E-Filed Document May 15 2019 13:48:58 2018-CA-01590 Pages: 36

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALCATEC, LLC, et al.

Plaintiffs/Appellants

Supreme Court No. 2018-CA-01590

VS.

Hinds County Circuit Court No. 1:15-cv-00131

THE JONES GROUP OF MISSISSIPPI, LLC, et al.

Defendants/Appellees

BRIEF OF APPELLANTS ALCATEC, LLC AND ROSEMARY BARBOUR

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

No. 2018-CA-01590
ALCATEC, LLC, et al. v. THE JONES GROUP OF MISSISSIPPI, LLC, et al.

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.

1. Alcatec, LLC and Rosemary Barbour
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I. STATEMENT OF THE ISSUES

A. Whether the Hinds County Circuit Court abused its discretion in allowing Defendants to amend their Answer to include collateral estoppel as an affirmative defense after Defendants had actively litigated the case for nearly four years with full knowledge of the purported basis of that affirmative defense.

B. Whether the court erred in granting Defendants' Motion for Summary Judgment, holding that collateral estoppel, combined with the tort doctrine of superseding intervening cause, barred all of Plaintiffs' claims.

II. STATEMENT OF THE CASE

This case arises from Defendants' failure to provide proper logistical support to Plaintiffs regarding the management and billing of Plaintiffs' contract with FEMA. FEMA contracted with Plaintiffs to inspect and maintain temporary housing units for citizens impacted by Hurricane Katrina. In turn, Plaintiffs contracted with Defendants, paying Defendants large sums of money to ensure that FEMA was properly billed for Plaintiffs' work. Defendants failed to do so, creating a chaotic system that would not properly keep track of billable inspections performed. Defendants prepared the documents used for billing FEMA, and these documents contained hundreds of duplicate lines of inspections. Defendants' failures caused Plaintiffs to lose the FEMA contract and to forfeit millions of dollars thereunder after a Federal Claims Court found that FEMA had been recklessly overbilled for inspections. Plaintiffs filed the present lawsuit seeking damages caused by Defendants' failures.

The court abused its discretion in granting Defendants' motion to amend their Answer -- after the parties had actively litigated this case for nearly four years -- to add certain affirmative defenses, including collateral estoppel. Defendants waived collateral estoppel by failing to plead it. *See* M.R.C.P. 8(c); *State ex rel. Moore v. Molpus,* 578 So. 2d 624, 641 (Miss. 1991) (collateral estoppel waived); *Miss. Public. Serv. Comm'n v. Merchants Truck Line, Inc.*, 598 So. 2d 778, 780 (Miss. 1992) (res judicata waived). Defendants further waived collateral estoppel by actively participating in this litigation for years before moving to amend their Answer. *See Hutzel v. City*

of Jackson, 33 So. 3d 1116, 1119-21 (Miss. 2010) (waiver of right to assert affirmative defenses of release and accord and satisfaction found where defendant did not raise the defenses in its initial answer and waited twenty-six months to raise it, plus both parties filed interrogatories and requests for production of documents and one party noticed a deposition). Furthermore, Defendants knew about the purported basis of collateral estoppel (the Federal Claims Court opinion) throughout this litigation, as Defendant Gennie Jones was a witness in that case, and Defendants have referenced that case since the inception of this litigation.

The court later erred in granting Defendants' Motion for Summary Judgment. The court hinged its decision on collateral estoppel, relying on the Federal Claims Court opinion that adjudicated rights and liabilities between Alcatec and the United States. But under Mississippi law, Defendants are not entitled to assert collateral estoppel because they were neither a party nor in privity with a party to that case. *See, e.g., Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387, 401-402 (Miss. 2013); *Smith v. Malouf,* 826 So. 2d 1256, 1260 (Miss. 2002).

And even if Defendants are allowed to assert collateral estoppel, the lower court still erred by applying the affirmative defense of superseding intervening cause to dismiss all of Plaintiffs' claims. Superseding intervening cause is an affirmative defense in tort which may be used to challenge the proximate cause element in a negligence case. Neither Defendants nor the lower court 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. It clearly has no application to an indemnity case like the one at issue. And notably, under Mississippi law, proximate cause is not an element of a breach-of-contract claim, as breach-of-contract claims have only two elements: the existence of a contract, and breach thereof. Effectively, as Plaintiffs pointed out to the lower court, Defendants moved for summary judgment as to Plaintiffs' negligence claim only.

Finally, even if the doctrine of superseding intervening cause could apply to all of Plaintiffs' claims, genuine issues of material fact exist as to whether Plaintiffs' conduct qualifies as such. The doctrine focuses on foreseeability of damages which could flow from the Defendants' act. Certainly a reasonable jury could find that Defendants should have foreseen that their failure to do the job for which they were hired -- to manage the logistics of the FEMA contract and to ensure FEMA was not overbilled -- would cause FEMA to be overbilled and thus cause the exact damages that Plaintiffs now seek to recover from Defendants.

III. STATEMENT OF FACTS

FEMA Contract. In April 2006, Homeland Security and the Federal Emergency Management Agency (FEMA) awarded a contract to Alcatec. *See* FEMA Contract, R. 1081. The FEMA Contract required Alcatec to coordinate the delivery, setup, maintenance, and disconnection of temporary housing for citizens impacted by Hurricane Katrina. *See Id.*; *see also* Attachment A thereto, "Performance Work Statement," R. 1141. Alcatec was to be compensated for performing monthly inspections of mobile homes, performing maintenance on the mobile homes, responding to emergency calls on the mobile homes, and deactivating the mobile homes no longer in use. R. 1318-19.

The FEMA Contract also required Alcatec to establish and set up logistics for each aspect of its business. *See* FEMA Contract, R. 1081. To facilitate efficiency in operations and accuracy with respect to billing FEMA, the FEMA Contract required Alcatec to use detailed service protocols, including methods to document and order the setup, maintenance, inspection, and disconnection of mobile homes. *See Id.*

Jones Group Contract. Alcatec elected to hire specialists engaged in the business of coordinating the required logistical efforts to ensure that all aspects of the FEMA Contract were properly met and that the contract was properly billed. Defendant Gennie Jones represented to

Plaintiffs that she and her company, The Jones Group, had the knowledge and experience to provide the services that Plaintiffs needed under the FEMA Contract. *See* Attachment A to Alcatec/Jones Group Contract, R. 1332-1335. Jones assured Plaintiffs that she could run the logistics, manage the demands of the FEMA Contract, and provide accurate and timely documentation for purposes of billing FEMA. *See Id.*

Based on these representations, Alcatec contracted with Jones Group to provide consulting services, establish all protocols required for Alcatec's compliance with the FEMA Contract, establish and execute proper protocols for running the logistics, maintain documentation, enter work orders into a database, provide technology personnel support, provide quality control services, tract work orders, manage inventory, provide preventative maintenance, support dispatch services, track labor hours against work orders, track materials used against work orders, and properly fulfill billing requirements under the FEMA Contract, among other services. *See* Alcatec/Jones Group Contract, R. 1320-37.

