IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2018-CA-01590

ALCATEC, LLC AND ROSEMARY BARBOUR — **APPELLANTS**

vs.

THE JONES GROUP OF MISSISSIPPI, LLC AND GENIE LACEY JONES — **APPELLEES**

BRIEF OF APPELLEES, THE JONES GROUP, LLC AND GENIE LACEY JONES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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B. Whether the Trial Court erred in applying defense collateral estoppel thereby precluding Appellants from re-litigating the issue of whether Barbour perpetrated a fraudulent scheme to submit duplicate invoices to the Government for payment.

C. Whether Plaintiffs'/Appellant's claims are barred by the doctrines of intervening, superseding cause.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

In April 2016, Alcatec, LLC, was awarded a federal government contract ("the Contract") with Federal Emergency Management Agency ("FEMA") to maintain temporary housing units throughout the gulf coast region affected by Hurricane Katrina. [ROA.88]. Rosemary Barbour was the sole owner and operator of Alcatec, LLC. *Id.* Under the Contract, Alcatec was compensated for the completion of a series of discrete activities related to the mobile homes, including performing monthly preventative maintenance inspections ("PMIs") of each mobile home, responding to emergency and routine maintenance calls, and "deactivating" mobile homes no longer used that were transported to a different location. [ROA.88-89]. Alcatec was paid a fixed rate of $244.00 for each PMI completed. [ROA.91]. Central to the Contract was the concept that the inspections were to be performed monthly and were not to be performed within fourteen days of one another. *Id*. At each inspection, the inspector was to complete a checklist and the supervisor would sign off on it. *Id*.

Under Alcatec's system all work orders, for routine or emergency requests or requests for deactivation, were received by a "call center", either by telephone call or e-mail, and dispatched

to Alcatec's general maintenance workers (not the inspectors). [ROA.93]. Alcatec subcontracted with the Jones Group, LLC, a business development and project management company for federal projects, to manage the "call center." [ROA.92]. Alcatec also tasked the Jones Group with finding a suitable computer software program to "track the life cycle" of a PMI work order. *Id*. After researching leading software programs in the industry, The Jones Group recommended the CrossForms program to Barbour. *Id*. Thereafter, Barbour met with representatives of CrossForms for a presentation, decided to purchase the software, and entered into a contract with them. *Id*.

The life cycle of a work order in CrossForms was as follows: Alcatec's inspectors/supervisors would complete the inspection and fax or deliver the completed checklists to the Jones Group, who would record the data into CrossForms. [ROA.93]. Before entering the completed inspections into CrossForms, the Jones Group would vet the checklists to ensure they were properly dated, signed, and contained a valid trailer number. *Id*. If not "complete", the checklists would be sent back to Alcatec. *Id*. If "complete", the Jones Group then would export the completed PMI list from CrossForms to an Excel spreadsheet and sort by barcode to ensure no duplicate PMIs were included on the list. *Id*. The Excel spreadsheet was then provided to Alcatec to be used for invoicing FEMA. *Id*. Rosemary Barbour was solely responsible for preparing and submitting all invoices to the Government. [ROA 114-16].

In November 2006, Alcatec fell behind in completing its monthly PMIs and began back-billing to make up for the lost profit.[1] [ROA.94]. This complicated practice led to a breakdown

[1] Alcatec fell behind on its billing due to a disruption in its workforce. [ROA.94]. Following an audit by the Department of Labor, Alcatec was directed to cease using independent contractors to perform the inspections and instead use direct hires. *Id*. Many of the inspectors Alcatec was using refused to transition from a fee per inspection to an hourly rate, and Alcatec was forced to hire new inspectors. *Id*. The new inspectors were unfamiliar were the area and routes, so Alcatec fell behind in completing PMIs bi-monthly. *Id*. In December 2006, Alcatec failed to inspect approximately 900 of its 2,000 units, and with permission from FEMA, Alcatec performed those inspections in the beginning of January to

in the Jones Group's relationship with Alcatec. [ROA.95]. The Jones Group began to notice duplicative PMIs within the same month, as well as checklists that appeared to be backdated. [ROA.95-96]. Being uncomfortable with Barbour's new business practices, the Jones Group submitted its ninety-day notice of resignation in January 2007. [ROA.96]. Two weeks later, on January 29 or 30, 2007, Alcatec terminated its relationship with the Jones Group. *Id*.

Also, around this same time beginning with the December 2006 invoice, FEMA began rejecting part of Alcatec's invoices for duplicate billing of PMIs. [ROA.97]. Initially, Barbour refused to provide FEMA with Excel spreadsheets of invoices as required under the Contract and would only produce PDF versions that FEMA could not "sort," requiring FEMA to manually vet for duplicates. [ROA.96-97]. By April 2007, FEMA rejected the entire invoice stating that an audit was required for any payment due to the discovery of "double billing". *Id*. Barbour's scheme continued until Alcatec's offices were raided by the FBI in June 2007. [ROA.102].

Despite understanding that it had received payment for duplicate invoicing, Alcatec filed a breach of contract claim against the Government in the United States Court of Federal Claims ("Court of Federal Claims") on February 26, 2006, asserting it was owed $3,846,471.69 under the FEMA Contract.[2] [ROA.86]. The Government resisted payment and asserted counterclaims alleging that Alcatec had forfeited any right to receive the payment under the Contract its owner, Rosemary Barbour, defrauded the Government. [ROA.104]. In an effort to overcome the fraud counterclaims, Barbour blamed CrossForms (the computer software program recommended by Jones) for the duplicate billing. [ROA.98]. Barbour argued that CrossForms was the "heart of

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complete billing for the December invoice. *Id*. The practice was initially allowed due to the workforce change and the holidays, but there was no agreement that it could continue in the following months. *Id*.

