with the judgment creditor collection action.

Further, although the Court of Appeals indirectly acknowledged judicial economy concerns, the result of the decision was a rigid application of the rules. The Court focused too intently on the length of time that passed between events, much of which was totally within Respondents' control, ***rather than when Mt. Hawley learned of them.*** Likewise, the Court of Appeals ignored that the proper consideration was not the length of the proceedings against NFF, but rather whether Mt. Hawley timely sought to intervene once ***its*** interests arose and it was on

notice of them. Mt. Hawley timely sought to intervene as soon as its interest arose and it was placed on notice of said interest. Judicial economy concerns favor the grant, not the denial, of intervention here.

In light of these circumstances, the Court should grant certiorari to review and reverse the decision of the Court of Appeals.

C. The Court of Appeals erred in finding that intervention impeded finality.

The Court of Appeals found that Mt. Hawley's motion to intervene was untimely because the action "had all but concluded" at that time. This was erroneous and conflicts with prior precedent on the propriety of intervention.

Mt. Hawley intervened to highlight to the court that the case had already been dismissed with prejudice as to NFF.[4] Mt. Hawley's motion was designed to promote, not thwart, finality with regard to the dismissal of NFF. Mt. Hawley was attempting to explain that ***the judgment should have never existed*** at all. 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).

Contrary to the Court of Appeals' 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,

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[4] The class settlement orders stated that they represent a "full, final and complete" settlement between respondents, NFF, and the other settling defendants. (*See* Proposed Order, App. 97; Final Order, App. 212.) Likewise, the Proposed Order's stated that it "ends" the claims against them. (*See* Proposed Order, App. 198.) "Full, final and complete," however, means precisely what the Orders state—there was no case or controversy remaining against NFF. *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). Therefore, the Final Order was akin to a dismissal of NFF.

improper default proceedings and an entirely separate lawsuit (the collection action) resulted. Thus, certiorari in warranted, and the Court of Appeals should be reversed.

D. The Court of Appeals' decision conflicts with prior precedent permitting intervention under analogous circumstances.

As the Court of Appeals has recognized, 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). Further, 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").

The Court of Appeals 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.*

Therefore, for all these reasons, certiorari is warranted to address the Court of Appeals' failure to consider these important factors.

III. The Court of Appeals erred in finding that Mt. Hawley's motion was untimely.

A. The Court of Appeals' decision conflicts with this Court's precedent, which supports that all four timeliness factors must be considered.

As this Court has explained, in examining the timeliness of a motion to intervene, courts should 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).

As set forth herein, Mt. Hawley acted quickly and in a timely fashion once it became aware of the judgment creditor collection action. The time that had elapsed and the stage of the litigation are only two of the four factors. As the *Davis* Court noted, 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, Respondents are seeking to collect on a ***void*** default judgment from Mt. Hawley, which never received any notice of the default-related issues and thus could not protect itself against the judgment.

The Court of Appeals, however, solely focused on when Mt. Hawley knew or should have known of its insurer interests, finding that the motion was untimely because Mt. Hawley knew of its interest as the insurer of defendant NFF in 2009. The Court's failure to consider the other timeliness factors was error and warrants certiorari.

B. The Court of Appeals erred in referencing Mt. Hawley's duty to defend in finding that the motion was untimely.

The Court of Appeals also improperly relied on a finding that Mt. Hawley owed a duty to defend NFF to reach its holding. This also conflicts with this Court's precedent and warrants certiorari.

The Court of Appeals found 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 Court concluded 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.) The Court of Appeals should not have, respectfully, noted the decision of Mt. Hawley not to defend as part of its justification for affirming the denial of the motion to intervene. Mt. Hawley had a number of valid grounds for not defending NFF.[5] These grounds, however, were not before the trial court or the Court of Appeals, and were 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, such was not the case. Further, 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.

[5] These grounds included, but were 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 coverage provided by the policies.

Hence, the Court of Appeals improperly pointed to Mt. Hawley's decision not to defend as a reason for affirming the circuit court's denial of the motion to intervene. The Court should thus grant certiorari and reverse the Court of Appeals.

C. The Court of Appeals also erred in finding that Mt. Hawley had a duty to monitor the case against its insured, NFF, even after disclaiming coverage.

