

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

FEB 16 2017

Kristi Lea Harrington, Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-08-00179

Ex Parte:

Nationwide Mutual Fire Insurance Company,..... Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,..... Respondent,

v.

Superior Solution, LLC,..... Respondent.

**APPELLANT’S RETURN IN OPPOSITION TO  
RESPONDENT BERESFORD COMMONS  
HOMEOWNERS ASSOCIATION, INC.’S  
MOTION TO DISMISS APPEAL**

Appellant Nationwide Mutual Fire Insurance Company (hereinafter  
“Nationwide”), submits the following Return in Opposition to Respondent Beresford

Commons Homeowner Association, Inc.’s (hereinafter “Beresford”) Motion to Dismiss Appeal. For the reasons that follow, Beresford’s Motion to Dismiss should be denied.

Nationwide appealed from the denial of its Motion to Intervene for the limited purpose of drafting and submitting special interrogatories or a special verdict form to the jury at trial. Beresford moved to dismiss this appeal, arguing that the trial court’s ruling was not final. This Court has jurisdiction to hear this appeal.

### **FACTUAL BACKGROUND**

Beresford brought this lawsuit alleging construction defects in a townhome project. Beresford sued the general contractor and a number of subcontractors, including Superior Solution, LLC, which allegedly installed siding on some of the buildings.

Nationwide issued two Contractors Liability policies to Superior Solution. On February 10, 2016, Nationwide filed a declaratory judgment action in federal district court seeking a ruling on certain coverage issues. Nationwide Mut. Fire Ins. Co. v. Superior Solution, LLC, et al., CA# 2:16-cv-423-PMD (hereinafter “the coverage DJ”). The coverage DJ was stayed when Beresford appealed from a default judgment against Superior Solution to the Fourth Circuit.

While the coverage DJ was pending in the Fourth Circuit, the Supreme Court of South Carolina released an opinion that dramatically altered the landscape of liability coverage law in South Carolina. See Harleysville Group Ins. v. Heritage Cmties., et al., 2017 WL 105021, Op. No. 27698 (S.C. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2). The Harleysville ruling is not yet final. However, if it stands, one of the many changes in the law is that, under Harleysville, it appears that liability insurers will no

longer be able to litigate certain coverage issues in separate declaratory judgment actions. This issue is developed in Nationwide's Motion to Intervene, filed on January 25, 2017, which is attached to Beresford's Motion to Dismiss Appeal as Exhibit A. Accordingly, Nationwide moved to intervene in this action in order to obtain findings of fact necessary for the determination of its coverage—findings that the Supreme Court held can only be addressed in the underlying tort action. See Harleysville, 2017 WL 105021 at \*7 n.11.

Another liability insurer, Selective, had previously filed a motion to intervene, but there was no separate declaratory judgment action addressing Selective's coverage. Prior to Harleysville, insurers generally lacked standing to intervene due to longstanding South Carolina law prohibiting the intermingling of liability and coverage issues. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007). Moreover, Selective's motion was not granted until January 27, 2017, after the Harleysville opinion was released.

Nationwide's Motion to Intervene was based upon a change in law under Harleysville. At a pre-trial motions hearing on January 31, 2017, the trial court refused to hear Nationwide's Motion to Intervene. The trial court ruled that Nationwide's motion was untimely. A Form 4 Order was filed the same date. (See Exhibit to Notice of Appeal.)

On February 2, 2017, Nationwide filed a motion for clarification and/or reconsideration of the trial court's Order dated January 31, 2017. A copy of Nationwide's Motion is attached as Exhibit B. Because trial was scheduled to begin the following Monday, February 6, 2017, counsel for Nationwide provided a brief

explanation of Nationwide's position to the trial court. (See e-mail chain, p. 5, attached as Exhibit C.) Counsel advised the trial court that Nationwide intended to appeal from a denial of its motion to intervene. (Id.) Counsel requested clarification as to whether the trial court's ruling was final, and indicated that Nationwide did not want to waste judicial resources by appealing from a ruling during trial. (Id.) After all the other pending matters were resolved, Nationwide reiterated its position. (Id. at p. 1.)

On February 3, 2017, Beresford filed a Memorandum opposing Nationwide's motion for reconsideration or clarification. (Attached as Exh. D.) Nationwide filed a reply memorandum later that day. (Attached as Exh. E.)

On February 4, 2017, the trial court advised that a hearing on Nationwide's motion was scheduled for Monday, February 6, 2017, at 9:00 a.m. (E-mail attached as Exh. F.) Counsel for Nationwide appeared for the purpose of arguing its motion.

At the hearing on February 6, 2017, the trial court did not grant Nationwide's motion. Nationwide disputes Beresford's version of the trial court's ruling. Counsel for Nationwide's recollection is that the trial court denied Nationwide's motion. However, the trial court later indicated that Nationwide could re-assert its motion after trial during the charge conference. A transcript of the hearing has been requested and will be filed once it is received. In any event, Beresford admits that the trial court subsequently moved forward with the trial. (See Beresford Mot. to Dismiss Appeal, p. 2.) This appeal followed.

### **ARGUMENT**

Generally, appeals may be taken from final judgments only. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 708 (2005). However certain types of

interlocutory orders are subject to immediate appeal. The grounds for an interlocutory appeal are set forth in Section 14-3-330 of the South Carolina Code. Id.

An order affecting a substantial right is immediately appealable when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken; or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2) (Rev. 2017).

It has long been the rule in South Carolina that orders denying a motion to intervene are immediately appealable. Rutledge v. Tunno, 63 S.C. 205, 41 S.E. 308, 309 (1902); see also Ex Parte Wells, 2012 WL 10906587 at \*1 n.1 (S.C. Sup. Ct. Mar. 7, 2012) (unpublished opinion). Appellate courts in South Carolina have decided cases appealed from denials of motions to intervene on a number of occasions. See Ex Parte Horry County State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004); Ex Parte Gov't Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Additionally, the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right. Hagood, 362 S.C. at 196, 607 S.E.2d at 709.

Furthermore, certain types of orders must be appealed immediately to prevent a waiver. Orders denying a right to a particular mode of trial and orders disqualifying a party's preferred attorney must be immediately appealed or any later objection in a subsequent appeal will be waived. Hagood, 362 S.C. at 198, 607 S.E.2d at 710; Lester v. Dawson, 327 S.C. 236, 266, 491 S.E.2d 240, 241 (1997). An order that effectively deprives a litigant of a trial is also included within this rule. Salmonsens v. CGD, Inc., et al., 377 S.C. 442, 452-53, 661 S.E.2d 81, 87 (2008). The trial court's denial of Nationwide's motion to intervene effectively denies Nationwide a trial with respect to

issues the Supreme Court now holds may not be considered in separate coverage actions. Harleysville, 2017 WL 105021 at \*7 n.11. (See Nationwide's Mot. to Intervene, ¶¶ 10-16, attached as Exhibit A to Beresford's Motion to Dismiss Appeal.)