[2] Originally, Alcatec was to be paid a fixed rate of $6,111,000.00 under the Contract for the management of 6,700 units at a price of $912.00/unit. [ROA.89]. However, FEMA later reduced the amount owed under the Contract by $4,173,912.00, stating that Alcatec would only be managing 2,124 units. *Id*. This was the basis of Plaintiffs' breach of contract claim against the Government. *Id*.

the operation" and "that a flaw in the CrossForms software created duplicate inspections." [ROA.92].

Because Barbour took this position at trial, Ms. Jones was forced to testify as to CrossForms and the role the Jones Group played in Alcatec's business. Ms. Jones became a central witness for the Government and provided testimony to substantiate the Government's claim of a scheme to defraud the Government perpetrated by Barbour. [ROA.95]. Ms. Jones "who was initially charged with `track[ing] the life cycle of [a] particular work order, and was intimately familiar with the call center procedures and the CrossForms software, testified that one of the reasons that the Jones Group terminated its contract with Alcatec was that she was not comfortable with this new tracking process" of PMIs implemented by Barbour. [ROA.106]. Specifically, Ms. Jones "testified that the Jones Group received December and January spreadsheets from Ms. Barbour in a January 31, 2017 e-mail that reflected a larger number of PMIs from Ms. Barbour than what the Jones Group had recorded." [ROA.108]. Additionally, Ms. Jones provided testimony regarding the conflicting dates in connection with the PMIs. *Id*. Throughout her testimony, Barbour consistently attempted to marginalize Jones' credibility. [ROA.92-93].

The Federal Court rejected Alcatec's claims regarding Crossforms and found by clear and convincing evidence that Barbour "engaged in a continued effort to manipulate Alcatec's billing system that distorted the contractual requirements and ultimately perpetrated a fraud by intentionally falsifying dates on PMI checklists." [ROA.92, 98]. Moreover, the Court found that Alcatec showed reckless disregard as it related to the hundreds of duplicate inspections that were billed to FEMA. [ROA.120-21]. Consequently, Alcatec lost the ability to further participate in federal contracts and was ordered to pay $77,000.00 in fines and $275,000.00 in penalties to the Government. [ROA.122].

Appellants appealed, but the Court of Federal Claim's decision was upheld on appeal. *See Alcatec, LLC v. United States*, 2012 U.S. App. LEXUS 14109 (Fed. Cir. July 11, 2012). Appellants then filed suit against Appellees alleging they suffered damages stemming from Appellees' recommendation and implementation of CrossForms, despite the Federal Court previously finding Alcatec liable for their own damages based upon the intentional, fraudulent conduct of Barbour. [ROA.15, 17-18, 21-22].

B. PROCEDURAL POSTURE.

On August 7, 2014, Plaintiffs/Appellants Rosemary Barbour and Alcatec, LLC (hereinafter "Alcatec") filed suit against The Jones Group, LLC and Gennie Lacy Jones (hereinafter "Jones") alleging breach of contract, negligence, fraudulent misrepresentation, negligent misrepresentation, and indemnity as it related to Jones' handling of logistics related to the FEMA Contract. [ROA.15]. Alcatec sought to recover from Jones "all lost income and lost benefits under the FEMA Contract," the penalties assessed by the Government," loss of earning capacity as a result of being barred from future business with the Government, as well as emotional distress damages and punitive damages. [ROA.21]. Jones filed an Answer denying all claims, and specifically reserving the right to amend the Answer to include additional affirmative defenses which may become available during discovery. [ROA.65]. Thereafter, Jones pursued early dismissal based upon a statute of limitations defense, including a petition for interlocutory appeal on this issue which was denied on May 18, 2016. [ROA.8].

On July 11, 2016, Jones propounded its First Set of Interrogatories and Requests for Production of Documents on Alcatec seeking information regarding Alcatec's specific allegations against Jones and evidentiary proof to support the allegations. *Id.* Plaintiff did not fully respond to discovery requests and produce all responsive documents until nine (9) months

later on April 19, 2017, and only after two Motions to Compel were filed, including a request for sanctions.[3] [ROA.8-9, 657].

After reviewing all responses and documents produced, it became evidently clear that Alcatec's allegations against Jones were the exact same arguments raised by Alcatec in the federal court case and rejected by the court.[4] [ROA 927-930]. The same expert was identified, and Alcatec appeared to produce the exact same set of documents that they produced during the federal court matter. Alcatec failed to identify any new information and/or evidence to support the allegations against Jones. Accordingly, counsel for Jones emailed Alcatec's counsel on or about June 8, 2017, and advised that Jones planned to file a Motion to Amend Answer to raise additional affirmative defenses, including res judicata and/or collateral estoppel. [ROA.932]. Alcatec's counsel advised that there was no objection to the amendment. [ROA.1007]. However, after the Motion was filed, Alcatec filed a Response in opposition of same. [ROA.799, 817]. While the Motion to Amend was still pending and awaiting a hearing, Appellants filed their Motion for Summary Judgment on the basis that Jones was not the cause in fact of Alcatec's damages, that Barbour's egregious conduct was the superseding cause of

[3] Pursuant to an Agreed Order, Appellants were to produce discovery responses by January 30, 2017. [ROA.658]. On February 3, 2017, Appellants produced discovery responses that referenced documents produced, although no documents were produced. *Id*. On February 9, 2017, Appellees' counsel sent counsel for Appellants a letter regarding deficiencies in the discovery responses in a good faith effort to resolve any dispute. [ROA.755]. On February 10, 2017, Appellants' counsel again advised that documents responsive to discovery were being uploaded and would be sent out that day. [ROA.765]. On February 14, 2017, counsel conducted a telephone conference to discuss the deficiencies with Appellants' discovery responses. [ROA.767]. Counsel agreed that Appellants would produce supplemental response by February 20, 2017. [ROA.770]. On February 16, 2017, Appellants finally produced the first set of documents responsive to discovery requests. [ROA.658]. On March 2, 2017, Appellants produced supplemental responses but failed to address the majority of the deficiencies, including questions related to the very allegations raised in the Complaint. [ROA.659]. Pursuant to an Agreed Order on Appellee's Second Motion to Compel, Appellants produced the final set of documents responsive to discovery on April 19, 2017. [ROA.793].

