THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049

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

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

RESPONDENTS' REPLY TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

The above-named Respondents hereby request that this Honorable Court deny the Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Order of the Honorable John C. Few dismissing the appeal filed by Appellant, National Fire & Marine Insurance Company, Inc. ("Appellant").

BACKGROUND

The factual setting and procedural posture of the matter on appeal are crucial. Appellant is not a party to the lawsuit captioned above. Instead, Appellant is an insurer that provided a defense to Professional Plastering & Stucco, Inc. ("PPS") in the lawsuit under a reservation of

rights. Appellant never moved to intervene in the action, never made a formal appearance in the action, and, in keeping with the foregoing, never subjected itself to the jurisdiction of the circuit court. Appellant's only involvement in the week-long jury trial was to request[1] that the circuit court submit special interrogatories to the jury.[2] Notably, neither Respondents nor PPS, the only parties actually participating in the trial, endorsed Appellant's request. The circuit court denied Appellant's request from the bench without a written order. Appellant's scant involvement in the proceedings below is reflected in a short colloquy that occurred on the last day of trial, which starts at page 527 of the trial transcript.

Appellant appealed the circuit court's refusal to give the requested special interrogatories. Thereafter, Respondents moved this Court for an Order dismissing Appellant's appeal on the basis that it lacks appellate standing to challenge the Court's decision. Because Chief Judge Few neither overlooked nor misapprehended any matter of law or fact in dismissing Appellant's appeal, there is no basis upon which to grant Appellant's request for a rehearing.

LAW AND ANALYSIS

I. CHIEF JUDGE FEW NEITHER OVERLOOKED NOR MISAPPREHENDED ANY MATTER OF LAW OR FACT, AND REHEARING *EN BANC* IS NOT WARRANTED.

There is nothing raised in the Appellant's motion that demonstrates anything was overlooked or misapprehended. The operable facts are undisputed and fit squarely within the well-settled precedent relied upon by Chief Judge Few, and Appellant's request for rehearing is merely a recitation of the arguments it previously made. Rule 221(a), SCACR, requires that

---

[1] Attention is drawn to the Motion Information Form and Cover Sheet accompanying Appellant's Motion when it was filed. The section for "Defendant's Attorney" is completely blank. Similarly, the moving attorney, John L. McCants, Esquire, did not identify himself as counsel for either the Plaintiffs or a Defendant in the space provided beneath his signature. The reason for this is self-explanatory: he did not represent any "party" in the action, nor was he moving to intervene on behalf of any non-party claiming an interest in the case.

[2] Presumably, Appellant intended to use the answers supplied on its proposed verdict form in the underlying liability trial against its insured as evidence in a declaratory judgment action to address Appellant's coverage obligations stemming from PPS's negligent construction.

Appellant state with particularity the points that were overlooked or misapprehended by the Court. Here, there are none. As the Order states, the decision to dismiss was made after "careful consideration."

Further, rehearing *en banc* is disfavored and will not be ordered except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 19, SCACR. Chief Judge Few's Order dismissing the appeal is squarely on point with prior appellate court decisions addressing the exact issue presented herein. Further, Appellants' material rights, *i.e.*, adjudication of its coverage responsibilities, are yet to be determined in an entirely independent proceeding. With that in mind, these are not the circumstances that warrant a rehearing or review *en banc*.

II. APPELLANT DOES NOT GAIN STANDING TO APPEAL SIMPLY BY FILING A REQUEST FOR SPECIAL INTERROGATORIES IN A PENDING IN CASE IN WHICH IT HAS OTHERWISE MADE NO EFFORT TO PARTICIPATE AS A PARTY.

Ex parte Condon, 354 S.C. 634, 583 S.E.2d 430 (2003) is directly on point, and Chief Judge Few's reliance upon its instruction is sound. In *Condon*, the Attorney General was not a party to the underlying action and never moved to intervene. Nevertheless, the Attorney General sought to appeal from the trial. In dismissing Attorney General Condon's appeal the Supreme Court observed,

> ...[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal. Accordingly, we dismiss this appeal based on the Attorney General's failure to move for intervention as required by *Rule 24, SCRCP*. Such a ruling avoids the necessity of addressing the Attorney General's standing to become involved in this action, and makes clear that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case.

