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

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

RECEIVED
FEB 08 2017
SC Court of Appeals

Nationwide Mutual Fire Insurance Company,Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,Respondent,

v.

Superior Solution, LLC,Respondent.

MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Beresford Commons Homeowners Association, Inc. (hereinafter "Beresford HOA"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellant Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide").

BACKGROUND

This appeal arises from a construction defect case commenced by Beresford HOA against various defendants, including Superior Solution, LLC. Nationwide is an insurer of Superior Solution, LLC. Nationwide filed a Motion to Intervene in the underlying action.

By Form 4 Order entered January 31, 2017, the Court stated that “Nationwide Mutual Fire Company’s Motion to Intervene on behalf of Superior Solutions, LLC filed January 26, 2017, was not heard. Motion was filed after pretrial deadline.” Subsequently, Nationwide filed a Motion for Reconsideration on February 3, 2017. This action was set for trial to begin on this date, February 6, 2017. All remaining parties to the case appeared in court to try the matter, at which time the Court reiterated to Nationwide that its Motion to Intervene had not been denied and as such, there was nothing to reconsider, but noted that the Court would consider hearing the Motion before charging the jury. At this time, the jury panel was qualified, witnesses were present in court, and on a break Nationwide filed its Notice of Appeal. The Court has informed all parties that the jury is being held until Wednesday, February 8, 2017 in hopes that it would not have to release a jury panel that has been set aside for this two-week date certain trial.

To better understand the improper nature of Nationwide’s appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Nationwide filed a written motion to intervene for the purpose of requesting a special verdict form or special interrogatories. (See *Exhibit A attached*). Nationwide is not a party to the litigation. Beresford HOA asserted no claims whatsoever against Nationwide, and Nationwide does not appear as a party in the caption of its own motion from which this appeal arises. After the filing of the motion at issue, Beresford HOA noticed the Rule 30(b)(6) deposition of Nationwide for purposes of determining and narrowing the issues related to Nationwide’s special interrogatories and any that may be requested by Beresford HOA, which Nationwide moved to quash. The Circuit Court ruled the Motion as untimely, as noted in Nationwide’s Notice of Appeal. This appeal follows.

LAW AND ANALYSIS

In order for an issue to be appealed, it must have been ruled upon by the Court. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (upholding the dismissal of an appeal as interlocutory when the appealed order was not intended to be a final ruling). "An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005) citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCPP; Rule 201(a), SCACR. A ruling which does not determine the rights of the parties in a matter is interlocutory and not immediately appealable. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573-74, 698 S.E.2d 856, 859-60 (Ct. App. 2010).

The Court did not rule on Nationwide's Motion to Intervene, it simply refused to hear it because it was filed past the pretrial deadline. There has been no appealable final judgment because there has been no judgment – no decision regarding the merits of Nationwide's Motion has been made. There has not been a judgment that determines the rights of any parties in this matter because there has not been any judgment, and a trial on the facts of the case has yet to be completed.

Further, the decision that Nationwide's Motion to Intervene was not timely does not give Nationwide any rights to stay the case, and permitting this appeal will prejudice Beresford HOA's rights. Nationwide filed a declaratory judgment action against its insured, Superior Solution, LLC, to determine insurance coverage in February of 2016, and coincidentally, has taken this exact position when Beresford HOA attempted to

appeal a ruling of Nationwide placing their own insured in default. Citing directly from Nationwide's brief:

Finally, allowing this appeal to go forward prejudices Nationwide's rights. This declaratory judgment action was filed in February 2016. The underlying case is set for trial the first week of February 2017.

Nationwide's Reply Memorandum in Support of Motion to Dismiss Appeal dated December 19, 2016 in United States Court of Appeals, Fourth Circuit

Nationwide acknowledges the trial date in the brief to the United States Court of Appeals, Fourth Circuit and discusses the prejudice an appeal would have on their right as the insurance company. However, Respondent, the Beresford Commons Homeowners Association, has been waiting since 2013 to bring this case to a resolution, which may be jeopardized with Nationwide's attempt to appeal a decision by the Court that is interlocutory and not appealable.