[4] The Federal Court rejected Appellants' arguments and found by clear and convincing evidence, which was upheld on appeal, that Barbour "engaged in a continued effort to manipulate Alcatec's billing system

Plaintiff's damages, and lastly and more importantly, that Alcatec was collateral estopped from re-litigating the issue of causation which had been thoroughly litigated before the Federal Claims Court. [ROA.1767].

Unfortunately, due to scheduling conflicts, the Motion to Amend was not heard until June 14, 2018.[5] [ROA.10]. At that time, the lower Court granted the Motion to Amend after consideration of the papers and arguments of counsel. [ROA.1028]. Promptly thereafter, on June 15, 2018, Jones filed the Amended Answer asserting the defenses of res judicata and/or collateral estoppel. [ROA.1029]. On July 2, 2018, Jones moved to Renew their previously filed Motion for Summary Judgment, and thereafter, depositions of the parties were taken and the matter was fully briefed. [ROA.1044].

On September 12, 2018, the lower Court heard Jones' Motion for Summary Judgment, and on October 10, 2018, issued a nineteen (19) page Order granting the motion. [ROA.1767]. The Order reflects that the lower Court performed a thorough analysis of the applicable case law and determined that Alcatec was barred by the doctrine of defensive collateral estoppel. Accordingly, Alcatec was estopped from re-litigating the issue of whether Barbour perpetuated a fraudulent scheme to submit duplicate invoices to the Government, as the issue was previously litigated and determined by the United States Court of Federal Claims following an eight day trial. [ROA.1774]. Further, the Court held that Barbour's fraudulent conduct was an intervening and superseding cause of Plaintiff's damages that were the subject of the Complaint. [ROA.1781].

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that distorted the contractual requirements and perpetrated a fraud by intentionally falsifying dates on PMI checklists." [ROA.92, 98].

[5] Appellees' originally set their Motion to Amend for hearing on February 28, 2018 (Notice of Hearing entered on December 20, 2017), but due to scheduling conflicts, it was postponed. [ROA.934].

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in allowing Jones to amend the Answer to include the defenses of res judicata and/or collateral estoppel. At the inception of the lawsuit, it was not known whether Alcatec planned to pursue the same theory of liability in the state court case as it pursued in the federal case. Accordingly, written discovery was needed to confirm Alcatec's specific allegations against Jones, as well as the evidentiary proof regarding same. Once written discovery was complete, it became evidently clear that Alcatec planned to pursuet the same arguments to the state court. Moreover, Alcatec planned to rely upon on the exact same documents produced in the federal court case. Promptly after receipt and review of Alcatec's final document production, counsel for Jones contacted counsel for Alcatec and advised of the plan to seek leave to amend the Answer to include the defenses of res judicata and/or collateral estoppel. Counsel for Alcatec advised in writing that he had no objection to the request to amend. Only later did Alcatec file a Response in Opposition to the Motion to Amend.

Further, there is Mississippi precedence establishing that discovery may be needed in some matters prior to pursing an affirmative defense, as long as the discovery is conducted in a reasonable amount of time. *Doe v. Rankin County School District*, 189 So. 3d 616 (Miss. 2015 Jones did not delay in initiating written discovery after the interlocutory appeal was denied. However, Alcatec delayed the process by not providing complete discovery responses until over eight months after they were due and only after two Motions to Compel were filed. Based upon the unusual circumstances of the case, prior precedence, and the application of the "when justice so requires" provision of Mississippi Rule of Civil Procedure 15, the lower court's ruling to allow Jones to amend its Answer was a reasonable option, and there was no abuse of discretion.

Moreover, the lower court did not err in finding that the doctrine of defense collateral estoppel precluded Alcatec from relitigating a single issue: that Barbour perpetrated a fraudulent scheme to submit duplicate invoices to the Government for payment. Alcatec's sole argument on appeal is that Jones was not a party, or in privity with any party, in the federal case so collateral estoppel does not apply. Notably, Alcatec does not dispute that the issue of whether Barbour knowingly committed fraud against the Government was litigated and determined by the Court of Federal Claims and/or that this issue was essential to the judgment in the federal action.

Alcatec's argument that Jones was not in privity with a party in the federal case fails as Jones was a central witness for the Government, Alcatec's adversary, and provided testimony to substantiate the Government's claim that Barbour perpetrated a fraud. Jones' relationship to the Government passed "technical muster" for the privity requirement. [ROA. 1777]. Once defensive collateral estoppel is applied on the fraud issue, all of Alcatec's claims against Jones fail, and summary judgement is appropriate.

Lastly, Barbour's fraudulent conduct is the intervening and superseding cause of Alcatec's damages. The damages sought include Alcatec's forfeiture of over $3.8 million under the FEMA contract and imposition of penalties. The conduct that resulted in these damages is directly attributable to Barbour's fraudulent scheme and independent of any actions and/or inactions on the part of Jones.

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO AMEND ANSWER AS JONES DID NOT DELAY IN SEEKING AMENDMENT AFTER THE CONCLUSION OF NECESSARY WRITTEN DISCOVERY.