Id. at 642, 583 S.E.2d at 434. Appellant argues *Condon* is distinguishable on the basis that, unlike the Attorney General, Appellant is a "party" to its own motion. This logic is fundamentally flawed, and, at most, reveals a distinction without a difference. In the literal sense, Appellant was indeed a party to its own request. But that fact, standing alone, does not create standing to appeal. If Appellant's lack of appellate standing is not clear from *Condon*, as Appellant contends, it is nevertheless made certain by *Ex Parte: South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010).

In *Ex Parte SCDMV*, the Department was not a party in the action, and it never moved to intervene pursuant to Rule 24, SCRCP. However, the Department did file successive motions seeking reconsideration by the circuit court under Rule 59, SCRCP, although it never moved to intervene. If Appellant's logic were applied, the Department should have had standing to appeal in *Ex Parte SCDMV* because the Department was a "party" to its own motions. However, the Supreme Court, citing *Condon*, summarily dismissed the Department's appeal, holding yet again that a non-party may not appeal under such circumstances. Applying *Condon* and *Ex parte SCDMV*, Appellant lacks standing to appeal regardless of whether Appellant was a party to its own motion. Appellant has cited to no case that supports the distinction it attempts to make.

In support of its request for rehearing, Appellant also suggests that Chief Judge Few's Order has the effect of mandating that, in every circumstance, one must first be accepted as a party in the action before a right of appeal attaches. This is not correct—the Order does not impinge upon the acceptable circumstances where a non-party is legally aggrieved by an order, creating standing to appeal. For example, consider the situation where a non-party files a motion to intervene under Rule 24, SCRCP. For more than a century, it has been the law of this state

that a non-party whose motion to intervene is denied has the right to appeal that denial.[3] *See Ex Parte Johnson v. Tunno*, 63 S.C. 205, 207-08, 41 S.E. 308 (holding the denial of a motion to intervene is appealable). This is precisely the situation in which a non-party is "aggrieved" by an order. This also explains why the proper procedure would have been for Appellant to have moved to intervene if it truly desired to participate in the trial.

Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 is equally unavailing to Appellant. *Whetstone* involved an appeal attempted by a non-party to the action after he was ordered to attend a deposition and produce documents. The appeal was dismissed as interlocutory, rather than for lack of appellate standing. In that regard, *Whetstone* has no application to the present matter except that it reiterates the requirement that a party must be aggrieved in the legal sense before he may appeal. *Id.* at 581, 347 S.E.2d at 882. In addition, although not a part of the court's reasoning given that the appeal was dismissed as interlocutory, the power of contempt over a non-party in the context of discovery arises from, *inter alia*, Rules 37 and 45, SCRCP. Both of these rules grant the circuit court the power to sanction non-parties for their failure to comply with lawful subpoenas and discovery efforts. For example, Rule 45, SCRCP, provides that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena issued."[4] By its own terms, Rule 45 subjects the non-party who fails without cause to abide by a lawful subpoena to the enforcement powers of the Court. In stark contrast, it begs the question as to whether Appellant ever subjected itself to the circuit court's jurisdiction in the case below.

---

[3] Appellants incorrectly state on page 5 of their Motion for Reconsideration that, "If Appellant formally moved to intervene, and that motion was denied, Appellant would not have standing to appeal because it would not be a named party in that instance." The reverse is true.

[4] Consider that the Court issuing the subpoena may be different from the circuit court in which the action is pending. The contempt power of the court provided under the Rules of Civil Procedure to enforce discovery bears no relation whatsoever to the facts or posture of the current appeal before this Court.