Jones Group promised to work diligently and to perform all work in full compliance with the terms and specifications of its agreement with Alcatec as well as the FEMA Contract together with all applicable federal, state, and local laws and regulations. R. 1321. Jones Group promised to meet or exceed all quality control requirements set forth in the Alcatec/Jones Group Contract. R. 1333. In addition to providing logistical information and setting all schedules for service of the FEMA Contract, Jones Group also maintained responsibility for gathering all information required for billing FEMA under the FEMA Contract, verification of billing accuracy, and forwarding of all required billing documents to Alcatec for submission to FEMA. *See* R. 1320-37.

Mainstream and CrossForms. To meet the obligations of the FEMA Contract, the Jones Group recommended computer hardware and software, including the Mainstream Software CrossForms, and Jones Group maintained responsibility for training. R. 1721. Plaintiffs entered a

contract with Mainstream whereby Mainstream agreed to provide CrossForms. *See* Mainstream Contract, R. 1338-53. Under these respective contracts, Plaintiffs paid The Jones Group and Mainstream substantial sums of money to facilitate satisfactory performance of the FEMA Contract. *See Id.*

The Jones Group/Call Center. It is undisputed that as part of the FEMA Contract, Alcatec was to perform monthly preventative maintenance inspections (PMIs) on mobile home units. Alcatec's inspectors inspected the mobile units along various routes, called a route list. The Jones Group managed the call center, collected information from the inspectors, and entered this information into CrossForms, tracking the life cycles of work orders. The Jones Group made appointments with residents for inspections of their mobile units and upon completion of the inspections, the inspectors sent PMI checklists to the call center so that Jones Group employees could enter this information into CrossForms, including FEMA barcodes for trailers, the addresses of trailers, and the PMI completion date. The Jones Group further reviewed the PMI checklists generated by the inspectors to make sure they were complete and undertook to ensure that no duplicates PMIs were included in CrossForms.

Defendants Breached the Contract. Defendants failed in their duties to support Plaintiffs, committing numerous errors in keeping track of PMIs and work orders for purposes of billing FEMA. Early in the process, Defendants were aware of duplicate inspection submissions, CrossForms' inability to prevent duplicate entries of trailer information and accompanying reports, and other problems. As early as June 2006, there were duplicates in the backup documentation that Defendants prepared for invoicing FEMA. R. 1746. Defendants were responsible for setting up CrossForms and inputting all of the FEMA trailers into a master database. R. 1721. Apparently, however, Defendants did not have enough manpower to enter all the units into CrossForms, so Defendants sent the data to Mainstream to perform a mass data dump. R 1721-23. Defendants

then looked at the database and noticed a lot of information that seemed to be either missing or inaccurate. R. 1723. Defendants did not delete the inaccurate information. R. 1723. Over the next several months, Defendants continued to input information, including information from completed PMI checklists, into CrossForms. R. 1728.

Defendants acknowledge that they agreed to provide the hardware and software support and to work with CrossForms. R. 1726. Defendant Jones was the point of contact for user access with Mainstream and CrossForms. R. 1746. Defendants acknowledge that they agreed to develop and maintain software and hardware to provide all functions required by the company in the FEMA Contract. R. 1727. At the heart of Defendants' operation were tools, such as CrossForms, to manage and track work orders, warranty information, inventory and warehouse management, and review maintenance trends. R. 1729. Defendants' operation included managing and tracking monthly PMIs, and Defendants were aware that a unit could be inspected and billed for only once per month. R. 1729. Defendants were to use CrossForms to help dispatch technicians and independent contractors to the various customer sites and to support PMIs. R. 1729. Defendants prepared the backup information concerning PMIs and periodically sent this information to Plaintiffs for purposes of invoicing FEMA. R. 1730. CrossForms could provide a complete history of PMIs and work orders for any particular unit. R. 1731.

Defendants acknowledge that they agreed to "customerize" and initialize software for Plaintiffs' performance under the FEMA Contract. R. 1732. Yet Defendants never looked into whether any software (e.g., CrossForms) could be customized such that for each unit only a single PMI could be entered on a monthly basis and that the software would reject entry of any other PMIs for that unit in the pertinent time period. R. 1732. As Defendants acknowledge, such customization is possible. R. 1732-33. As Defendants also acknowledge, Defendants represented to Plaintiffs that Defendants would allocate $75,000 for "customerization and initialization," but

Defendants now cannot say whether they did so, instead admitting that CrossForms is an "off-the-shelf product." R. 1733. This admission contradicts Defendants' earlier promises that CrossForms could be tailored to meet customer needs, including invoicing needs. *See* R. 1334. Furthermore, Defendants did not take care of all the duplicate entries using Microsoft Excel's sorting method after exporting the monthly PMI data there from CrossForms. R. 1734. In the same vein, Defendants cannot say whether they provided even basic Excel training to their employees. R. 1737.

Ultimately, Defendants failed in their job of reviewing the backup documentation that was used to invoice the government, failing to verify that there was no duplicate billing even though Defendants had the ability to sort through the information to check for duplicates. R. 1745. When asked whether there was any reason why Defendants were sending Plaintiffs backup documentation containing duplicates, Defendants now admit that "Nobody's . . . perfect," that "Nothing is 100 percent," and that someone could have missed it when they reviewed it. R. 1745. Defendants admit that there is a high probability of duplicates when relying on humans to input a large number of units into a system without proper quality-assurance measures in place. R. 1746.

Plaintiffs often attempted to communicate with Defendants to straighten out various issues. On August 16, 2006, Jim Oliver with Alcatec emailed Defendant Jones regarding Jones Group reports not being updated properly to reflect certain call-ins. R. 1470. On September 8, 2006, Oliver emailed Jones regarding a re-keying project: "there are some re-key jobs that we have done that are NOT found on this report but they are all listed on the faxed reports I have been recently sending to Jones Grp daily." R. 1469. On September 28, 2006, Jones emailed Felicia Bowens of Jones Group: "THE CMRs (AUGUST 1-15) THAT WERE INVOICE [sic] IN AUGUST WERE MOBILE HOMES NOT TRAVEL TRAILERS. PLEASE VERIFY AND REDO THE SPREADSHEET AND CREATE THE PDF." R. 1467.