Nationwide moved to intervene in this action as of right. (See Nationwide's Mot. to Intervene, ¶¶ 18-23, attached as Exh. A to Beresford's Mot. to Dismiss Appeal.) The relief Nationwide requested affected a mode of trial—jury findings that can now only be obtained in the proceeding establishing liability. Harleysville, 2017 WL 105021 at \*7 n.11. Although Nationwide sought intervention based upon a change of law, the trial court refused to hear Nationwide's motion as untimely. (See Form 4 Order attached to Notice of Appeal.) After Nationwide moved for reconsideration of this ruling and the issues were briefed by both parties, the trial court again ruled against Nationwide and proceeded with the trial on the merits. (See Beresford's Mot. to Dism. Appeal at 2.)

Regardless of the characterization of the trial court's ruling, it was effectively a final order denying Nationwide's Motion to Intervene. Nationwide requested a final ruling before trial began. (Exh. B at p. 7.; Exh. C at pp. 1, 5.) The parties briefed the issue of whether the denial of the trial court's ruling would be immediately appealable in conjunction with Nationwide's Motion for Reconsideration. (See Exh. D at p. 4; Exh. E at p. 6.) Because the denial of a motion to intervene is immediately appealable, a trial court cannot prevent an appeal by deferring a final ruling until after trial.

Moreover, because orders denying a substantial right such as a mode of trial must be immediately appealed or be waived, Nationwide could not delay its appeal. After the trial court ruled on Nationwide's motion at the scheduled hearing, it immediately began to move forward with the trial. (Beresford Mot. to Dismiss Appeal at 2.) Reassertion of

Nationwide's right to intervene would require a new motion. Because Nationwide is not a party to this action, it would have no notice as to when to reappear and reassert its motion. If Nationwide reasserted its motion at the charge conference and the ruling was denied, an appeal at that time would effectively nullify a two-week trial, preventing the jury from rendering a verdict after hearing all the evidence. Moreover, the ground for the trial judge's ruling—that Nationwide's Motion was untimely—would not be alleviated by the passage of even more time. Furthermore, Nationwide's right to intervene includes a right to attend and participate in the trial because the evidence presented at trial may affect the special interrogatories or special verdict requests needed for findings of fact as to Nationwide's coverage.

Orders denying motions to intervene are immediately appealable. The trial court's ruling effectively denied a mode of trial to which Nationwide claims an entitlement as of right. The ruling is immediately appealable, and if such a ruling was not immediately appealed, the right would be waived. Moreover, a ruling that an appeal cannot be taken from the denial of a motion to intervene until after trial effectively deprives the intervenor of his right to an immediate appeal and is not in the interest of judicial economy.

This Court has statutory jurisdiction to hear this appeal. Accordingly, Beresford's Motion to Dismiss should be denied.

*[Signature page follows]*

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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Attorneys Nationwide Mutual Fire  
Insurance Company

February \_\_, 2017

Other Counsel of Record:

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and

Mr. John T. Chakeris  
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Attorneys for Beresford Commons Homeowners Association, Inc.

Albert A. Lacour, III, Esquire  
Clawson & Staubes, LLC  
126 Seven Farms Drive, Suite 200  
Charleston, SC 29492

Attorney for Superior Solution, LLC

# Exhibit A

(Nationwide's Motion to Intervene  
attached to Beresford's Motion to Dismiss Appeal)

## Exhibit B



Timothy J. Newton  
Direct dial 803-454-1242  
tnewton@murphygrantland.com

February 2, 2017

Honorable Mary P. Brown, Clerk  
Berkeley County Clerk of Court  
300 California Avenue  
P.O. Box 219  
Moncks Corner, SC 29461-0219

Re: Beresford Commons HOA, Inc. vs. Penuel Construction, LLC aka Superior, et al.  
Civil Action No.: 2013-CP-08-00179  
Claim No.: 61 39 AC 221437  
Insured: Penuel Construction, LLC  
Our File No.: 1150-0740

Dear Ms. Brown:

Enclosed please find herewith for filing with the Court the original and one (1) copy of the **NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND BY NATIONWIDE MUTUAL FIRE INSURANCE COMPANY WITH RESPECT TO COVERAGE FOR SUPERIOR SOLUTION LLC** in the above-referenced matter. I would appreciate your filing the original and returning a clocked copy to me in the envelope provided. By copy of this letter I am serving same on all counsel of record.

Sincerely,

Timothy J. Newton

TJN/sb  
Enclosures

cc: All Counsel of Record (via email)

STATE OF SOUTH CAROLINA )

COUNTY OF BERKELEY )

Beresford Commons HOA, Inc.  
 Plaintiff )

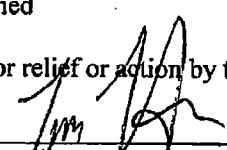
v. )

Penuel Construction, LLC, et al.,  
 Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.  
 2013-CP-00179

MOTION AND ORDER INFORMATION  
 FORM AND COVER SHEET

Plaintiff's Attorney: , Bar No. Address: phone: fax: e-mail:            other:	Defendant's Attorney: Tim Newton, Esquire Address: P.O. Box 6648, Columbia, SC 29260 phone: 803-782-4100 fax: e-mail: <a href="mailto:newton@murphygrantland.com">newton@murphygrantland.com</a> other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Motion to Reconsider Estimated Time Needed: 30 minutes Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	February 2, 2017 Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE  CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ Date Filed: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION NO: 2013-CP-08-00179

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
BRAZIL VINYL SIDING, VINICIUS  
ARAUJO A/K/A VINICIUS ARAUJO  
FREITAS, LUCAS RODRIGUEZ  
BARCELOS, GUILHERMERME DOS  
SANTOS, RENATO SECOMANDI D/B/A  
NEW CANAAN CARPENTRY, DONALD  
LEE D/B/A VINYL SIDING SPECIALISTS,

**NOTICE OF MOTION AND  
MOTION FOR RECONSIDERATION  
AND/OR TO ALTER OR AMEND  
BY NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY  
WITH RESPECT TO COVERAGE FOR  
SUPERIOR SOLUTION LLC**