Rule 15 of the Mississippi Rules of Civil Procedure sets forth that a party may amend a pleading by leave of court or upon written consent of the adverse party and further sets forth that leave shall be freely granted when justice so requires. MISS. R. CIV. P. 15. This Court reviews the trial court's decision to grant or deny a motion to amend a pleading for abuse of discretion. *Hutzel v. City of Jackson,* 33 So. 3d 1116, 1119 (¶ 10) (Miss. 2010). In determining whether there was an abuse of discretion, the Court first determines whether the trial court "applied the correct legal standard" and then "consider[s] whether the decision was one of those several reasonable ones which could have been made." *Burkett v. Burkett,* 537 So. 2d 443, 446 (Miss. 1989). Accordingly, "the trial court's exercise of its discretion may be disturbed only where it has been abused." *Guar. Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987).

Jones initially filed an Answer denying all claims, and specifically reserving the right to amend the Answer to include additional affirmative defenses which may become available during discovery. [ROA.65, 68]. Thereafter, Jones pursued early dismissal based upon a statute of limitations defense, including a petition for interlocutory appeal on this issue which was denied on May 18, 2016. [ROA.8]. Shortly thereafter, Jones initiated written discovery to obtain specific information regarding the general allegations raised by Alcatec against Jones in the Complaint. [ROA.8-9, 657]. Due to Alcatec's delay, it took over eight (8) months to obtain complete discovery responses. After review of the responses and document production, it became evidently clear that Alcatec did not have any new information and/or evidence against Jones that was not previously argued and presented to the federal court. [ROA.927-30]. No new witnesses and/or experts were identified, and no new documents were produced. Accordingly,

counsel for Jones advised counsel for Alcatec that Jones planned to petition the court to amend their Answer to include the affirmative defenses of res judicata and/or collateral estoppel. [ROA.932]. Counsel for Alcatec reported, in writing, that there was no objection to the amendment. [ROA.1007]. However, after the Motion was filed, Alcatec changed its position and filed a response in opposition. [ROA.799, 817].

Jones submits that the trial court did not abuse its discretion by allowing amendment of the Answer to include the additional affirmative defenses. First and foremost, Alcatec's counsel agreed in writing to the amendment before later changing his position. Secondly, Rule 15 allows a party to amend a pleading when justice so requires. As discussed above, it was not clear until complete discovery responses were received that Alcatec planned to pursue the exact same arguments regarding CrossForms and Jones as it had previously presented to the federal court. Moreover, they planned to rely upon the exact same documents produced in the federal court case. Once Alcatec's positon was confirmed, Jones did not delay in seeking to amend its Answer. It is also important to note that during the time that written discovery was ongoing and the Motion to Amend was pending, no depositions were taken.

Alcatec's reliance on this Court's prior ruling in *Hutzel v. City of Jackson*, 33 So. 3d 1116 (Miss. 2010), is misplaced. *Hutzel* is factually distinguishable. The City sought to make street improvements and needed land that was subject to a leasehold held by Hutzel. *Hutzel*, 33 So. 3d at 1117 (¶ 2). The City approached Hutzel and obtained a quitclaim deed from him conveying his interest in the property to the City in consideration for payment of $2,500.00. *Id.* The deed was drafted by the City and contained a general release provision. *Id.* (¶ 3). Later Hutzel alleged damages to his business due to the road project. *Id.* at 1118 (¶ 5). Although the City drafted the quit claim deed, which included the release provision claims, the City did not

raise the defenses of release and accord and satisfaction. *Id.* (¶ 7). Over two years later, the City sought to amend the answer to include the defenses but did not identify any unusual and/or extreme circumstances to explain the failure to assert the defenses earlier. *Id.* at 1120 (¶ 16). Unlike Jones, the City did not need to conduct discovery in order to determine whether these defenses were applicable because the quitclaim deed spoke for itself, and the City was aware of the deed at the inception of the lawsuit.

At the inception of this lawsuit, it was not known by Jones whether Alcatec had identified new evidence and/or planned to purse a different theory of liability Jones than previously presented to the federal court. It was only after written discovery was complete that Jones confirmed that Alcatec planned to submit the exact same arguments and evidence as previously presented to the federal court. This case presented unusual circumstances that required the completion of discovery before pursuing the defense of collateral estoppel.

The facts in this case are more analogous to the facts in *Doe v. Rankin County School District*, 189 So. 3d 616 (Miss. 2015). In *Doe*, the Supreme Court held that the defendant did not waive its immunity defense by waiting for almost two (2) years before filing a motion for summary judgment asserting discretionary function immunity as the case necessitated thorough discovery which the Defendant took a reasonable time to conduct. *Id*. at 620 (¶ 14). Moreover, the Court explained that *Doe* was distinguishable from *MS Credit Center v. Horton,* 926 So. 2d 167 (Miss. 2006), as *Horton* involved a defendant's right to compel arbitration and did not require discovery in determining so as the defense was evident at the inception of the lawsuit. *Id.* Likewise, in the current case, written discovery was needed in order to establish the applicability of the defenses of res judicata and/or collateral estoppel.

Moreover, a lengthy delay typically is not enough to constitute waiver of an affirmative defense. *MS Credit Cetner, Inc. v. Horton*, 926 So. 2d 167, 180 (¶ 41) (Miss. 2006). There must

be a "**substantial and unreasonable delay** coupled with active participation in the litigation process."[6] *Id.* at 180 (¶ 42) (emphasis added). Jones did not delay in initiating written discovery in this matter to determine Alcatec's specific allegations against Jones, and further, did not delay in moving to amend the Answer once written discovery was complete. The only substantial and unreasonable delay was Alcatec's dilatory efforts in responding to the discovery requests. Additionally, it is important to note that depositions were not taken and trial had not been set prior to Jones' seeking leave and amending its Answer. The lower court applied the correct legal standard in this matter, and the decision to allow the amendment was one of those several reasonable ones that could have been made based upon the facts presented; therefore, there was no abuse of discretion.