An internal Jones Group email from Tracy Buchanan to Jones on November 16, 2006 regarding "Open Ticket Status" provides: "Attached is the spreadsheet with the open Work Orders, the ones that are highlighted in green are the work orders we did not receive from the FEMA Call Center/email. Please advise if additional information needs to be added. P:S [sic] This spread sheet [sic] has not been sent to anyone other than yourself." R. 1429.

On January 17, 2007, Jim Oliver, Chief Operating Officer of Alcatec, sent an email to Jones and Jones Group reminding them of certain requirements of the FEMA Contract. Despite this reminder, Defendants failed to adhere to the contractual requirements, leading to double billing. Felicia Bowens of Jones Group followed up with Plaintiffs the next day, representing to Plaintiffs that Jones Group was in the process of comparing PM dates and determining which PMs to add to certain spreadsheets that Jones Group was preparing. Oliver followed up with Jones Group the next day again to remind Jones Group of certain contractual requirements. R. 1561-63.

On January 19, 2007, Barbour emailed Jones regarding the invoice for November 15-30, where Barbour pointed out several problems to Jones concerning Jones Group's duplicate billing. Jones forward the email to Bowens, telling Bowens "We need to take a look at this." R. 1397. In addition, Oliver continued to communicate with Jones regarding Alcatec's need for Defendants to sort work orders on a spreadsheet. R. 1403. Barbour also continually tried to get Jones to fix problems with Defendants' system. R. 1406. In a January 2, 2007 email to A.J. Hughes, Oliver discussed his efforts to try to straighten things out with Jones:

> I discussed the tracking of PM completions with Gennie today and they will track the number of PMs completed each time the tech calls and then tally a total for that day. After the review and confirmation of completed work orders that we are still conducting in Jackson, we decided that the techs should also include the Bar Code of each PM they complete when they call in. The tracking of completed PMs should be done by tech and Bar Code for accounting and tracking purposes.

R. 1408. The next day, on January 3, 2007, Oliver had to reach out to Bowens about Defendants' invoicing practice for certain items. R. 1409.

Again on January 19, 2007, Barbour had to email Jones requesting excel spreadsheets for CLIN 1001 and 1002 for all of October 2006. R. 1474. In these emails, Barbour also pointed out more of Jones Group's errors. Jones apologized for Jones Group's "error." R. 1491-95. On January 21, 2007, Barbour emailed Jones Group pointing out Jones Group's errors in the CLIN Report totals. R. 1489. On February 5, 2007, shortly after Defendants abandoned ship, Barbour reached out to Jones Group regarding the spreadsheets that Jones Group was required to prepare for January 2007. Bowens responded that Jones Group had not prepared any spreadsheets for January. R. 1542.

Jones Group's failures caused FEMA to be double billed for duplicate inspections. On November 24, 2006, Barbour emailed Jones Group telling Jones Group to delete duplicate items and to make sure Jones Group was not double billing FEMA. R. 1499. Barbour again emailed Jones Group on November 29, 2006 pointing out Jones Group's errors in not deleting certain work orders. R. 1496. Likewise, even as early as August 2006, Barbour had to tell Jones Group to take out work orders, emphasizing that "We cannot invoice twice for the same TT." *See* R. 1505, 07. On December 19, 2006, Jones Group emailed Oliver explaining that Jones Group was in the process of "scrubbing" lists to remove sites with no trailer. R. 1526. On January 18, 2007, Bowens emailed Barbour discussing moving PMs from January to December. R. 1565. The next day, Oliver had to email Bowens trying to get Jones Group to compare and confirm a PM count for a certain time period. R. 1644. Likewise, on January 30, 2007, Oliver had to email Bowens in an attempt to get MDC reports to send to FEMA. R. 1652.

Jones Group's errors and delays came to a head in December 2006, a critical period in this case's timeline. On December 20, 2006, Bowens had to apologize to Barbour regarding the Jones Group's delays. R. 1578. On December 28, 2006, Jones had to apologize for another error, explaining that Jones Group was "truly sorry" for the error that Barbour pointed out on a CLIN

report that Jones Group had prepared. R. 1575. On December 30, 2006, Jones Group again emailed Barbour apologizing for Jones Group's delays, noting that Jones Group understood that Barbour might feel "frustrated" due to Jones Group's delays. R. 1571. This email also further reinforces the fact that Jones Group was responsible for entering data into CrossForms. R. 1571. Finally, Jones Group's December 2006 PM Status Report shows hundreds of duplicates. R. 1557. Defendants acknowledge that sorting the December 2006 PMIs by barcode, which Defendants had the power to do, reveals many duplicates in the documentation sent to FEMA for billing. R. 1751-52.

The Jones Group Resigns. Rather than rectify their failures, Defendants sent their 90-day notice of resignation to Alcatec on January 9, 2007. At this point, despite Defendants' multiple representations to Plaintiff that they would provide a competent system to monitor the federal contract, including the submission of duplicates in CrossForms, and despite multiple payments made to both Defendants and CrossForms, the Jones Group handed over a broken system that would not even prevent duplicate information from being entered into the system. The CrossForms system recommended by and controlled by the Jones Group had no safeguards in place to prevent duplicate billings, much less prevent the same barcode for the same trailer from being twice uploaded in the system. Even with the ability to customize the system to Alcatec's needs, the Jones Group failed to do so.

The Government's Breach of Contract. During the initial phase-in period of the FEMA Contract (referred to as "CLIN 1000") Plaintiff had to be prepared to service 1000 mobile units. The fixed rate for CLIN 1000 was $6,111,000.00, and Plaintiff completed this work. FEMA stated that it had made an error and lowered the fixed rate for the phase-in to $1,937,088.00 for phase-in costs. Based on this reduction, Alcatec sued the Government. In response to Alcatec's claim, the Government asserted a False Claims Act (FCA) counterclaim against Alcatec for improper billing

in connection with CLINs 1001 and 1002. Notably, Jones was a witness in that case. Barbour and Alcatec did not know in advance of the trial against the government that Jones's testimony would be unhelpful to them, as Barbour and Alcatec firmly believed that they would defeat the government's False Claims Act counterclaim. R. 18-19. Ultimately, Alcatec lost the FCA claim based on improper billing. The court found that Alcatec acted with "reckless indifference" toward billing FEMA for duplicate inspections. *See Alcatec, LLC v. U.S.*, 100 Fed. Cl. 502, 526 (Fed. Cl. 2011).