RONEDES VENTURA D/B/A  
 PROVIDENCIA SIDING, NICHOLAS  
 OWENS, WELINTON REZENDE, LEVI  
 ARRUDA, ARGENTINO JOSE CAMPOS,  
 WELLEN RESENDE BUENO, CHARLES  
 BOWSWER D/B/A CBW SERVICES,  
 MARCIO NUNES DA SILVA, JOSE  
 GERALDO DOS REIS, MILTON DIAS  
 D/B/A MILTON DIAS SIDING, AND  
 LEANDRO DE PAULO ARAUJO, TOM'S  
 VINYL SIDING, UNIVERSAL FOREST  
 PRODUCTS, INC., UNIVERSAL FOREST  
 PRODUCTS EASTERN DIVISION, INC.  
 N/K/A UFP EASTERN DIVISION, INC.,  
 UNIVERSAL FOREST PRODUCTS  
 SHOFFNER, LLC, GUY C. LEE BUILDING  
 MATERIALS, LLC, BENJAMIN MORA  
 D/B/A MORA CONSTRUCTION  
 BENJAMIN MORA CONSTRUCTION,  
 LLC, BUILDERS' FIRSTSOURCE-  
 SOUTHEAST GROUP, LLC, JAMES W.  
 WENTLING, AIA, R.B.A., INC. D/B/A  
 LIFESTYLE U.S.A. DESIGN, LIFESTYLE  
 DESIGN USA, LTD., CTS OF  
 SUMMERVILLE, INC. F/K/A CAROLINA  
 TRUSS SYTEMS, INC., GRADE A LAND  
 SERVICES, LLC, SALUDA HILL, INC.  
 MARCINIAK CONSTRUCTION CO., INC.  
 CAROLINA LANDSCAPE GROUP, INC.,  
 PLANTATION SCAPES, INC. AND M AND  
 J SIDING AND CONSTRUCTION, LLC,

Defendants.

**TO: ALL COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** pursuant to Rule 59(e), SCRCF, and associated case  
 law, Applicant, Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide"), hereby  
 moves for reconsideration, clarification, and/or to alter or amend this Court's Orders refusing to  
 hear Nationwide's Motion to Intervene in this action for the limited purpose of submitting a special

verdict form or special interrogatories to the jury and its Motion for a Protective Order.<sup>1</sup> These Orders were filed on January 31, 2017. The grounds for Nationwide's Motion for Reconsideration are that this Court failed to take into account a dramatic change in South Carolina law resulting from an opinion by the Supreme Court of South Carolina which was released on January 11, 2017. Nationwide filed its Motion to Intervene on January 26, 2017. Moreover, Nationwide had no notice of this Court's deadline for pre-trial motions because it was not a party to this action. Nationwide also seeks reconsideration of this Court's Order denying its Motion for a Protective Order because the Order is inconsistent with this Court's ruling from the bench.

#### MEMORANDUM

**I. This Court's Order failed to take into account a recent change in applicable law.**

Nationwide's Motion to Intervene for a specified limited purpose was made based upon a change in law, as set forth in its Motion filed January 26, 2017. (See Nationwide's Notice of Motion and Motion, ¶¶ 10-16.) Nationwide incorporates those arguments into this Motion by reference.

Nationwide expressly represented in its Motion that it was not seeking to delay this action or to participate in the trial or discovery. The intervention sought was solely for the purpose of drafting and submitting special interrogatories or a special verdict form to the jury. The likelihood of resulting delay or disruption was slight because this Court had previously allowed another insurer to intervene on the same basis.

Nationwide's motion was made in good faith due to a sweeping change in the law wrought by a Supreme Court opinion that was filed shortly before Nationwide moved to intervene.

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<sup>1</sup> This Motion concerns only Nationwide's coverage for Defendant SUPERIOR SOLUTION LLC. Nationwide or one of its affiliates also filed similar motions with respect to coverage for another defendant SAMUEL GLOVER, GLOVER'S BRICKWORKS, INC., but those motions were withdrawn due to a settlement.

Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11). The implications of the Harleysville are far-reaching for a number of reasons.

With respect to issues relevant to this case, the Harleysville opinion made several rulings that are fundamentally inconsistent with prior South Carolina law. First, the Supreme Court held that an insurer's right to control the defense includes a duty to obtain an allocated verdict as to covered versus non-covered damages. Id. at \*5. This holding is inconsistent with prior South Carolina law, which held that an insurer's defense is conducted for the benefit of the insured, not the insurer. The case the Supreme Court cited does not support its holding that the insurer must demand an allocated verdict. See Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933) (holding that the insurer must sacrifice its own interests in favor of the insured in conducting the defense). Because the interests of the insured in defending the underlying tort case may be different from the interests of the insurer with respect to coverage, insurers usually split the defense from coverage to avoid conflicts.

The Harleysville court held that conflicts of interest exist with regard to the insured's defense. Harleysville, 2017 WL 105021 at \*5. This is inconsistent with prior South Carolina law holding that conflicts of interests do not exist because defense counsel is bound by the duty of loyalty to the client, which is the insured. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 373-74 (D.S.C. 2005). When a liability insurer retains counsel to represent the insured, retained defense counsel's duty of loyalty runs to the insured and defense counsel is not an agent of the insurer. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 336 F. Sup. 2d 610, 619 (D.S.C. 2004). Courts are reluctant to find a conflict of interest based upon the presumption that insurance counsel will behave unethically. Id.

Because both the insurer and defense counsel are bound by a duty of loyalty to the insured with respect to the defense, a demand from the insurer that defense counsel seek an allocated verdict for coverage purposes would have represented a breach of the duty of loyalty under prior South Carolina law. Nevertheless, the Supreme Court held in Harleysville that insurers must do precisely that—demand that defense counsel breach his or her duty of loyalty to the client. The Harleysville case thus created a conflict of interest where none previously existed.

Additionally, under prior law insurers arguably lacked standing to intervene in tort actions. This argument is set forth in Nationwide's Motion to Intervene, along with its grounds for distinguishing the court's ruling in Auto Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). Prior South Carolina law allowed insurers to litigate coverage issues separately from defense issues. See Ex parte Gov. Employee's Ins. Co., 373 S.C. 132, 137, 644 S.E.2d 699, 702 (2007) (holding that intertwined coverage issues may be litigated separately, although the insurer's burden of proof in the coverage action may be affected by the results of the underlying tort action).

Accordingly, Nationwide followed existing law in choosing not to attempt to intervene in this action prior to the release of the Harleysville opinion. Nationwide followed existing law that the defense of its insured must be carried on separately from coverage disputes, and for the benefit of its insured, Superior Solution, LLC. Nationwide refrained from attempting to intervene in this case in order to prevent a conflict of interest for defense counsel. Additionally, under prior law it was doubtful that Nationwide even had standing to intervene. The only countervailing factor was the Newman case, which appeared to relate to a special situation in which the insurer was a participant in the construction defect litigation.<sup>2</sup>

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<sup>2</sup> See Nationwide's Motion to Intervene, ¶ 15.

The Harleysville opinion radically changed the landscape of South Carolina law by holding that an insurer has not only a right, but a duty to intervene in the underlying proceedings. Harleysville, 2017 WL 105021 at \*5. As a result, Nationwide was forced to seek intervention in this action based upon the Supreme Court's directive. Denial of Nationwide's Motion to Intervene may severely prejudice Nationwide's rights due to the Harleysville court's holding that failure to intervene waives an insurer's coverage defenses. Id. at \*7 n.12.<sup>3</sup> Accordingly, Nationwide's Motion to Intervene was timely due to a change in law, despite this Court's scheduling order deadline.