Another basis for the Court of Appeals' decision was that if Mt. Hawley had continued to monitor the proceedings after disclaiming coverage, it would have been aware of the need to intervene sooner. This Court has never recognized that an insurer owes such a monitoring duty where it has properly disclaimed 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" for any amendments to the complaint that could potentially bring the plaintiff's claims within the scope of coverage. *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). Likewise, the Minnesota Supreme Court reached the same conclusion in *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993), explaining that the insurer, "having initially denied coverage on the basis of the pleadings, was under no obligation to participate in subsequent discovery proceedings" to determine whether subsequent facts would support that the claims fell within the scope of the policy's coverage. *See id.*; *see also The Upper Deck Co., LLC v. Fed. Ins. Co.*, 358 F.3d 608, 612-13 (9th Cir. 2004) (explaining that after the insurer denies coverage, it is "not charged with knowledge of new extrinsic facts; nor is it under an independent obligation to investigate the potential for coverage").

Hence, after making a proper disclaimer of coverage, Mt. Hawley was under no affirmative duty to monitor the proceedings. There is no evidence suggesting Mt. Hawley's disclaimer of coverage was inappropriate, and that issue is not before the Court. It is undisputed that Mt. Hawley first received notice of the default and of the subsequent default judgment against NFF when it was served with the judgment creditor collection action. Moreover, it is undisputed that Mt. Hawley promptly moved to intervene in this action upon learning of the collection action. Mt. Hawley should not be penalized for a lack of notice where it was under no obligation to affirmatively monitor the underlying litigation.

Additionally, the Court of Appeals' logic in this regard is fundamentally flawed. The Court in its Opinion states that if Mt. Hawley monitored the litigation against NFF, it would have been aware of the default sooner. Yet, 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 intervention earlier.

Therefore, whether such a duty exists is also a novel issue of South Carolina law. Moreover, as noted herein, the Court of Appeals erred in relying on this purported monitoring duty as a basis for denying intervention. Therefore, the Court should grant certiorari and address whether this is a recognized obligation under South Carolina law where an insurer has disclaimed coverage.

IV. The Court of Appeals erred in relying on the availability of an alternative forum in denying Mt. Hawley's motion to intervene.

The Court of Appeals' ruling that Mt. Hawley could collaterally attack the judgment, while correct, was not a proper basis for denying Mt. Hawley's motion to intervene. There is no South Carolina precedent supporting that this is a proper ground for denying intervention.

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 Alliance 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—was not a basis for denying intervention. The Court of Appeals erred in ruling to the contrary, and therefore this Court should grant certiorari.

CONCLUSION

For the reasons stated above, this Court should grant Mt. Hawley's petition for a writ of certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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March 25, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

Fenwick Plantation Tarragon, LLC, a South Carolina Limited Liability Company f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company, Charleston Tarragon Manager, LLC, a Delaware Limited Liability Company, Tarragon Development Corporation, a Nevada Corporation, Summit Contractor WSW Group, Inc., Summit Contractors, Inc., Fugleberg Koch Architects, Inc., Development, Compliance & Inspectors, Inc., H2L Consulting Engineers, Twelve Oaks at Fenwick Property Owners Association, Inc., (from August 6, 2006 to December 15, 2008), Professional Plastering & Stucco, Inc., Johnson Companies, Inc., d/b/a Johnson Roofing, Inc., Los Compos, Inc., North Florida Framing, Inc., Best Masonry & Tool Supply, Inc., Marquez Construction, Inc., J.T. Walker Industries, Inc., J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP, J.R. Hobbs Co.-Atlanta, LLC f/k/a JRH Merger Co., LLC, Jamie Helman, individually, Scott Ferguson, individually, and Chris Cobbs, individually, and Federal Insurance Company, Maria Arias, 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 Paralegal 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 WRIT OF CERTIORARI

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March 25, 2019

Hand Delivered
The Honorable Daniel E. Shearouse
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RE: Mark Teseniar v. Fenwick Plantation
Appellate Case No. 2016-000185
Our File No. 01882/01508

Dear Mr. Shearouse:

Enclosed are the original and seven (7) copies of Appellant/Proposed Intervenor Mt. Hawley Insurance Company's Petition for Writ of Certiorari and the original and 2 copies of the Appendix. Also enclosed is our check for the filing fee as required. We would appreciate it if you would file the originals and return clocked copies to us via our office's courier.

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

With kind regards, I remain

Very truly yours,

Blake T. Williams

Blake T. Williams

BTW:mk
Enclosures

cc: The Honorable Jenny Abbott Kitchings, Clerk of Court

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