The finding that Alcatec acted with reckless indifference toward billing FEMA for duplicate inspections was the only finding essential to the final judgment, as this lone finding was all that was necessary under the FCA to make sure that Alcatec forfeited the millions of dollars to which it otherwise would have been entitled under the FEMA contract and that Alcatec had to pay thousands of dollars in penalties and fees. Also as a result, Alcatec and Barbour have been excluded from doing business with the Government. The Federal Claims Court did not adjudicate Jones Group or Gennie Jones' liability to Alcatec and Barbour. And even if it had, any such finding would not have been essential to the final judgment against Alcatec.

After unexpectedly losing the Federal Claims Court case against the Government, Alcatec and Barbour commenced the present action against Jones Group and Gennie Jones for breach of contract, negligence, fraudulent misrepresentation, negligent misrepresentation, and indemnity. The Alcatec/Jones Group Contract contains an indemnification agreement under which Jones Group agreed to indemnify Alcatec for "all losses, liabilities, claims, demands, damage, costs, and expenses . . . occasioned by or attributable to" Jones Group's performance under the Alcatec Jones Group Contract. R. 1323.

Procedural History Related to Defendants' Motion to Amend Answer. Plaintiffs filed their Complaint against Defendants on August 7, 2014. R. 15. On October 10, 2014, Defendants

filed their Answer and Cross-Claim, asserting many affirmative defenses but failing to assert collateral estoppel. R. 65-79. Defendants also filed motions to change venue, to dismiss the complaint under the statute of limitations; to dismiss Gennie Lacy Jones, individually; to dismiss Rosemary Barbour; to dismiss the claim for emotional distress' to dismiss the claim for punitive damages; and for a more definitive statement. R. 65-67.

On December 9, 2014, Defendants filed a Memorandum in Support of Rule 12(b)(3) Motion to Dismiss, or in the alternative, Motion to Change Venue. R. 232. On February 6, 2015, the Rankin County Circuit Court granted this motion and transferred the case to Hinds County Circuit Court. R. 393. On June 23, 2015, Defendants filed their notice of hearing on their Motion to Dismiss for September 3, 2015. R. 497. On October 26, 2015, the court denied Defendants' Motion to Dismiss based on the affirmative defense of statute of limitations. R. 563. Defendants then filed a Petition for Interlocutory Appeal and attached the federal claims opinion upon which they now base their affirmative defense of collateral estoppel, but the Mississippi Supreme Court denied Defendants' Petition. R. 638.

On July 11, 2016, Defendants filed a Notice of Service of Discovery. R. 639. The Jones Group served Interrogatories to Alcatec, LLC; Requests for Production to Alcatec, LLC; and Interrogatories to Rosemary Barbour. R. 639. On July 21, 2016, the Plaintiffs filed their Notice of Service of Discovery. R. 641. Plaintiffs served their First Set of Interrogatories and Requests for Production of Documents to Defendants. R. 641. On December 22, 2016, Defendants filed a Notice of Service of Discovery and served their Responses to Plaintiff's Discovery Requests. R. 643.

On January 3, 2017, Defendants filed a Motion for Trial Date and Scheduling Order, requesting the court to "set this matter for trial and for entry of Scheduling Order. For grounds, Defendants state that the parties are engaged in written discovery and have begun the process of

setting depositions." R. 648. On January 3, 2017, Defendants also filed a Motion to Compel written discovery responses from Plaintiffs. R. 645. On January 31, 2017, Plaintiffs filed their Notice of Service of Discovery Responses. R. 653. On March 2, 2017, Plaintiffs filed another Notice of Discovery Responses and served supplemental responses to the Jones Group's First Set of Interrogatories to Rosemary Barbour and Alcatec. R. 655. On March 24, 2017, Defendants filed a Motion to Compel Plaintiffs' Discovery Responses and Motion for Sanctions. R. 657. On April 5, 2017, Defendants filed a Notice of hearing, setting the hearing for their Second Motion to Compel and for Sanctions on April 19, 2017. R. 791.

On July 14, 2017, Defendants filed another Notice of Service of Discovery and served Interrogatories, Request for Production of Documents, and Requests for Admissions to Alcatec. R. 795. On August 28, 2017, Alcatec filed its Notice of Service of Discovery Responses, and served responses to Jones's First Set of Interrogatories; Requests for Production, and Requests for Admissions. R. 797.

On September 26, 2017, Defendants filed their Motion to Amend Answer, falsely representing to the court that Defendants did not learn of the purported basis of the affirmative defense of collateral estoppel until April 2017:

> Plaintiffs produced their Second Supplemental Responses to Defendants' First Set of Interrogatories on or about April 19, 2017. Plaintiffs produced the final set of documents responsive to Defendants' discovery requests on or about April 24, 2017. **Based on the written discovery responses and the assertion set forth by Plaintiffs' therein, Defendants seek leave of court to file an Amended Answer to include additional affirmative defenses, including res judicata and/or collateral estoppel**. Moreover, Defendants seek to amend their Answer to include additional affirmative defenses related to Plaintiffs' claim for punitive damages.

R. 799. Defendants attached the proposed Amended Answer -- including the newly added affirmative defense of collateral estoppel -- which states: "Plaintiffs' claims against these Defendants are barred by . . . collateral estoppel based upon the prior holding by the United States Court of Federal Claims in the matter of *Alcatec, LLC v. The United States*, 471 Fed. Appx. 899

(July 11, 2012)." R. 807. Defendants further asserted additional defenses to Plaintiffs' claims for punitive damages. R. 806-07.

On June 14, 2018, after the parties had actively litigated this case as described above for over four years with full knowledge of the Federal Claims Court opinion, the lower court allowed Defendants to amend their Answer to plead collateral estoppel. R. 1028.

IV. SUMMARY OF THE ARGUMENT

The court abused its discretion in granting Defendants' motion to amend their Answer to include extra affirmative defenses, including collateral estoppel. Defendants failed to plead collateral estoppel in their Answer. Defendants then actively participated in the litigation for over three years. Furthermore, Defendants knew about the Federal Claims Court opinion (i.e., the purported basis of Defendants' affirmative defense of collateral estoppel) throughout this litigation, as Defendant Gennie Jones served as a witness in that case, and Defendants have referenced that case throughout this litigation.