**II. This Court erred in holding that Nationwide is bound by the scheduling order.**

Nationwide is not bound by the scheduling order because it was not a party to this action and had no notice of the scheduling order.<sup>4</sup> Under fundamental principles of law, court orders are not binding on non-parties. Additionally, minimum due process requires notice and an opportunity to be heard. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). At the time Nationwide moved to intervene by and through coverage counsel it was not aware of any deadlines because Nationwide was not a party to this action. Indeed, Nationwide's first notice of this Court's deadline for pre-trial motions was by e-mail the day before the scheduled hearing. Furthermore, Nationwide's Motion to Intervene was based upon Rule 24(a), SCRPC, which provides that intervention must be allowed when the requirements for intervention are met. The rule provides that intervention "shall be allowed" upon timely

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<sup>3</sup> This holding also represents a significant departure from prior South Carolina law. See Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999) (holding that coverage cannot be created by waiver or estoppel).

<sup>4</sup> As discussed above, defense counsel is an agent of the insured, not the insurer. Twin City, 336 F. Supp. 2d at 615-16. Any notice of the scheduling order received by Nationwide went to Nationwide's defense adjuster, not Nationwide's coverage adjuster or coverage counsel.

application. Id. Nationwide respectfully requests that this court reconsider its ruling due to Nationwide's lack of notice of the scheduling order.

**III. Nationwide requests clarification as to the effect of this Court's refusal to hear its motion.**

Nationwide also requests clarification of the intent of this Court's Order. As counsel argued at the hearing, the effect of this Court's Order appears to be a denial of its Motion to Intervene because this case is set for trial next week. Nationwide seeks clarity as to whether this Court's Order is a final order denying its motion to intervene.

As discussed above, the Harleysville opinion appears to indicate that insurers must move to intervene to seek an allocated verdict, since defense counsel is bound by a duty of loyalty to the insured. Therefore, Nationwide must act to protect its rights to prevent waiver.

If this Court's Order was not intended as a final order, Nationwide will have to appear at trial and re-assert its motion. If Nationwide's motion is denied, Nationwide will be required to file a Notice of Appeal to protect its coverage defenses. Nationwide intends to exercise this right, and it will have a much greater disruptive effect on this case if the final denial of Nationwide's Motion is made at trial. In the interest of judicial economy, Nationwide therefore requests that this Court clarify whether its Order is final in order to prevent waste of time, expense, and judicial resources that could result from an appeal and ensuing stay during trial.

**IV. Nationwide requests clarification of the Order denying its Motion for a Protective Order.**

Finally, Nationwide requests clarification of this Court's Order denying Nationwide's Motion for a Protective Order. After Nationwide moved to intervene for the narrow purpose of drafting and submitting special interrogatories or a special verdict form, Plaintiff served written discovery on Nationwide and noticed the deposition of Nationwide representatives pursuant to Rule 30(b)(6), SCRCF. Nationwide filed a Motion for a Protective Order seeking an order that

Plaintiff's requested discovery not be had because it exceeded the scope of Nationwide's requested intervention.

The ruling from the bench at the hearing was that Nationwide's Motion for a Protective Order was granted because Nationwide's Motion to Intervene was denied. This Court's Orders indicate that the Court refused to hear both of Nationwide's motions. As a result, Plaintiff's requested discovery remains pending and Nationwide is uncertain as to its obligations as to Plaintiff's requested discovery.

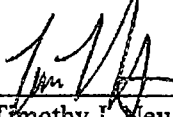
Nationwide therefore requests that this Court amend or clarify its Order so that it is consistent with this Court's ruling from the bench. If this Court's final order is that Nationwide's Motion to Intervene is denied, than Nationwide's Motion for a Protective Order should be either granted or denied as moot. On the other hand, if this Court grant's Nationwide's Motion to Intervene, Nationwide reasserts its Motion for a Protective Order for the reasons set forth in the Motion.

#### **CONCLUSION**

Nationwide requests that this Court reconsider and/or clarify its Orders for the reasons set forth above. This Court failed to take into account a recent change in law that directly affected Nationwide's rights and duties with respect to intervention. Nationwide is entitled to intervention as a commercial general liability ("CGL") carrier for Defendant Superior Solution LLC, as its rights may be affected by a disposition of this case on the merits. Nationwide, as a non-party, is not bound by the scheduling order in this case of which it had no prior notice. Moreover, Nationwide requests clarification as to whether this Court's Order refusing to hear its Motion to Intervene is a final order denying its Motion to Intervene, and also requests clarification regarding this Court's Order refusing to hear its Motion for a Protective Order.

Respectfully submitted,

**MURPHY & GRANTLAND, P.A.**



---

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**Attorneys for Nationwide Mutual Fire Insurance  
Company**

Columbia, South Carolina  
February 2, 2017

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY  
IN THE COURT OF COMMON PLEAS  
BERESFORD COMMONS

JUDGMENT IN A CIVIL CASE  
CASE NO. 2013 CP-08-0179  
PORTRAIT HOMES-SOUTH CAROLINA,

LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	OR <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 14(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: Nationwide Mutual Fire Insurance Company's Motion to Intervene on behalf of Superior Solutions, LLC filed January 26, 2017, was not heard. Motion was filed after pretrial deadline.

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

email all at h/s



FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY  
IN THE COURT OF COMMON PLEAS  
BERESFORD COMMONS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-08-0179

PORTRAIT HOMES-SOUTH CAROLINA,

LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: Nationwide Mutual Fire Insurance Company's Motion for Protective Order and to Quash Deposition and Subpoena on behalf of Superior Solutions, LLC filed January 31, 2017, was not heard. Motion was filed after pretrial deadline.

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.  
SCRCP Form 4C (12/2016) Page 1 of 4

Email all attorneys



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION NO: 2013-CP-08-00179

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

**CERTIFICATE OF SERVICE**

PORTRAIT HOMES-SOUTH CAROLINA, LLC, PORTRAIT HOMES-BERESFORD COMMONS, LLC, PASQUINELLI HOMEBUILDING, LLC, JJA CONSTRUCTION, INC., D/B/A JJA FRAMING, JOSE CASTILLO D/B/A JJA FRAMING, SAMUEL GLOVER, GLOVER'S BRICKWORKS, INC., Z & Z, INCORPORATED, UNITED SIDING SPECIALISTS, INC., SUPERIOR SOLUTION, LLC, ALL AMERICAN ROOFING, INC., JUAN LUIS SANCHEZ, ALFONSO VILLAVICENIO D/B/A ALFONSO'S PAINTING, HERITAGE CONSTRUCTION CONSULTANTS, INC., ROBERT H. YARNEL D/B/A HERITAGE CONSTRUCTION CONSULTANTS, INC. VICTOR MANUEL FERNANDEZ JIMENEZ D/B/A MJF ROOFING SPECIALIST, ARTURO TORRES SOLACHE, TRINIDAD OLIVIA GARCIA, LUIS HERNANDEZ D/B/A CNN ROOFING, NORLAN CERRATO, AMERICAN RESIDENTIAL SERVICES OF SC, INC., AMERICAN RESIDENTIAL SERVICES, LLC, SMITH'S HEATING & AIR CONDITIONING CO., INC., MAURILIO G. DEMENDONCA, GILDO RODRIGUES DE MELO D/B/A BRAZIL VINYL SIDING, VINICIUS ARAUJO A/K/A VINICIUS ARAUJO FREITAS, LUCAS RODRIGUEZ BARCELOS, GUILHERMERME DOS SANTOS, RENATO SECOMANDI D/B/A NEW CANAAN CARPENTRY, DONALD LEE D/B/A VINYL SIDING SPECIALISTS,