II. THE LOWER COURT DID NOT ERR IN COLLATERALLY ESTOPPING APPELLANTS FROM RELITIGATING THE SEMINAL ISSUE THAT WAS BEFORE THE UNDERLYING COURT OF FEDERAL CLAIMS ACTION.

The collateral estoppel doctrine is used to preclude parties "from relitigating the specific issues actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action." *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387, 401-402 (¶49) (Miss. 2013). In *Gibson v. Williams, Williams & Montgomery, P.A.*, this Court summarized Mississippi authority regarding collateral estoppel:

> The doctrine of collateral estoppel – often considered a cousin of res judicata – serves a "dual purpose" and "protects litigants from the burden of re-litigating an identical issue with the same party or his privy" and "promotes judicial economy by preventing needless litigation. Collateral estoppel is an unusual exception to the general rule that all fact questions should be litigated fully in each case. Collateral estoppel precludes relitigating a specific issue, which as (1) actually litigated in the former action; and (2) determined by the former action; and (3) essential to the judgment in the former action.

[6] These decisions are made on a case by case basis. *Id.* at 181.

186 So. 3d 836, 845-46 (¶¶21-22) (Miss. 2016). The Court also noted that where there is suspicion regarding the reliability of these first fact-findings, collateral estoppel should never be applied. *Id.* at 845-846. Moreover, courts are granted "**broad discretion**" when applying the doctrine of collateral estoppel. *Marcum v. Miss. Valley Gas Co., Inc.*, 672 So. 2d 730, 733 (Miss. 1996) (emphasis added) (*citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)).

Alcatec does not dispute that the issue of whether Barbour perpetuated a fraudulent scheme to submit duplicate invoices to FEMA for payment was litigated and determined in the former action. Moreover, Alcatec does not seek appellate review of whether this specific issue was essential to the judgment in the former action. Instead Alcatec argues that the lower Court unfittingly applied the doctrine of collateral estoppel because Jones was not a party – or in privity with a party – to the Court of Federal Claims action.[7] [Appellant Br., pp. 20, 22].[8]

The basis of Appellant's appeal regarding the lower Court's granting of summary judgment requires a two-step analysis. First, it must be determined whether the doctrine of collateral estoppel was applicable for defensive use by Appellees. If proper, this Court must review de novo whether summary judgment was warranted as to all claims *based upon* the fact that Appellant Barbour's own actions of perpetuating a fraudulent scheme superseded any wrongdoing or breach of Appellees. *See Baker & McKenzie, LLP*, 123 So. 3d at 401 (¶49).

A. The Doctrine of Defensive Collateral Estoppel Was Appropriate As The Privity Requirement Was Met.

The collateral-estoppel doctrine precludes parties "from relitigating the specific issues actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action." *Baker & McKenzie LLP*, 123 So. 3d at 401 (¶49). The collateral estoppel doctrine may be used offensively or

[7] Alcatec made this same argument before the lower Court and were unsuccessful. [ROA.1772].

defensively. Offensive collateral estoppel refers to circumstances in which "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co.,* 439 U.S. at 329. Defensive collateral estoppel refers to circumstances in which "a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant." *Id.* "In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action." *Id.*

The lower court held defensive collateral estoppel applies to prevent Alactec from re-litigating the fraud issue that Alcatec previously litigated and lost following an eight-day trial in the Court of Federal Claims. Alcatec argues that Jones was not in privity with a party in the federal trial and that the lower court erroneously analogized the present case to *Jordan* and *McCoy* because those cases involved adversarial relationships in the prior litigation.[9] However, *Jordan* and *McCoy* are not substantively distinguishable from the present matter as Jones was also in an adversarial position to Alcatec at the federal trial.

"For a nonparty to be considered in privity, the nonparty must be 'connected with [the former action] in their interests [and be] affected by the judgment with reference to interest involved in the action, as if they were parties.'" *Baker & McKenzie LLP,* 123 So. 3d at 401-402 (¶ 49) (*quoting Little v. V & G Welding Supply, Inc.*, 704 So. 2d 1336, 1339 (Miss. 1997)). "Privity is…a broad concept, which requires [the Court] to look to the surrounding circumstances to determine whether claim preclusion is justified." *Little,* 704 So. 2d at 1339. For a nonparty to be considered in privity, the nonparty must be "connected with [the former

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[9] *Jordan v. McKenna,* 573 So. 2d 1371 (Miss. 1990) and *McCoy v. Colonial Baking Co., Inc.*, 572 So. 2d 850 (Miss. 1990).

action] in their interests [and be] affected by the judgment with reference to interest involved in the action, as if they were parties." *Id*.

In *Jordan v. McKenna,* the defendant (Jordan) was convicted by a jury of assaulting and raping Marie. 573 So. 2d at 1374. Following the conviction, Marie resumed her pending civil action against Jordan and argued "[c]ollateral estoppel decreed Marie entitled to have the fact of Jordan's fault taken as established. Jordan thus entered the present proceeding faced with a final finding of fact that he had assaulted and raped Marie." *Id.* at 1375. Jordan appealed and argued that because Marie was not a party to the criminal proceeding, the requirement of identity of parties/privity had not been met. This Court rejected Jordan's argument and succinctly stated:

> The law is settled that the final findings of a *criminal* court jury regarding the facts of a matter must be given collateral estoppel effect in subsequent *criminal* proceedings. *See Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), which we have followed in *Sanders v. State*, 429 So. 2d 245, 250-51 (Miss.1983), and other cases. If this be so, there is no reason on principle why collateral estoppel's preclusive effect should not apply in civil actions where the finding offered in the civil action is one made beyond a reasonable doubt in the criminal action and collateral estoppel's requisites are otherwise met.
>
> The only possible grounds for arguing to the contrary might be a wooden and artificial reading of the traditional mutuality rule, that is, to say that, whereas the defendant, here John S. Jordan, was in a similar posture in both the criminal prosecution and in today's action, the party proceeding against him in a criminal action was the State of Mississippi in its prosecutorial capacity, while here his party opponent is Marie Redus. Of course, in the criminal action **Marie occupied a like status, one we frequently label prosecutrix or prosecuting witness. Common sense suggests that there is enough of an identity of the parties in the two cases so that there is no rational reason for refusing to apply collateral estoppel here on grounds of lack of mutuality.**

Id. at 1376-77 (emphasis added). Thus, the Mississippi Supreme Court held: "In sum, we hold Jordan collaterally estopped to relitigate the fact issue whether he raped Marie. This holding makes moot all issues Jordan tenders that go to fault." *Id*. at 1377.

Alcatec argues that Marie was considered adversarial to Jordan because she was his only victim and key witness to his prosecution. [Appellant Br., p. 22]. And to the contrary, Alactec alleges that Gennie Jones (owner of The Jones Group) was not adversarial. This is incorrect. Barbour created a false narrative in the Court of Federal Claims that the Crossforms software created duplicated inspections that resulted in duplicative billing. Ms. Jones was forced to testify as to CrossForms and the role the Jones Group played in Alcatec's business. Ms. Jones became a central witness for the Government and provided testimony to substantiate the Government's claim of a scheme to defraud the Government perpetrated by Barbour. [ROA.95]. Ms. Jones "who was initially charged with `track[ing] the life cycle of [a] particular work order, and was intimately familiar with the call center procedures and the CrossForms software, testified that one of the reasons that the Jones Group terminated its contract with Alcatec was that she was not comfortable with this new tracking process" of PMIs implemented by Barbour. [ROA.106]. Specifically, Ms. Jones "testified that the Jones Group received December and January spreadsheets from Ms. Barbour in a January 31, 2017 e-mail that reflected a larger number of PMIs from Ms. Barbour than what the Jones Group had recorded." [ROA.108]. Additionally, Ms. Jones provided testimony regarding the conflicting dates in connection with the PMIs. *Id*. The lower Court succinctly concluded:

> [T]he position of Ms. Jones, like the position of Marie in *Jordan,* suggests that there is enough identity of the parties for application of collateral estoppel. Additionally, as in *Jordan*, the prior finding of fraud on the part of Barbour was the product of a more stringent burden of proof than would be applicable in the instant case. Specifically, the Court of Federal Claims' finding of fraud by Barbour/Alcatec was supported by "clear and convincing evidence."

[ROA.1779]. Also, the lower court noted that as in *Jordan*, the prior finding of fraud on part of the Barbour was a more stringent burden of proof that would be applicable in the instant case. The Federal Claims Court find by clear and convincing evidence that Barbour committed fraud in manipulating dates on PMI checklists.

In addition, in *McCoy v. Colonial Baking Co., Inc*., this Court recognized that a plaintiff should be collaterally estopped from litigating a loss of consortium claim when a jury had rendered a verdict for the defendant in his wife's personal injury action—an action to which the plaintiff was not a party. 572 So. 2d at 852. Alcatec argues that the application of the doctrine in *McCoy* was limited to the specific context of loss-of-consortium claims as a special area within collateral-estoppel jurisprudence. [Appellant Br., p. 23]. However, this Court in *McCoy* cautioned the following as it applies to negligence actions:

> "collateral estoppel must be applied on an ad hoc basis in order to preserve the critical component of due process—i.e., the requirement that every party have an opportunity to fully and fairly litigate an issue. More specifically, the facts of each case should be perused in order to determine whether the issue—of which a party seeks to collaterally estop relitigating—was *fully and fairly* tried in the personal-injury action… To hold otherwise by . . . *including in hair splitting technicalities, such as . . . technical definitions of 'privity,' is to promote form over substance."*
>
> *Id*. at 854, 863 at n. 3 (internal citations omitted) (emphasis original).

In other words, the intended purpose of this Court's caution is the concern to preserve the critical component of due process in the instant action. Here, Jones relied upon defensive collateral estoppel.[10] Therefore, due process is of no concern as Alcatec was a party to the prior action and had their day in court. Moreover, as in *McCoy*, the issue of whether Barbour perpetrated a fraudulent scheme to submit duplicate invoices to the Government for payment was fully and fairly litigated in the Court of Federal Claims. There are no due process concerns that would preclude the application of collateral estoppel to this finding under these facts and circumstances. The lower Court correctly held that "under these facts and circumstances, 'a wooden and artificial reading of the traditional mutuality rule' is not

[10] Defensive Collateral Estoppel: wherein a plaintiff is precluded from asserting a claim that the plaintiff had previously litigated and lost against another defendant. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) (*citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 131 (1971)).

warranted". [ROA.1776-77].[11] Rather, Jones' relationship to the Government in connection with the prior Court of Federal Claims action passed "technical muster" for the privity requirement. [ROA.1777].[12] As explained above, as perpetuator of the privity, Alcatec cannot now refute it.

B. Summary Judgment Was Warranted As Appellant Barbour Perpetuated A Scheme Which Negated Any Alleged Wrongdoing by Appellees.

Alcatec argues that the lower Court improperly dismissed all its causes of actions and damages after applying the doctrine of collateral estoppel in conjunction with the superseding cause doctrine. Notwithstanding that the superseding cause doctrine is applicable (discussed infra), Jones avers that summary judgment was still warranted.