Condon and *Ex Parte SCDMV* control, and these decisions mandate that Appellant lacks standing to appeal because it has not been legally aggrieved as contemplated under Rule 201(b), SCACR. Thus, Chief Judge Few correctly applied the law of this state in dismissing Appellant's appeal without encroaching upon proper circumstances where a non-party may appeal. [5]

III. APPELLANT OVERLOOKS THE IMPRACTICALITY OF SUBMITTING SPECIAL INTERROGATORIES TO THE JURY ON ISSUES THAT WERE NEVER DEVELOPED BY THE PARTICIPATING PARTIES IN THE TRIAL.

In *Auto Owners Insurance Company, Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009),[6] the Supreme Court agreed with the logic of Auto Owners' argument, but nevertheless held the insurer responsible for the full amount of the arbitrator's award, stating, "it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco...." *Id.* At 199, 684 S.E.2d at 547 (emphasis added). The "record before the Court" in *Newman* was the record from the declaratory judgment action, which is the proceeding from which that appeal emanated. It is unclear from the Court's opinion to what degree Auto Owners presented evidence of the varying types or categories of damages in the course of the declaratory judgment action. We are only told in the opinion that there was insufficient information in the record for the Supreme Court to parse the amount of resulting damages from the amount of damages for removal and replacement of the stucco in that case.[7] This point is interesting, especially if one

---

[5] As Appellant's Motion and Accompanying Memorandum before the circuit court correctly point out, "Insurance coverage for the damages alleged by the Plaintiffs are not determined in this action." Having reserved its rights, Appellant is a party to a separate declaratory judgment action to have its coverage obligations determined. Its day in court is yet to come, and it has not been aggrieved in legal sense in the underlying action.

[6] *Newman* was decided by an arbitrator well versed in construction defect cases. Presumably, any concern of mentioning the existence of liability insurance before a jury would not exist where the matter is decided by an arbitrator familiar with construction litigation.

[7] It appears the result in *Newman*, and the Supreme Court's comment in footnote 5 of that opinion, give Appellant concern that it must have the jury in the underlying trial of its insured's liability make the necessary factual findings for Appellant to later use in its declaratory judgment action. Such a setting is ripe for conflicts of interest.

keeps in mind how the evidence and issues were presented to the jury in the underlying liability case against Appellant's insured, PPS.

In the course of the underlying trial against PPS, there was certainly no requirement that Respondents present evidence of the damages they suffered in a manner that caters to a non-party insurer's particular requests or interests. In a trial to determine the liability of a contractor for defective work, damages proximately caused by the contractor's negligence either exist or they do not—the particular "category" of damage, *i.e.*, resulting damage versus replacement of defective work, is irrelevant in relation to the jury's determination of whether the contractor defectively constructed the building. Counsel for Respondents presented their case at trial in a manner designed to benefit their clients' interests, not to build a record for a non-party insurer's use in a coverage dispute. The same is true of the Defendant, PPS. Counsel for PPS did not (and ethically should not)[8] present evidence and testimony designed to parse out covered types of damages from those that might not be covered by Appellant's policy. Doing so would serve only the interests of Appellant and may very well be directly contrary to the interests of PPS. This is where the rubber meets the road: If neither Respondents nor PPS offered any evidence in the course of the trial to educate the jury on categorical differences between resulting damages to other construction trades versus damages solely related to the repair and replacement of PPS's own work, it strains logic to expect that twelve jurors could intelligently answer the special interrogatories Appellant desired the court to submit. Twelve jurors should not be expected to accomplish that which the learned Justices of the South Carolina Supreme Court could not resolve in *Newman* in the absence of a sufficient record of evidence to guide them. In effect, Appellant wanted the jury to answer questions that were not litigated by the actual parties.

---

[8] *Cf. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Company of South Carolina*, 433 F.3d 365 (4th Cir. 2005)(observing an attorney representing an insured owes a duty of loyalty to the insured and is forbidden to undertake actions that are detrimental to the insured, such as communicating harmful information to the insurance company).