RONEDES VENTURA D/B/A  
 PROVIDENCIA SIDING, NICHOLAS  
 OWENS, WELINTON REZENDE, LEVI  
 ARRUDA, ARGENTINO JOSE CAMPOS,  
 WELLEN RESENDE BUENO, CHARLES  
 BOWSWER D/B/A CBW SERVICES,  
 MARCIO NUNES DA SILVA, JOSE  
 GERALDO DOS REIS, MILTON DIAS  
 D/B/A MILTON DIAS SIDING, AND  
 LEANDRO DE PAULO ARAUJO, TOM'S  
 VINYL SIDING, UNIVERSAL FOREST  
 PRODUCTS, INC., UNIVERSAL FOREST  
 PRODUCTS EASTERN DIVISION, INC.  
 N/K/A UFP EASTERN DIVISION, INC.,  
 UNIVERSAL FOREST PRODUCTS  
 SHOFFNER, LLC, GUY C. LEE BUILDING  
 MATERIALS, LLC, BENJAMIN MORA  
 D/B/A MORA CONSTRUCTION  
 BENJAMIN MORA CONSTRUCTION,  
 LLC, BUILDERS' FIRSTSOURCE-  
 SOUTHEAST GROUP, LLC, JAMES W.  
 WENTLING, AIA, R.B.A., INC. D/B/A  
 LIFESTYLE U.S.A. DESIGN, LIFESTYLE  
 DESIGN USA, LTD., CTS OF  
 SUMMERVILLE, INC. F/K/A CAROLINA  
 TRUSS SYTEMS, INC., GRADE A LAND  
 SERVICES, LLC, SALUDA HILL, INC.  
 MARCINIAK CONSTRUCTION CO., INC.  
 CAROLINA LANDSCAPE GROUP, INC.,  
 PLANTATION SCAPES, INC. AND M AND  
 J SIDING AND CONSTRUCTION, LLC,

Defendants.

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys  
 for Nationwide Mutual Fire Insurance Company, do hereby certify that on February 2, 2017, I  
 have served a copy of the foregoing **NOTICE OF MOTION AND MOTION FOR  
 RECONSIDERATION AND/OR TO ALTER OR AMEND BY NATIONWIDE MUTUAL  
 FIRE INSURANCE COMPANY WITH RESPECT TO COVERAGE FOR SUPERIOR  
 SOLUTION LLC** in connection with the above-referenced case by electronic mail and U.S.  
 mail where indicated to:

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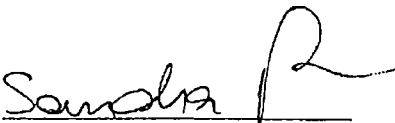
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# Exhibit C

**Tim J. Newton**

---

**From:** Tim J. Newton  
**Sent:** Thursday, February 02, 2017 3:56 PM  
**To:** 'Harrington, Kristi L. Law Clerk (Elizabeth D. Wiles)'; Sandra R. Branson  
**Cc:** CEI@griffithsharp.com; breeser@wilsonheyward.com; JFlynn@gmlj.com; jlyons@seguilawfirm.com; collier.jones@hoodlaw.com; blanton.oneal@hoodlaw.com; amber.gilliam@hoodlaw.com; julie.dunn@hoodlaw.com; julian@allenlawsc.com; sstephens@arlawsc.com; kmars@arlawsc.com; lphillips@arlawsc.com; ssmith@scnlaw.com; apittman@scnlaw.com; jross@jeffrosslaw.com; pcristaldi@jeffrosslaw.com; abonner@jeffrosslaw.com; clankford@jeffrosslaw.com; ldixon@hedrickgardner.com; jroquemore@hedrickgardner.com; khook@hedrickgardner.com; hsharkey@clawsonandstaubes.com; edl@brownandbrehmer.com; dale.lang@brownandbrehmer.com; michael.freeman; dalfini@hinshawlaw.com; aguetzow@hinshawlaw.com; bcranshaw@griercoxandcranshaw.com; GCollins@griercoxandcranshaw.com; tnicollette@griercoxandcranshaw.com; nclark@griercoxandcranshaw.com; methridge@carlockcopeland.com; iwf@p-tw.com; js@p-tw.com; bwilson@wilsonheyward.com; wmccravy@wilsonheyward.com; mhemingway@carlockcopeland.com; Sarah.Wetmore; kcarlsten@carlockcopeland.com; SSimpson@carlockcopeland.com; sanderson@carlockcopeland.com; aterrien@carlockcopeland.com; FClarke@cjpmllaw.com; SPHughes@hgpha.com; caboyne@hgpha.com; hwhite@hgpha.com; jmccue@collinsandlacy.com; tjefferson@collinsandlacy.com; DCleveland@clawsonandstaubes.com; ssmith@clawsonandstaubes.com; lvriesinga@clawsonandstaubes.com; mstubbs@brblegal.com; CGwyn@brblegal.com; jkurka@brblegal.com; rgilsenan@wcsr.com; sforster@wcsr.com; nbeaulieu@wcsr.com; RHerron@wcsr.com; tpalcorn@yahoo.com; bsmithiv@hsblawfirm.com; mmoody@hsblawfirm.com; ege@aikenbridges.com; jnp@aikenbridges.com; janderson@arlawsc.com; cmartin@arlawsc.com; jdunning@arlawsc.com; ahaselden@hnblaw.com; jnovak@hnblaw.com; kmiller@hnblaw.com; alindemann@dml-law.com; jbaker@dml-law.com; John@chakerislawfirm.com; christi@chakerislawfirm.com; psegui@seguilawfirm.com; abby@chakerislawfirm.com; SDixon@gmlj.com; ablundy@seguilawfirm.com; shatch@clawsonandstaubes.com

**Subject:** RE: Beresford/Constantini

Thank your honor. I was not copied on that e-mail. That clears up the matter of the deposition tomorrow. However, there are still discovery requests that have not been withdrawn. If those are withdrawn, then Nationwide would have no further objection as to the Order on its Motion for a Protective Order, as all issues would be moot.

However, Nationwide continues to request that this Court advise as to whether the Order denying Nationwide's Motion to Intervene is final. If not, counsel has been instructed to appear at trial and re-assert the motion, and if it is denied, to file an immediate appeal.