The court further erred in granting Defendants' Motion for Summary Judgment. The Order Granting Summary Judgment hinged on collateral estoppel, relying on the 2011 Federal Claims Court opinion that adjudicated rights and liabilities between Alcatec and the United States. But under Mississippi law, Defendants are not entitled to assert collateral estoppel because they were neither a party nor in privity with a party to that Federal Claims Court case. *See, e.g., Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387, 401-402 (Miss. 2013); *Smith v. Malouf,* 826 So. 2d 1256, 1260 (Miss. 2002).

And even if Defendants are allowed to assert collateral estoppel, the lower court still erred by applying the affirmative defense of superseding intervening cause to dismiss all of Plaintiffs' claims. Superseding intervening cause is an affirmative defense in tort, as it is an aspect of the proximate cause element of negligence cases. Neither Defendants nor the lower court 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. And notably, under Mississippi law, proximate cause, being a tort doctrine, is not an element of a breach-of-contract claim. Effectively, as Plaintiffs pointed out to the lower court, Defendants moved for summary judgment as to Plaintiffs' negligence claim only. The lower court erred in applying the doctrine of superseding intervening cause to all of Plaintiffs' claims.

Finally, even if the doctrine of superseding intervening cause could apply to all of Plaintiffs' claims, genuine issues of material fact exist as to whether Plaintiffs' conduct qualifies as such. The doctrine focuses on foreseeability, and a reasonable jury could find that Defendants should have foreseen that their failure to do the job for which they were hired -- to manage the logistics of the FEMA contract and to ensure FEMA was not overbilled -- would cause FEMA to be overbilled and thus cause the exact damages that Plaintiffs now seek.

V. ARGUMENT

This Court should review for abuse of discretion whether the trial court erred in allowing Defendants to amend their Answer to include non-pled affirmative defenses after more than three years of active litigation where Defendants had actual knowledge of these defenses' purposted bases since before this litigation began. *See Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 51 (Miss. 1998). On the other hand, this Court reviews questions of law and summary judgments de novo. *See, e.g., Bayview Land, Ltd. v. State ex rel. Clark*, 950 So. 2d 966, 972 (Miss. 2006); *Bennett v. Highland Park Apartments, LLC*, 170 So. 3d 450, 452 (Miss. 2015).

A. THE LOWER COURT ABUSED ITS DISCRETION IN ALLOWING DEFENDANTS TO AMEND THEIR ANSWER TO INCLUDE THE AFFIRMATIVE DEFENSE OF COLLATERAL ESTOPPEL.

A defendant must plead affirmative defenses in its answer, or these defenses are waived. *See* M.R.C.P. 8(c); *State ex rel. Moore v. Molpus,* 578 So. 2d 624, 641 (Miss. 1991) (collateral

estoppel waived); *Miss. Public. Serv. Comm'n v. Merchants Truck Line, Inc.*, 598 So. 2d 778, 780 (Miss. 1992) (res judicata waived). Mississippi Rule of Civil Procedure 15 does not permit a defendant to salvage non-pled affirmative defenses in a pleading amendment on the ground that "justice so requires" where the defendant has actively participated in the litigation. *Hutzel v. City of Jackson*, 33 So. 3d 1116, 1119-21 (Miss. 2010) (waiver of right to assert affirmative defenses of release and accord and satisfaction found where defendant did not raise the defenses in its initial answer and waited twenty-six months to raise it, plus both parties filed interrogatories and requests for production of documents and one party noticed a deposition).

These principles are especially binding in this case, as Defendants had no excuse for waiting over three years to assert collateral estoppel. Defendants knew of this defense's purported basis – the Federal Claims Court opinion – when Plaintiffs filed suit. Defendant Gennie Jones was a witness before the Federal Claims Court.

1. Defendants waived the affirmative defense of collateral estoppel by failing to plead it in their Answer.

Mississippi Rule of Civil Procedure 8(c) "specifically requires that, in pleading to a preceding pleading, a party shall set forth affirmatively certain listed defenses." *Hutzel*, 33 So. 3d at 1119 (citing M.R.C.P. 8(c)). The Mississippi Supreme Court has interpreted Rule 8(c) "to mean that, generally, if a party fails to raise an affirmative defense in its original answer, the defense will be deemed waived." *Id*. (citing *Pass Termite and Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1033 (Miss. 2004)). *See also Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030 (Miss. 2004); *Canizaro v. Mobile Communications Corp. of Am.,* 655 So. 2d 25 (Miss. 1995) (holding that statute of frauds defense is waived if not included in the answer); *Martin v. Estate of Martin,* 599 So. 2d 966 (Miss. 1992) (holding that note maker who claims note is unenforceable as against public policy must affirmatively state so by asserting such a defense); *Hertz Commercial Leasing Div. v. Morrison,* 567 So. 2d 832 (Miss. 1990) (holding that Lessee was required to plead

that the acceleration clause was punitive and unenforceable); *Wholey v. Cal-Maine Foods, Inc.,* 530 So. 2d 136, 138 (Miss. 1988) (holding that "[s]ince res judicata was not affirmatively plead by [Defendant] it was error for the lower court to grant summary judgment on this basis.").

Under Mississippi Rule of Civil Procedure 8(c), collateral estoppel is an affirmative defense that is waived if not timely pled. *See Merchants Truck Line, Inc.*, 598 So. 2d at 780; *Molpus,* 578 So. 2d at 641. Here, Defendants waived collateral estoppel by failing to plead it.

2. The cower court abused its discretion by using Rule 15's "justice so requires" clause to salvage Defendants' non-pled affirmative defenses, as Defendants actively participated in the litigation for over three years with knowledge of these affirmative defenses' purported basis.