Appellant correctly cites to *Sims v. Nationwide*, 247 S.C. 82, 145 S.E.2d 523 (1965) for the proposition that these questions must be dealt with in the separately pending declaratory judgment action. In that proceeding, Appellant may offer whatever admissible evidence and testimony it deems important, free from conflicts of interest with its insured, so that the trial court might have an adequate record from which to intelligently address the coverage issues before it. If there is any confusion over what *Newman* requires of an insurer in this regard, that confusion needs to be raised to and ruled upon in the course of the declaratory judgment action, where Appellant is a party and can build its own record for meaningful judicial review. If Appellant's legal rights are affected in that declaratory judgment proceeding, presumably it would then have standing to appeal. Here, however, Appellant has no such standing, and Chief Judge Few properly dismissed its appeal.

IV. REHEARING IS UNNECESSARY BECAUSE THE RECORD IS UNCLEAR AND APPELLANT CANNOT PREVAIL ON THE MERITS.

Attention is drawn to the materials submitted in support of Appellant's request for rehearing. Among those materials is Appellant's Memorandum submitted to the circuit court in support of its request for special interrogatories, which states, "[Appellant] believes that any special interrogatories must be based upon the evidence presented at trial. Accordingly, it is premature to commit to specific interrogatories." (Memorandum Submitted by National Fire & Marine Insurance Company, p. 9)(emphasis added). Also provided to this Court by way of Appellant's petition is the sample verdict form accompanying Appellant's motion in the circuit court, which is entitled, "Examples of Written Interrogatories." (*See* Petition for Rehearing)(emphasis added.) Even though Appellant did not at that time commit to the questions it wanted to submit to the jury, it provided examples "of the kinds of interrogatories that may be applicable..." along with its Memorandum. (Memorandum Submitted by National

Fire & Marine Insurance Company, p. 9)(emphasis added). There are no subsequent or amended special interrogatories provided to this Court for consideration in support of Appellant's petition for rehearing. Whether the "Example" interrogatories or some subsequent iteration thereof are now in dispute is unclear from Appellant's petition. It is Appellant's requirement to develop a record sufficient for this Court review the alleged errors. *Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). Either way, Appellant cannot prevail.

The circuit court has the discretion to determine whether to submit special interrogatories to the jury. *Frazier v. Badger*, 361 S.C. 94, 105, 603 S.E.2d 587, 592 (2004). "To warrant a reversal, a party must show that he was prejudiced by the trial court's refusal to submit special interrogatories." *Id.* (citing *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 279-80 (Ct. App. 1997). While the foregoing standard touches on the merits of the matter rather than Appellant's standing to appeal, the point is worth considering in light of Appellant's request for a rare rehearing *en banc*. It is difficult to imagine how the circuit court abused its discretion in denying Appellant's motion when Appellant had not yet committed to any particular special interrogatories when the ruling was made. To the extent Appellant intends to rely on any other interrogatories, they have not been provided to this Court for review. *See Harkins*, 340 S.C. at 616, 533 S.E.2d at 891. A rehearing of this matter would serve no purpose under these circumstances.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondents hereby respectfully request an Order of this Honorable Court declining to reconsider its dismissal of Appellant's appeal.

FOR RESPONDENTS:

MICHAEL A. TIMBES
JESSE A. KIRCHNER
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Fax: (843) 937-4200

- AND -

Justin O'Toole Lucey, Esquire
Post Office Box 806
Mt. Pleasant, SC 29465

W. Jefferson Leath, Jr., Esquire
Post Office Box 59
Charleston, SC 29402

Phillip Ward Segui, Jr., Esquire
864 Lowcountry Blvd., Suite A
Charleston, SC 29464

John T. Chakeris, Esquire
Post Office Box 397
Charleston, SC 29402

April 30, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned herewith certifies that she, on this date, January 31, 2012, did mail and serve via regular U.S. Mail one (1) copy of the foregoing "Respondents' Reply to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc" with proper postage affixed thereto, to all counsel of record, at the following addresses:

John L. McCants
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, SC 29202

M. Britain Travis, Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, SC 29402-0993

Jonathan J. Anderson, Esquire
Anderson Reynolds & Stephens, LLC
37 ½ Broad St.
Charleston, SC 29401

R. Bryan Barnes, Esquire
Rogers Townsend & Thomas, PC
220 Executive Center Dr., Winthrop Bldg.
Columbia, SC 29202-3200

Randell C. Stoney, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
885 Island Park Drive, PO Drawer H
Charleston, SC 29492

David S. Cobb, Esquire
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413

Roy P. Maybank, Esquire
Maybank Law Firm, LLC
P.O. Box 12579
Charleston, SC 29422

J. Blanton O'Neal, IV, Esquire
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401

Charles G. Blackburn, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260

Michael B. T. Wilkes, Esquire
Wilkes Bowers, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306

Christopher M. Adams, Esquire
Collins & Lacy, P.C.
1330 Lady Street, Sixth Floor
Columbia, SC 29211

Robert D. Waltz, Esquire
Keaveny Law Firm, LLC
445 Folly Road
Charleston, SC 29412

William A. Scott, Esquire
Rogers Townsend & Thomas, PC
775 St. Andrews Blvd.
Charleston, SC 29407

Everett A. Kendall, II, Esquire
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

This 30 day of April, 2012.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

BY: _____
Moira W. Kerrigan
Legal Assistant to Michael A. Timbes

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF, SUITE 101
CHARLESTON, SOUTH CAROLINA 29401

Paul R. Thurmond
Jesse A. Kirchner
Michael A. Timbes*
Matthew E. Yelverton**
Steven D. Epps
Christopher P. Deters
David L. Barnes, Jr.
Christine L. Williams

*Also admitted in Georgia
**Also admitted in North Carolina

David L. Savage
Of Counsel

Phone: 843.937.8000
Fax: 843.937.4200
www.tktylawfirm.com

April 30, 2012

VIA FACSIMILE & U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201
Fax to: (803) 734-1839

Re: ***Case Tracking No. 2011193671***
Mark F. Teseniar and Nan M. Teseniar, et al. v. Professional Plastering & Stucco, Inc.; Case No.: 2008-CP-10-0049

Dear Ms. Kitchings:

Please find enclosed the original and ten (10) copies of the Respondents' Reply to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. Kindly file this Response with the Court and return a file-stamped copy thereof to my office in the self-addressed postage pre-paid envelope included for your convenience.

Should you have any questions or concerns, please do not hesitate to contact me. Your assistance is greatly appreciated.

With kindest regards, I remain

Very truly yours,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

Michael A. Timbes
mtimbes@tktylawfirm.com

/mwk
Enclosures: as stated.
cc: J.J. Anderson, Esquire (w/ enclosure)

---

cc: J.J. Anderson, Esquire (w/ enclosure)
Everett A. Kendall, Esquire (w/ enclosure)
W. Jefferson Leath, Jr., Esquire (w/ enclosure)
John T. Chakeris, Esquire (w/ enclosure)
Justin O. Lucey, Esquire (w/ enclosure)
Phillip W. Segui, Jr., Esquire (w/ enclosure)
John L. McCants, Esquire (w/enclosure)
Michael B. T. Wilkes, Esquire (w/enclosure)
Randall C. Stoney, Jr., Esquire (w/ enclosure)
Charles G. Blackburn, Esquire (w/ enclosure)
R. Bryan Barnes, Esquire (w/ enclosure)
Timothy A. Domin, Esquire (w/ enclosure)
Roy Maybank, Esquire (w/ enclosure)
Robert D. Waltz, Esquire (w/ enclosure)
William A. Scott, Esquire (w/ enclosure)
David Cobb, Esquire (w/ enclosure)
Chris Adams, Esquire (w/ enclosure)
M. Brittain Travis, Esquire (w/ enclosure