In this suit, Alcatec asserts claims of negligence, fraudulent misrepresentation, negligent misrepresentation, breach of contract, and indemnity against Jones. All actions are predicated upon the assertion that CrossForms – not Barbour's fraudulent scheme – was the cause of the duplicate billing. [ROA.17-22]. Specifically, Alcatec claims that Ms. Jones "represented to [Appellents] that she and Jones Group possessed the knowledge and experience to provide the services that [Appellants] needed under the FEMA contract," but failed to provide an "adequate system" and instated recommended a program that committed "numerous errors" while tracking the life cycle of work orders. [ROA.1057]. These alleged failures, according to Barbour, are what caused the duplicate billing. [ROA.1059]. When the lower Court determined that Alcatec was precluded from re-litigating whether Barbour or CrossForms caused the duplicate invoices, all claims were appropriately dismissed. [ROA.1784].

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[11] *Citing Jordan*, 573 So.2d at 1377.

[12] *Citing Baker & McKenzie, LLP*, 123 So. 3d at 402 (¶ 50) (*quoting Marcum*, 673 So.2d at 733 ((*quoting Jordan*, 573 So.2d at 1375)).

Quite simply, there can be no fault or liability attributed to Jones for the negligence, fraudulent misrepresentation, or negligent misrepresentation claims. It has already been determined that Appellees' recommendation and/or representations played no role in the duplicate billing as it was a result of Barbour's intentionally fraudulent conduct. Additionally, there can also be no recovery under breach of contract or indemnity when the damages requested do not stem from Jones' performance and/or actions. In order to recover for breach of contract under Mississippi law, the damages sought must stem from the breach. *Knight's Marine & Indus. Servs. v. Lee*, 110 So. 3d 795, 798 (¶ 10) (Miss. Ct. App. 2012).

Similarly, the damages requested in this suit stem from the Court of Federal Claims' sanctions against Alcatec. After the Federal Court found that Barbour's systematic scheme to defraud the Government was the cause of the duplicate billing, it ordered that Alcatec to pay $77,000.00 in fines and $275,000.00 in penalties to the Government. [ROA.121]. It further ordered that Alcatec was prohibited from contracting with the federal contracts. Id. Alcatec only seeks to recover from Jones the fines and penalties it paid to the Government, lost income and loss of earning capacity in light of the order prohibiting future government contracts, emotional distress damages, and punitive damages. [ROA.15, 21-22]. Alcatec's sought damages flow directly from the Court of Federal Claims' finding that Alcatec intentionally defrauded the Government in their billing practices. The money damages cannot be attributed to any alleged breach or negligence by Jones for failure to track inspections or work orders. [ROA.1064]. Therefore, the lower Court was proper to dismiss all causes of actions and damages against Jones.

III. BARBOUR'S FRAUDULENT SCHEME WAS AN INTERVENING AND SUPERSEDING CAUSE OF ANY ALLEGED CONDUCT BY APPELLEES.

Alcatec appeals the lower court's decision that "Barbour's fraudulent conduct is an intervening and superseding cause of Plaintiffs' damages that are the subject of the Complaint." [ROA.1781]. The bases of Alcatec's appeal is that the lower Court incorrectly found that certain factors weighed in Jones favor and "erred by applying the affirmative defense of superseding intervening cause to dismiss *all* of [Appellants'] claims." [Appellant's Br., pp. 14, 26]. Alcatec misses the mark on appeal. Not only do all factors clearly weight in Jones' favor, but the doctrine was applied to all of Alcatec's damages based upon the damages requested and the indemnity provision of the parties' contract. Thus, the lower Court's decision to apply the doctrine of intervening, superseding cause was founded in law and fact.

A. The Six Factors Weight in Appellees' Favor.

Mississippi courts weigh six (6) factors in determining whether an intervening force was sufficiently foreseeable to warrant its classification as a "superseding intervening clause". *Southland Mgmt. Co. v. Brown,* 730 So. 2d 43, 46 (Miss 1998) (adopting the Restatement (Second) of Torts § 440). Alactec argues that the lower Court was incorrect in in finding that "[e]ach of these six factors weighs in favor of a finding that Barbour's intentional and fraudulent conduct was an intervening and superseding cause of the damages that are the subject of [Appellants'] Complaint". [ROA.1783; Appellants' Br., p. 26]. Yet, their arguments for each factor lack merit.

1) The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence.

Alactec merely reiterates that Jones' "failures to fulfill their duties to Plaintiffs" brought about the penalties assessed by the Court of Federal Claims (fines and prohibition to further

contract with the government). [Appellants' Br., p. 26]. However, a specific finding of fraud on the part of Barbour was necessary for the Court of Federal Claims to assess these penalties. A mere finding of negligence (by either Barbour or due to Jones' action) would not have resulted in the imposition of penalties. Thus, the lower Court correctly determined that, "[a]ny damages to Alcatec that would have resulted from the negligence by Jones Group would have been different in kind from the damages that are the subject of the Complaint." [ROA.1783].

2) *The fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation.*

Alcatec argues that Barbour's "conduct was not extraordinary in view of the circumstances existing at the time of its operation." [Appellant's Br., p. 27]. Alcatec rationalizes that Barbour was just trying to keep her head above water and "perform under the [FEMA] contract despite the dysfunctional system" (i.e. CrossForms) that Jones put into place. *Id*. However, it has already been found by clear and convincing evidence that CrossForms had nothing to do with the duplicate invoicing. Barbour intentionally falsified information ***after*** Jones had turned the data over to her. [ROA.106]. Barbour's fraudulent conduct was extraordinary and anything but foreseeable as Alcatec suggests.

3) *The fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation*.