While Nationwide is relying on the recent case law, *Harleysville Group Ins. v. Heritage Cmities, Inc., et al.*, 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017)(Shearhouse Adv. Sh. No. 2 at 21, 36 n.11) in order to justify its failure to file a Motion to Intervene in a timely manner, there is no case law prior to the *Harleysville* case preventing it from doing so. In fact, there is no case law in South Carolina that overturns *Auto Owners Insurance Co. Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) and the concept of allowing a carrier to intervene in this type of case has been fully briefed by another carrier who intervened in this exact matter. Nationwide and Beresford HOA's counsel have been litigating this coverage matter since February 10, 2016, when the declaratory judgment action was filed. The coverage issues have been at issue for a year and Nationwide could have filed a Motion to Intervene in this action at any time prior to the eve of trial. Specifically, Nationwide could have moved to intervene immediately

after the *Harleysville* decision, but chose to wait more than two weeks to file its Motion. In fact, Selective Insurance Company moved to intervene prior to even filing a coverage action, which was granted by Judge Nicholson. Selective moved to intervene in October 2016 in time to have a hearing and a determination prior to trial.

On these grounds, the Court's determination that the Motion was untimely and would not be heard is not a final judgment as to all the claims or parties, and is not an immediately appealable interlocutory order.

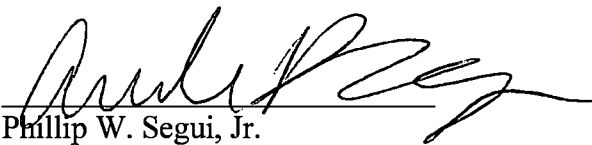
As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

As such, Nationwide appeal must be dismissed as an impermissible interlocutory appeal.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Beresford HOA respectfully requests an Order of this Honorable Court dismissing Appellant Nationwide's Appeal in its entirety.

**FOR RESPONDENT BERESFORD
COMMONS HOMEOWNERS
ASSOCIATION, INC.:**



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February 6, 2017
Mount Pleasant, South Carolina

- AND -

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party(s) with one (1) copy of the foregoing "Motion to Dismiss Appeal" by *electronic mail* and by depositing a copy of same in the *United States mail* in an envelope properly addressed to the following, with adequate postage thereon to insure proper delivery to the following:

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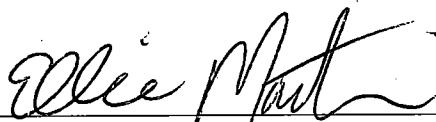
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This 6th day of February, 2017.

BY:



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February 6, 2017

Via Federal Express and electronic mail

The Honorable Jenny Abbott Kitchings
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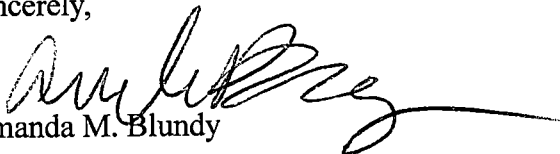
RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al
Case No.: 2013-CP-08-179

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent Beresford Commons Homeowners Association, Inc.'s Motion to Dismiss Appeal as well as this firm's check in the amount of \$25.00 for the applicable filing fee. If you would, please file this motion with the Court and return a file-stamped copy thereof to my office in the enclosed, self-addressed, stamped envelope.

Should you have any questions or require any additional information, please don't hesitate to contact me.

Sincerely,


Amanda M. Blundy

AMB/esm

Enclosure

cc: John T. Chakeris, Esquire (w/enclosure)
J.R. Murphy, Esquire (w/enclosure) - via U.S. mail and electronic mail
Adam J. Neil, Esquire (w/enclosure) - via U.S. mail and electronic mail
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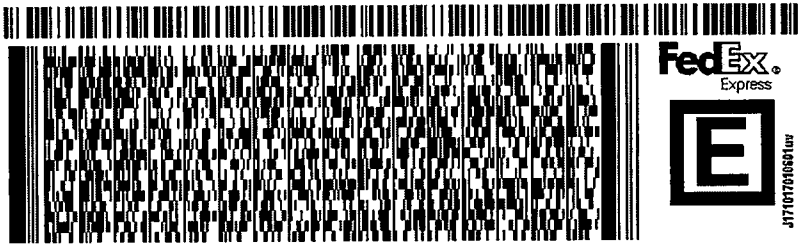
TO HONORABLE JENNY ABBOTT KITCHINGS

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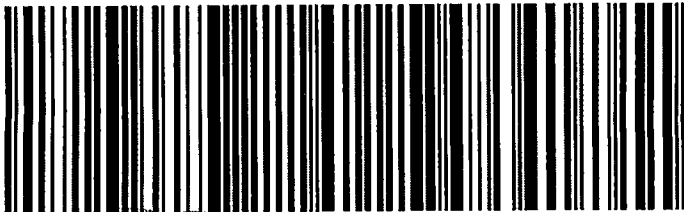
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