Respectfully,  
 Tim Newton



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**From:** Harrington, Kristi L. Law Clerk (Elizabeth D. Wiles) [mailto:kharringtonlc@sccourts.org]  
**Sent:** Thursday, February 02, 2017 3:36 PM  
**To:** Tim J. Newton <tnewton@murphygrantland.com>; Sandra R. Branson <sbranson@murphygrantland.com>  
**Cc:** CEI more@griffithsharp.com; breeser@wilsonheyward.com; JFlynn@gmlj.com; jlyons@seguilawfirm.com; collier.jones@hoodlaw.com; blanton.oneal@hoodlaw.com; amber.gilliam@hoodlaw.com; julie.dunn@hoodlaw.com; julian@allenlawsc.com; sstephens@arslawsc.com; kmiars@arslawsc.com; lphillips@arslawsc.com; ssmith@scnlaw.com; apittman@scnlaw.com; jross@jeffrosslaw.com; pcristaldi@jeffrosslaw.com; abonner@jeffrosslaw.com; clankford@jeffrosslaw.com; ldixon@hedrickgardner.com; jroquemore@hedrickgardner.com; khook@hedrickgardner.com; hsharkey@clawsonandstaubes.com; edl@brownandbrehmer.com; dale.lang@brownandbrehmer.com; michael freeman <mfreeman@griffithsharp.com>; dalfini@hinshawlaw.com; aguetzow@hinshawlaw.com; bcranshaw@griercoxandcranshaw.com; GCollins@griercoxandcranshaw.com; tnicolette@griercoxandcranshaw.com; nclark@griercoxandcranshaw.com; methridge@carlockcopeland.com; iwfp@p-tw.com; js@p-tw.com; bwilson@wilsonheyward.com; wmccravy@wilsonheyward.com; mhemingway@carlockcopeland.com; Sarah Wetmore <swetmore@carlockcopeland.com>; kcarlsten@carlockcopeland.com; SSimpson@carlockcopeland.com; sanderson@carlockcopeland.com; aterrien@carlockcopeland.com; FClarke@cjplaw.com; SPHughes@hgpa.com; caboyne@hgpa.com; hwhite@hgpa.com; jmccue@collinsandlacy.com; tjefferson@collinsandlacy.com; DCleveland@clawsonandstaubes.com; ssmith@clawsonandstaubes.com; lvriesinga@clawsonandstaubes.com; mstubbbs@brblegal.com; CGwyn@brblegal.com; jkurka@brblegal.com; rgilsenan@wcsr.com; sforster@wcsr.com; nbeaulieu@wcsr.com; RHerron@wcsr.com; tpalcorn@yahoo.com; bsmithiv@hsblawfirm.com; mmooddy@hsblawfirm.com; ege@aikenbridges.com; jnp@aikenbridges.com; janderson@arslawsc.com; cmartin@arslawsc.com; jdunning@arslawsc.com; ahaselden@hnblaw.com; jnovak@hnblaw.com; kmiller@hnblaw.com; alindemann@dml-law.com; jbaker@dml-law.com; John@chakerislawfirm.com; christi@chakerislawfirm.com; psegui@seguilawfirm.com; abby@chakerislawfirm.com; SDixon@gmlj.com; ablundy@seguilawfirm.com; shatch@clawsonandstaubes.com  
**Subject:** RE: Beresford/Constantini

Mr. Newton,

Pursuant to Ms. Blundy's e-mail and attachment, it appears that the Deposition of Nationwide scheduled for February 3, 2017 has been cancelled.

Sincerely,

**Elizabeth D. Wiles**

Law Clerk

The Honorable Kristi Lea Harrington

The Circuit Court of South Carolina

Ninth Judicial Circuit

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I may be in Court from 9:00 AM - 5:00 PM. If you need immediate assistance and cannot reach me, please contact Judge Harrington's Administrative Assistant, Tasha Kotz, at [kharringtonsc@sccourts.org](mailto:kharringtonsc@sccourts.org) or call our office.

**From:** Tim J. Newton [<mailto:tnewton@murphygrantland.com>]  
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**Subject:** RE: Beresford/Constantini

The deposition of Nationwide with respect to Superior Solution has not been cancelled to my knowledge, just the one for Glover and also Selective

Sent from my Windows 10 phone

**From:** [Harrington, Kristi L. Law Clerk \(Elizabeth D. Wiles\)](mailto:kharringtonlc@sccourts.org)  
**Sent:** Thursday, February 2, 2017 3:06 PM

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Subject: RE: Beresford/Constantini

Counselors,

It was our understanding that the deposition would not be proceeding because the Motion to Intervene was denied, and as such, there would be no need for a deposition. Please advise accordingly.

Sincerely,

**Elizabeth D. Wiles**

Law Clerk

The Honorable Kristi Lea Harrington

The Circuit Court of South Carolina

Ninth Judicial Circuit

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**Subject:** RE: Beresford/Constantini

Judge Harrington,

By way of brief explanation due to the shortness of time, these are motions for reconsideration of the two Orders regarding Nationwide's Motion to Intervene and Motion for a Protective Order. These are the primary concerns:

- (1) The Rule 30(b)(6) deposition of Nationwide is still scheduled for tomorrow. The Order is unclear as to Nationwide's obligations;
- (2) Nationwide intends to appeal a denial of its Motion to Intervene. Therefore, we need to know if the Order is final. We do not want to waste judicial resources or the time of the parties and counsel by appealing from a ruling at trial, which would stay the case;
- (3) This motion sets forth Nationwide's position that its Motion to Intervene was based upon a change in law – a position that counsel was not able to flesh out at the hearing.

Nationwide respectfully requests clarification as quickly as possible because trial is scheduled for next week.