Alcatec argues that Barbour's actions were due to Jones' failures (i.e. CrossForms) "to document everything properly," and thus, did not operate independently of the "dysfunctional system" created by Jones. [Appellant's Br., p. 27]. Again, the Barbour's falsifying of dates was intentional and occurred ***after*** Jones submitted data to Alcatec. Further, as the Court of Federal

Claims found, Barbour alone had the responsibility for submitting invoices to the Government. [ROA.114-16]. Therefore, Barbour's fraudulent conduct unquestionably occurred independent of any alleged negligence of Jones.

> 4) *The fact that the operation of the intervening force is due to a third person's act or to his failure to act*:
>
> 5) *The fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him.*
>
> 6) *The degree of culpability of a wrongful act of a third person which sets the intervening force in motion*.

For the last three elements, Alcatec assert that: "[Appellants'] conduct (the purported "intervening force") was not due to a third person's act or failure to act. Rather, it was due to or at the very least intertwined with Jones' failures [i.e. CrossForms]…" [Appellant's Br., p. 27]. This is simply not true, and the last three elements further weight in Jones' favor. The fraudulent conduct that resulted in Alcatec's damages that are the subject of the Complaint is attributable to Barbour solely and while acting independently of Jones (or CrossForms). Further, as the lower Court succinctly stated in regards to the fifth factor, the "fraudulent conduct of Barbour directed towards the Government was wrongful and resulted in Alcatec forfeiting its right to recover from the Government $3.8 million due under the Contract (and the imposition of penalties), the very damages that Alcatec/Barbour seek to recover in this suit." [ROA.1784]. Lastly, regarding culpability, the Court of Federal Claims was clear: Barbour acted with specific knowledge of the fraud of her actions. [ROA.115]. The lower Court correctly relied upon the findings of the Court of Federal Claims and did not err when it found Barbour's actions to be an intervening superseding cause.

B. The Doctrine Is Applicable to All of Appellants' Claims.

Alcatec asserts that the doctrine of superseding cause is a tort doctrine, and the lower Court was incorrect to apply to the doctrine to all of Alcatec's claims, especially the breach of contract and contractual-indemnity claims. [Appellants' Br., p. 15]. Alcatec only argues that the lower Court and Jones are unable to "cite any case where a Mississippi court – or any court – has applied it to dismiss a breach-of-contract claim or a contractual-indemnity claim." [Appellants' Br., pp. 14-15]. Application to Alcatec's claim is not the issue. The lower Court applied the doctrine to Alcatec's damages. To quote the lower Court:

> The Court need not address [Appellees'] argument regarding cause in fact or [Appellants'] arguments regarding disputed issues of fact relating to proximate cause to resolve [Appellees'] Motion for Summary Judgment. Assuming that [Appellees] breached some duty (contractual or otherwise) owed to [Appellants], and assuming that such a breach was the legal (proximate) cause of some theoretical damages to [Appellants], the Court holds that the effectuation by Barbour of a scheme to defraud the Government was an intervening and superseding cause of [Appellants'] ***damages*** that are the subject of the Complaint.
>
> [ROA.1781].

There is a clear and unambiguous indemnity provision in the contract between the parties, which the Alcatec conveniently fail to bring to this Court's attention.[13] The indemnity provision requires the Jones Group "to indemnify Alcatec for all losses, liabilities, claims, demands, damage, costs and expenses occasioned by or **attributable to the Jones Group's performance under the Alcatec Jones Group Contract**." [ROA.1323, 1784 (emphasis added)].[14] The indemnification provision plainly states that the damages suffered by Alcatec must be attributable to Jones' performance under the contract. To recover under the Contract, Alcatec must prove that Jones' breached a duty under the contract (whether negligent or intentional)

[13] As a recap, Appellants entered into a contract ("the Contract") with Appellees to operate a service call center. [ROA.91-92]. Appellees were not responsible for billing/invoicing FEMA under the Contract. [ROA.97, 1320-37]. Appellants submitted all invoices to FEMA. [ROA.96].
[14] ROA.505.

which caused the injury. Based upon the language of the provision, the lower Court succinctly concluded:

> The damages [Appellants] seek to recover in this action are not attributable to the Jones Groups performance or breach of any duty under the Contract. Rather, the damages [Appellants] seek to recover are the result of the scheme to defraud the Government effectuated by Barbour. Accordingly, Plaintiffs' claim for indemnity should be dismissed.
>
> [ROA.1784].

As stated above, Alcatec were penalized by the Court of Federal Claims because it found Barbour implemented a systematic scheme to defraud the Government. [ROA.106, 122]. Had the Federal Court determined it was mere mistake (e.g. due to CrossForms) that invoices were duplicated, Alcatec would not have incurred these damages. Therefore, Barbour's actions were a superseding intervening cause in relation to the damages incurred.

Alcatec essentially want the court to award damages for injury that occurred as a result of the underlying judgment, but they conversely take the position that "[a]ny fault addressed in the federal claims court opinion is not preclusive in the instant case." [ROA.1076]. Alcatec cannot have it both ways. Doing so would essentially be asking this Court to re-litigate whether the Federal Court's ruling and sanctions were proper. Alcatec cannot use this Court as an appellate avenue for the Court of Federal Claims' judgment.[15]

CONCLUSION

For the foregoing reasons, Appellees respectfully submit that this Court should uphold the decisions of the trial court, and dismiss all matters against Appellees with prejudice.

[15] Plaintiffs have already appealed the Federal Court's judgment, which was affirmed by the United States Court of Appeals for the Federal Circuit. *See Alcatec, LLC v. United States*, 471 Fed. Appx. 899 (2012).

Respectfully submitted this, the 17th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2019, I have mailed, by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the following individuals, unless said individual(s) are registered participants of the Mississippi Appellate E-Filing system in which case the Court's Notice of Electronic Filing will act as service of said document:

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