Rule 15's "justice so requires" language cannot salvage Defendants' affirmative defenses. The Mississippi Supreme Court has specifically found that in reviewing a request to amend under Rule 15 "over an objection grounded in Rule 8(c)," this Court will give "**full effect to the mandatory language of Rule 8(c)**." *See Hutzel*, 33 So. 3d at 1122 (emphasis added). A defendant waives affirmative defenses when it actively participates in the litigation yet fails to pursue them. *See Estate of Grimes v. Warrington*, 982 So. 2d 365, 369 (Miss. 2008) (waiver of tort-immunity defense found where not pursued for five years, during which time the case was twice reset for trial, experts were designated and deposed on the merits of the claim, and defendants filed a motion in limine to exclude portions of the plaintiff's expert's testimony); *Meadows v. Blake*, 36 So. 3d 1225, 1232-33 (Miss. 2010) (defendants waived the defense of plaintiffs' failure to attach a certificate of expert consultation where they did not pursue it for two years, but at the same time, filed a motion for partial summary judgment, participated in discovery, filed a motion to compel, entered into three scheduling orders, and designated experts); *E. Miss. State Hosp. v. Adams*, 947 So. 2d 887, 889 (Miss. 2007) (waiver of insufficiency of process and insufficiency of service of process where not pursued for more than two years, during which time defendants filed a motion

for summary judgment, motions to compel, motion for status conferences, and motion for additional discovery).

In *Hutzel*, on February 11, 2003, the defendant filed its answer and affirmative defenses to Hutzel's Complaint and then engaged in discovery. *Id*. at 1118. Over two years after Hutzel filed the Complaint, on April 1, 2005, the defendant filed a motion for leave to amend its answer under Rule 15(a), seeking to raise the affirmative defenses of release and accord and satisfaction. *Id*. The defendant "alleged that certain events had transpired in the matter since the filing of its original answer, and that additional investigation had revealed additional defenses that were available to the defendant." *Id*. The defendant, however, failed to "reveal what events or investigation had led to the discovery of the new defenses." *Id*. Hutzel objected, arguing that "because the City had failed to plead the defenses in compliance with Mississippi Rule of Civil Procedure 8(c), the City had waived its right to assert them." *Id.* The trial court agreed with the defendant and permitted it to amend its answer. But the Mississippi Supreme Court reversed:

> The City of Jackson failed to abide by Mississippi Rule of Civil Procedure 8(c) by pleading release and accord and satisfaction in its initial answer, and the City did not raise those defenses until twenty-six months later, having actively participated in the litigation during that period. As the City has not advanced a reasonable explanation to account for its inordinate delay, it has waived its right to assert release and accord and satisfaction, and the trial judge abused his discretion in allowing the City to amend its answer. This case is therefore reversed and remanded for a trial on the merits.

Hutzel, 33 So. 3d at 1122. In so doing, the Mississippi Supreme Court rejected the defendant's arguments that justice required an amendment under Rule 15 where the Plaintiff had raised an objection to the amendment under Rule 8(c):

> [W]hen reviewing a trial court's decision to grant or deny a party's request to amend pleadings pursuant to Rule 15 over an objection grounded in Rule 8(c), this Court will adhere to the rule expressed in *Horton,* giving full effect to the mandatory language of Rule 8(c). As stated *supra,* doing so ensures "judicial efficiency and the expeditious resolution of disputes."

Id. (internal citations omitted). Here, as in *Hutzel*, the Defendants waived collateral estoppel by failing to plead it and then actively participating in the litigation for over three years. Defendants filed numerous motions and have vigorously pursued discovery. Plaintiffs and Defendants have produced thousands of documents. Defendants also filed a Motion for Trial Setting and for Entry of Scheduling Order. R. 648. Even in July 2017, Defendant Jones propounded discovery to Plaintiffs. R. 795.

In moving to amend their Answer on September 26, 2017, Defendants posited that they learned of the purported basis (the Federal Claims Court opinion) of the affirmative defense of collateral estoppel in April 2017 when Plaintiffs served certain discovery responses: "[b]ased upon the written discovery responses and assertions by Plaintiffs therein, Defendants seek leave of the court to file an Amended Answer." *See* R. 799. This reasoning is baseless. As noted above, Defendants previously had filed a motion to dismiss based on the affirmative defense of statute of limitations and attached the Federal Claims Court opinion as an exhibit. Defendants did not attempt to amend their answer to plead collateral estoppel at that time despite Defendants' demonstration that they had knowledge of the Federal Claims Court opinion. Going back even further, it is undisputed that *since the inception of this case* in 2014, Defendants have been aware of the Federal Claims Court opinion. Defendant Jones was a trial witness in the case between Alcatec and the United States in 2012. Accordingly, reviewing Defendants' request to amend under Rule 15(a) over Plaintiffs' objection grounded in Rule 8(c), the trial Court erred in failing to give "full effect to the mandatory language of Rule 8(c)" and allowing Defendants to amend. *See Hutzel*, 33 So. 3d at 1122.

In sum, Defendants did not plead collateral estoppel in their Answer. Defendants then actively participated in the litigation for over three years before moving to amend. Furthermore, Defendants knew about *Alcatec, LLC v. The United States* throughout this litigation, as Gennie

Jones served as a witness in that case, and Defendants have referenced that case in various contexts when addressing the lower courts and the Mississippi Supreme Court. Defendants cannot claim that they learned of *Alcatec, LLC v. The United States* in April 2017. Accordingly, the lower court abused its discretion in allowing Defendants to amend their Answer to add collateral estoppel as an affirmative defense.

B. THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, HOLDING THAT COLLATERAL ESTOPPEL, COMBINED WITH THE TORT DOCTRINE OF SUPERSEDING INTERVENING CAUSE, BARRED ALL OF PLAINTIFFS' CLAIMS.

The lower court erred as a matter of law in holding that collateral estoppel barred Plaintiffs' claims. Under longstanding Mississippi law, Defendants cannot assert collateral estoppel because they were neither a party nor in privity with a party to the previous lawsuit. The lower court erroneously proclaimed that the Mississippi Supreme Court has adopted the federal standard for collateral estoppel. *See* R. 1774 ("As the Mississippi Supreme Court has noted, adopting the federal standard . . ."). The Mississippi Supreme Court has not adopted the federal standard, as has been recognized even by federal courts in Mississippi. "Though other jurisdictions have relaxed the mutuality of parties requirement for collateral estoppel to apply, Mississippi's adherence to the requirement 'has been characterized as being rigid as any now extant.'" *Bell v. Texaco, Inc.*, 2010 WL 5330729, at *2 (S.D. Miss. Dec. 21, 2010) (citing *Walker v. Kerr-McGee Chem. Corp.,* 793 F. Supp. 688, 696 (N.D. Miss. 1992); *Stovall v. Price Waterhouse Co.,* 652 F. 2d 537, 540 (5th Cir. 1981)); *see also Cumbest v. Gerber Life Ins. Co.,* 2009 WL 30111217 at *11 (S.D. Miss. Sept. 16, 2009) (noting that Mississippi strictly interprets the mutuality of parties requirement); *Lacroix v. Marshall Cnty., Miss.,* 2009 WL 3246671 at *6 (N.D. Miss. Sept. 30, 2009) (noting that Mississippi recognizes parties in privity as identical for purposes of collateral estoppel).