Tim Newton

  
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**From:** Sandra R. Branson

**Sent:** Thursday, February 02, 2017 2:53 PM

**To:** [kharringtonlc@sccourts.org](mailto:kharringtonlc@sccourts.org)

**Cc:** [CElmore@griffithsharp.com](mailto:CElmore@griffithsharp.com); [breeser@wilsonheyward.com](mailto:breeser@wilsonheyward.com); [JFlynn@gmlj.com](mailto:JFlynn@gmlj.com); [jlyons@seguilawfirm.com](mailto:jlyons@seguilawfirm.com); [collier.jones@hoodlaw.com](mailto:collier.jones@hoodlaw.com); [blanton.oneal@hoodlaw.com](mailto:blanton.oneal@hoodlaw.com); [amber.gilliam@hoodlaw.com](mailto:amber.gilliam@hoodlaw.com); [julie.dunn@hoodlaw.com](mailto:julie.dunn@hoodlaw.com); [julian@allenlawsc.com](mailto:julian@allenlawsc.com); [sstephens@arlawsc.com](mailto:sstephens@arlawsc.com); [kmiars@arlawsc.com](mailto:kmiars@arlawsc.com); [jphillips@arlawsc.com](mailto:jphillips@arlawsc.com); [ssmith@scnlaw.com](mailto:ssmith@scnlaw.com); [apittman@scnlaw.com](mailto:apittman@scnlaw.com); [jross@jeffrosslaw.com](mailto:jross@jeffrosslaw.com); [pcristaldi@jeffrosslaw.com](mailto:pcristaldi@jeffrosslaw.com); [abonner@jeffrosslaw.com](mailto:abonner@jeffrosslaw.com); [clankford@jeffrosslaw.com](mailto:clankford@jeffrosslaw.com); [ldixon@hedrickgardner.com](mailto:ldixon@hedrickgardner.com); [iroquemore@hedrickgardner.com](mailto:iroquemore@hedrickgardner.com); [khook@hedrickgardner.com](mailto:khook@hedrickgardner.com); [hsharkey@clawsonandstaubes.com](mailto:hsharkey@clawsonandstaubes.com); [edl@brownandbrehmer.com](mailto:edl@brownandbrehmer.com); [dale.lang@brownandbrehmer.com](mailto:dale.lang@brownandbrehmer.com); michael freeman <[mfreeman@griffithsharp.com](mailto:mfreeman@griffithsharp.com)>; [dalfini@hinshawlaw.com](mailto:dalfini@hinshawlaw.com); [aguetzow@hinshawlaw.com](mailto:aguetzow@hinshawlaw.com); [bcranshaw@griercoxandcranshaw.com](mailto:bcranshaw@griercoxandcranshaw.com); [GCollins@griercoxandcranshaw.com](mailto:GCollins@griercoxandcranshaw.com); [tnicolette@griercoxandcranshaw.com](mailto:tnicolette@griercoxandcranshaw.com); [nclark@griercoxandcranshaw.com](mailto:nclark@griercoxandcranshaw.com); [methridge@carlockcopeland.com](mailto:methridge@carlockcopeland.com); [iwf@p-tw.com](mailto:iwf@p-tw.com); [js@p-tw.com](mailto:js@p-tw.com); [bwilson@wilsonheyward.com](mailto:bwilson@wilsonheyward.com); [wmccravy@wilsonheyward.com](mailto:wmccravy@wilsonheyward.com); [mhemingway@carlockcopeland.com](mailto:mhemingway@carlockcopeland.com); Sarah Wetmore <[swetmore@carlockcopeland.com](mailto:swetmore@carlockcopeland.com)>; [kcarlsten@carlockcopeland.com](mailto:kcarlsten@carlockcopeland.com); [SSimpson@carlockcopeland.com](mailto:SSimpson@carlockcopeland.com); [sanderson@carlockcopeland.com](mailto:sanderson@carlockcopeland.com); [aterrien@carlockcopeland.com](mailto:aterrien@carlockcopeland.com); [FClarke@cjpmlaw.com](mailto:FClarke@cjpmlaw.com); [SPHughes@hgpha.com](mailto:SPHughes@hgpha.com); [caboyne@hgpha.com](mailto:caboyne@hgpha.com); [hwhite@hgpha.com](mailto:hwhite@hgpha.com); [jmccue@collinsandlacy.com](mailto:jmccue@collinsandlacy.com); [tjefferson@collinsandlacy.com](mailto:tjefferson@collinsandlacy.com); [DCleveland@clawsonandstaubes.com](mailto:DCleveland@clawsonandstaubes.com); [ssmith@clawsonandstaubes.com](mailto:ssmith@clawsonandstaubes.com); [lvriesinga@clawsonandstaubes.com](mailto:lvriesinga@clawsonandstaubes.com); [mstubbs@brblegal.com](mailto:mstubbs@brblegal.com); [CGwyn@brblegal.com](mailto:CGwyn@brblegal.com); [jkurka@brblegal.com](mailto:jkurka@brblegal.com); [rgilsenan@wcsr.com](mailto:rgilsenan@wcsr.com); [sforster@wcsr.com](mailto:sforster@wcsr.com); [nbeaulieu@wcsr.com](mailto:nbeaulieu@wcsr.com); [RHerron@wcsr.com](mailto:RHerron@wcsr.com); [tpalcorn@yahoo.com](mailto:tpalcorn@yahoo.com); [bsmithiv@hsblawfirm.com](mailto:bsmithiv@hsblawfirm.com); [mmoody@hsblawfirm.com](mailto:mmoody@hsblawfirm.com); [ege@aikenbridges.com](mailto:ege@aikenbridges.com); [jnp@aikenbridges.com](mailto:jnp@aikenbridges.com); [janderson@arlawsc.com](mailto:janderson@arlawsc.com); [cmartin@arlawsc.com](mailto:cmartin@arlawsc.com); [jdunning@arlawsc.com](mailto:jdunning@arlawsc.com); [ahaselden@hnblaw.com](mailto:ahaselden@hnblaw.com); [jnovak@hnblaw.com](mailto:jnovak@hnblaw.com); [kmiller@hnblaw.com](mailto:kmiller@hnblaw.com); [alindemann@dml-law.com](mailto:alindemann@dml-law.com); [jbaker@dml-law.com](mailto:jbaker@dml-law.com); [John@chakerislawfirm.com](mailto:John@chakerislawfirm.com); [john@chakerislawfirm.com](mailto:john@chakerislawfirm.com); [christi@chakerislawfirm.com](mailto:christi@chakerislawfirm.com); [psegui@seguilawfirm.com](mailto:psegui@seguilawfirm.com); [abby@chakerislawfirm.com](mailto:abby@chakerislawfirm.com); Tim J. Newton <[tnewton@murphygrantland.com](mailto:tnewton@murphygrantland.com)>; [SDixon@gmlj.com](mailto:SDixon@gmlj.com); [ablundy@seguilawfirm.com](mailto:ablundy@seguilawfirm.com); [shatch@clawsonandstaubes.com](mailto:shatch@clawsonandstaubes.com)  
**Subject:** Beresford/Constantini

Please see attached correspondence from Tim Newton in the above matter. By copy of this email I am informing opposing counsel of our communication with the court and providing them a copy of same.  
 Thank you.



**Murphy & Grantland, P.A.**

Sandra R. Branson

Legal Assistant to J.R. Murphy and Tim J. Newton

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# Exhibit D

**SEGUI LAW FIRM PC**864 Lowcountry Boulevard  
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Mount Pleasant, SC 29464

T 843-884-1865

Amanda M. Blundy  
ablundy@segulawfirm.com

February 3, 2017

Mary P. Brown  
Clerk of Court  
Berkeley County Court of Common Pleas  
P.O. Box 219  
Moncks Corner, SC 29461RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South  
Carolina, LLC, et al  
Case No.: 2013-CP-08-179

Dear Ms. Brown:

Please find enclosed the original and one (1) copy of Plaintiff's Memorandum in Opposition to Nationwide Mutual Fire Insurance Company's Motion for Reconsideration and/or to Alter or Amend with Respect to Coverage for Superior Solution, LLC, in the above-referenced matter.