Indeed, the Mississippi Supreme Court has consistently held that a party cannot assert collateral estoppel unless that party also was a party – or in privity with a party – to the previous action. *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387, 401-402 (Miss. 2013) (citing *Smith v. Malouf,* 826 So. 2d 1256, 1260 (Miss. 2002)); *see also Garner on Behalf of Garner v. State*, 2018 WL 2213646, at *8 (Miss. Ct. App. May 15, 2018) ("Collateral estoppel is also inapplicable because Garner was not a party to Stewart's trial"); *State v. Oliver*, 856 So. 2d 328, 331 (Miss. 2003) ("[C]ollateral estoppel provides that an issue of ultimate fact determined by a prior judgment may not be *relitigated between the same parties* in a subsequent action.").

"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.'" *Id.* (citing *Little v. V & G Welding Supply, Inc.,* 704 So. 2d 1336, 1339 (Miss. 1997)). Stated differently, the Mississippi Supreme Court scrutinizes "whether the parties . . . were *adversaries in fact* in the prior litigation. This test is adopted by the Restatement (Second) of Judgments (1982)." *Marcum v. Mississippi Valley Gas Co., Inc.*, 672 So. 2d 730, 734 (Miss. 1996). The Mississippi Supreme Court further explained: "Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate fully and fairly *as adversaries to each other* and which are essential to the judgment rendered." *Id.* (citing Restatement (Second) of Judgments, § 38 (emphasis added)). "[T]he test of adversary confrontation is a practical one, to be measured against the whole record of the prior litigation." *Id.* (citing 18 Wright, Miller and Cooper, Federal Practice and Procedure, § 4450 at 420 (1981)).

In *Marcum*, a lawsuit between Marcum and Mississippi Valley Gas Co., the Mississippi Supreme Court recognized that Marcum and Mississippi Valley Gas did not have this type of adversarial relationship in the prior case in question. *Id.* Notably, Marcum and Valley Gas were

both parties to the prior case, yet they had not raised any cross-claims between themselves. *Id.* In the later suit between Marcum and Mississippi Valley Gas, Marcum moved for summary judgment, attempting to assert collateral estoppel against Mississippi Valley Gas, but the Mississippi Supreme Court held that collateral estoppel did not apply due to lack of privity or adversarial relationship.

Here, Defendants cannot use collateral estoppel because they were not a party to the Federal Claims Court action and were not in privity with any such party. Defendants were not connected with the Federal Claims Court action such that Defendants' interests were affected by the judgment with reference to interest involved in the action as if they were parties. Defendants did not stand to gain anything in the Federal Claims Court case. Defendants likewise did not stand to lose anything in the Federal Claims Court case, as that case was to determine only the liabilities and obligations between Plaintiffs and the U.S. Government. In the same vein, under the test described in *Marcum*, Defendants were not adversaries to Plaintiffs in the Federal Claims Court case. As in *Marcum*, there were no claims between the two entities.

The lower court erroneously analogized the present case to *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990) and *McCoy v. Colonial Baking Co., Inc.*, 572 So. 2d 850 (Miss. 1990). Both of these cases are materially different from the instant case, as those cases concerned adversarial relationships in the prior litigation. In *Jordan*, the prior litigation was a criminal proceeding where Jordan was convicted of raping and assaulting Marie. 571 So. 2d at 1374. In that proceeding, Marie was, of course, the key prosecutorial witness; Marie was the one whom Jordan had raped, so her relationship to Jordan in that proceeding was as adversarial as one can imagine. Accordingly, the circumstances in *Jordan* satisfied the adversary confrontation test such that Marie was entitled to assert collateral estoppel in subsequent civil litigation against Jordan.

In *McCoy*, the prior litigation was a personal-injury action where McCoy's wife sued another motorist. 572 So. 2d 851. After McCoy's wife lost at trial, McCoy sued the same defendants for loss of consortium. *Id.* The Mississippi Supreme Court held that McCoy was collaterally estopped from pursuing this claim. *Id.* at 854. Notably, the *McCoy* court's analysis focused entirely on the specific context of loss-of-consortium claims as a special area within collateral-estoppel jurisprudence. *See Id.* at 852-54. Regardless, *McCoy* comports with Mississippi's traditional collateral-estoppel jurisprudence regarding privity and adversarial relationships as exceptions to the same-parties requirement. As in *Jordan*, while McCoy was not a party to the prior litigation, he still was in privity with a party to that litigation (his wife) and had an adversarial relationship with the defendants.

Here, unlike in *Jordan* and *McCoy*, Defendants Gennie Jones and The Jones Group were neither parties to the prior litigation, nor in privity with a party, nor in an adversarial position to a party. It is true that Gennie Jones was a witness in the prior litigation. Neither Ms. Jones' nor the Jones Group's acts were on trial in the federal case. Barbour did not know in advance of its trial against the government that Jones's testimony would be unhelpful to them, and Barbour and Alcatec firmly believed that they would defeat the government's False Claims Act counterclaim. Certainly, as proponents of the affirmative defense of collateral estoppel, Defendants did not meet their burden in establishing that Jones was in an adversarial position to Barbour in the suit between Alcatec and the United States. This contrasts with *Jordan*, which concerned a rape victim who was helping to prosecute her attacker, creating an unmistakably adversarial relationship.

The Mississippi Supreme Court's adherence to the strict mutuality requirement comports with the Court's overall hesitance to rely on collateral estoppel to settle legitimate disputes. The Court has emphasized that "in the absence of passing technical muster of the previous action involving identical parties, identical legal issues, and the same facts required to reach a judgment,

it cannot be applied. And, even where it arguably meets a technical muster, 'the rule is neither mandatory nor mechanically applied.'" *Marcum*, 672 So. 2d at 733. "Collateral estoppel is 'an unusual exception to the general rule that all fact questions should be litigated fully in each case.'" *Gibson v. Williams, Williams & Montgomery, P.A.*, 186 So. 3d 836, 845 (Miss. 2016).

Here, many fact questions exist regarding both Plaintiffs' and Defendants' conduct, and these fact questions require the careful consideration of a jury. This is particularly true because the Federal Claims court did not adjudicate the rights and liabilities between Plaintiffs and Defendants, as Defendants were not a party to that case.

In sum, because Defendants were not a party to the Federal Claims Court case, nor in privity with any party, nor adversaries within the meaning of the "adversary confrontation" test, Defendants cannot assert collateral estoppel. Accordingly, the lower court erred as a matter of law in granting Defendant's Motion for Summary Judgment based on collateral estoppel.

Finally, even if the Court allows Defendants to assert collateral estoppel, and even if the Court takes it as conclusively established that Plaintiffs effectuated a scheme to defraud the Government, the lower court still erred by applying the affirmative defense of superseding intervening cause to dismiss all of Plaintiffs' claims. Superseding intervening cause is an affirmative defense in tort. *See, e.g., Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.*, 971 P.2d 1119, 1125 (1998). More specifically, superseding intervening cause is an aspect of the proximate cause element of negligence cases. *See, e.g., Violet v. Picillo*, 648 F. Supp. 1283, 1294 (D.R.I. 1986), *overruled on other grounds by United States v. Davis*, 794 F. Supp. 67 (D.R.I. 1992). Neither Defendants nor the lower court 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. And notably, under Mississippi law, proximate cause is not an element of a breach-of-contract claim, as breach-of-contract claims have only two elements: the existence of a contract, and breach

thereof. *Maness v. K & A Enterprises of Mississippi, LLC*, 250 So. 3d 402, 414 (Miss. 2018), *reh'g denied* (Aug. 9, 2018).

Effectively, as Plaintiffs pointed out to the lower court, Defendants moved for summary judgment as to Plaintiffs' negligence claim only. R. 1056. The lower court erred in applying the doctrine of superseding intervening cause to all of Plaintiffs' claims.

Even if the doctrine of superseding intervening cause could apply to all of Plaintiffs' claims, genuine issues of material fact exist as to whether Plaintiffs committed any superseding intervening cause. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Southland Mgt. Co. v. Brown ex rel. Brown*, 730 So. 2d 43, 46 (quoting Restatement (Second) of Torts § 440 (1965)). "[T]he problem [of intervening causes] is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of *independent* origin, for which the defendant is not responsible." *Id.* (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44 (5th ed. 1984)) (emphasis added).

The issue is whether "the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances." *Id.* (quoting Prosser and Keeton on the Law of Torts § 44). Notably, even criminal acts do not always constitute superseding intervening causes. *See Williams ex rel. Raymond v. Wal-Mart Stores E., L.P.*, 99 So. 3d 112, 118 (Miss. 2012).

Equally important is that "the question of superseding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact." *Green v. Dalewood Prop. Owners' Ass'n, Inc.*, 919 So. 2d 1000, 1009 (Miss. Ct.

App. 2005) (citing *O'Cain v. Harvey Freeman and Sons, Inc. of Miss.,* 603 So. 2d 824, 829 (Miss. 1991)).

Mississippi courts scrutinize six factors in determining whether a particular intervening force was sufficiently foreseeable such that it can be fairly classed as a superseding intervening cause:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
> (b) 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;
> (c) 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;
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
> (e) 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;
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Southland, 730 So. 2d at 46 (quoting Restatement (Second) of Torts § 440). Here, contrary to the lower court's order granting summary judgment, each factor weighs in Plaintiffs' favor such that none of Plaintiffs' conduct can be fairly classed as a superseding cause.

Regarding the first factor, Plaintiffs' alleged actions did not bring about a different kind of harm than that which otherwise would have resulted from Defendants' negligence. The harm that Plaintiffs suffered was that Plaintiffs lost millions of dollars under Plaintiffs' contract with FEMA, and Plaintiffs had to pay thousands of dollars in fees and penalties. Plaintiffs also lost the ability to contract with the federal government in the future. This kind of harm is precisely the type that would have resulted from Defendants' failures to fulfill their duties to Plaintiffs. It is certainly foreseeable that if one's failures cause a second person to breach its contract with a third party, then the second person would lose the benefit that it otherwise would have received under the

contract with the third party, and the third party would then refuse to contract with the second person in the future.

Second, Plaintiffs' conduct was not extraordinary in view of the circumstances existing at the time of its operation. The circumstances were that Plaintiffs relied on Defendants to facilitate performance under the FEMA Contract. Instead of facilitating performance, Defendants put a dysfunctional system in place that sent Plaintiffs' operations spiraling out of control. It is also important to remember the purpose of the FEMA Contract: to provide critical shelter to Mississippi citizens affected by Hurricane Katrina. This FEMA Contract was critical to Alcatec's success as a company, as Alcatec devoted its resources to complying with the FEMA Contract. Under these circumstances, it is not extraordinary that Plaintiffs would do everything in their power to keep trying to perform under the contract despite the dysfunctional system that Defendants perpetuated. Plaintiffs did not have the luxury of halting its operations for months while Plaintiffs dealt with the aftermath of Defendants' inability to fulfill its duties.

Third, Plaintiffs' conduct (the purported "intervening force") did not operate independently of the situation created by Defendants' failures. Indeed, Plaintiffs' conduct in scrambling to perform under its FEMA contract was dependent on Defendants' failures. Defendants were supposed to work together with Plaintiffs to make sure everything was performed and documented properly, so there is no way that Plaintiffs' conduct would have operated independently of the situation created by Defendants' failures.

Regarding the fourth, fifth, and sixth factors, Plaintiffs' 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 Defendants' failures, as set forth above. Indeed, courts have allowed parties to pursue recovery in similar scenarios without applying the tort doctrine of superseding intervening cause. *See, e.g., Ultramed, Inc. v. Beiersdorf-Jobst, Inc.*, 98 F. Supp. 2d

609 (M.D. Pa. 1998); *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.*, 234 Cal. App. 3d 1724 (Cal. App. 1991).

In sum, the lower court erred in barring all of Plaintiffs' claims through the combined doctrines of collateral estoppel and superseding intervening cause.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Hinds County Circuit Court's order granting Defendant's motion to amend their Answer to include collateral estoppel as an affirmative defense, and this Court should remand this case for further proceedings. Alternatively, this Court should reverse the court's order granting Defendants' motion for summary judgment and remand the case for further proceedings.

THIS the 15th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael A. Heilman, do hereby certify that I electronically file the foregoing with the Clerk of the Court using the MEC filing system which sent notification of such filing to the following counsel of record:

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I, Michael A. Heilman, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing document via U.S. Mail, postage prepaid to the following:

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This the 15th day of May, 2019.

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