I would appreciate it if you would file the original and returned the clocked copy to me in the enclosed self-addressed stamped envelope.

Should you have any questions or require any additional information regarding this matter, please feel free to contact me.

Sincerely,

  
Amanda M. Blundy

AMB/jl

cc: John T. Chakeris, Esquire (w/enclosure) - via electronic mail only  
Elizabeth D. Wiles, Law Clerk to the Honorable Kristi Lea Harrington (w/enclosure) - via  
electronic mail and U.S. Mail  
All Counsel of Record (w/enclosure) - via electronic mail only  
Mr. Jose Castillo (w/enclosure) - via U.S. Mail  
Mr. Charles Bowser (w/enclosure) - via U.S. Mail

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

BERESFORD COMMONS HOMEOWNERS ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA, LLC, PORTRAIT HOMES-BERESFORD COMMONS, LLC AND PASQUINELLI HOMEBUILDING, LLC, JJA CONSTRUCTION, INC. D/B/A JJA FRAMING, JOSE CASTILLO D/B/A JJA FRAMING, SAMUEL GLOVER, GLOVER'S BRICKWORKS, INC., Z & Z, INCORPORATED, UNITED SIDING SPECIALISTS, INC., SUPERIOR SOLUTION, LLC, ALL AMERICAN ROOFING, INC., JUAN LUIS SANCHEZ, ALFONSO VILLAVICENIO D/B/A ALFONSO'S PAINTING, HERITAGE CONSTRUCTION CONSULTANTS, INC., ROBERT H. YARNALL D/B/A HERITAGE CONSTRUCTION CONSULTANTS, INC., SPEEDWAY PLUMBING, INC., VICTOR MANUEL FERNANDEZ JIMENEZ D/B/A MJF ROOFING SPECIALIST, ARTURO TORRES SOLACHE, TRINIDAD OLIVIA GARCIA, LUIS HERNANDEZ D/B/A CNN ROOFING, NORLAN CERRATO, AMERICAN RESIDENTIAL SERVICES OF SC, INC., AMERICAN RESIDENTIAL SERVICES, LLC, SMITH'S HEATING & AIR CONDITIONING CO., INC., MAURILIO G. DEMENDONCA, GILDO RODRIGUES DE MELO D/B/A BRAZIL VINYL SIDING, VINICIUS ARAUJO A/K/A VINICIUS ARAUJO FREITAS, LUCAS RODRIGUEZ BARCELOS, GUILHERMERME DOS SANTOS, RENATO SECOMANDI D/B/A NEW CANAAN CARPENTRY, DONALD LEE D/B/A VINYL SIDING SPECIALISTS, RONEDES VENTURA D/B/A PROVIDENCIA SIDING, NICHOLAS OWENS, WELINTON REZENDE, LEVI ARRUDA, ARGENTINO JOSE CAMPOS, WELLEN RESENDE BUENO, CHARLES BOWSER D/B/A CBW SERVICES, MARCIO NUNES DA SILVA, JOSE GERALDO DOS REIS, MILTON DIAS D/B/A MILTON DIAS SIDING, AND LEANDRO DE PAULO ARAUJO, TOM'S VINYL SIDING, UNIVERSAL FOREST PRODUCTS, INC., UNIVERSAL FOREST PRODUCTS EASTERN DIVISION, INC. N/K/A UFP EASTERN DIVISION,

COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-08-179

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND WITH RESPECT TO COVERAGE FOR SUPERIOR SOLUTION, LLC**



therefore, an evaluation of their untimely Motion to Intervene is futile. Should the Court even move to the question of their Motion to Reconsider, Plaintiff presents the following arguments in opposition.

I. **Nationwide had the opportunity to Move to Intervene for three years prior to the trial and failed to do so.**

While Nationwide's counsel is relying on the recent caselaw, *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 his failure to file a Motion to Intervene in a timely manner, there is no caselaw prior to the *Harleysville* case preventing him from doing so. In fact, there is no caselaw 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 Plaintiff'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. 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.

Nationwide is attempting to use *Harleysville* to stand for the proposition that Motions to Intervene were not entertained, which is simply not the case as outlined in Selective's Memorandum in Support of Motion to Intervene (attached as **Exhibit A**). Therefore, Nationwide's Motion to Intervene was not timely and must be denied. *Ken's Cabana, LLC v. Flemington Props., LLC (Ex parte Horry Cty. State Bank)*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004).

**II. Nationwide not only has been aware of the impending date certain trial, but has participated in the last mediation of this case.**

Nationwide contends it is not bound by the scheduling order but there was no scheduling order in place. This case has been up for a date certain trial in February 2017 for quite sometime. Plaintiff's counsel notified Nationwide's counsel of this trial as evidenced in correspondence regarding deadlines in the declaratory judgment action (email correspondence dated December 1, 2016, attached as Exhibit B). Furthermore, Nationwide's counsel participated in the last mediation of this case, which took place on December 2, 2017. The date certain trial was discussed by all parties and counsel at this mediation. There has never been deadlines for filing motions that Nationwide's counsel was not privy to as this is a Motion he could have filed at any time.

**III. The Court's Denial of Nationwide's Motion to Intervene is not a final order nor is an appealable interlocutory or collateral order.**

Nationwide is attempting to solicit a "final" ruling from the Court in an attempt to delay the trial, stay the case, and appeal the ruling. The ruling that Nationwide's Motion to Intervene was not timely does not give them any rights to stay the case, nor is it immediately appealable. Furthermore, deeming this order final and allowing an appeal will prejudice Plaintiff's rights. Coincidentally, Nationwide has taken this exact position in the declaratory judgment action when Plaintiffs 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 rights as the insurance company. However, the Plaintiffs, the Beresford Commons Homeowners Association and the residents have been waiting since 2013 to have this case come to a resolution, which may be jeopardized with Nationwide's attempt to appeal a decision by the Court that is interlocutory and not appealable. There was no ruling per se - just a determination that Nationwide waived its rights due to the untimely motion.

Nationwide should not have the ability to appeal the decision of the Court due to it being interlocutory. *Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 3 (See *Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory and was therefore not immediately appealable). 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 furthermore, is not an immediately appealable interlocutory order.

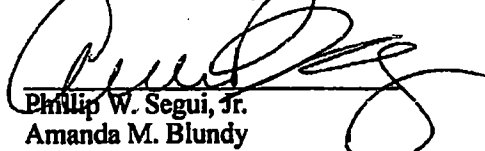
#### CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that this Court deny Nationwide's Motion for Reconsideration and/or Alter or Amend and not allow Nationwide to stay the case to appeal.

Respectfully submitted:

February 3, 2017

SEGUI LAW FIRM, PC



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THE CHAKERIS LAW FIRM

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Attorneys for Plaintiff

# Exhibit E



Timothy J. Newton  
Direct dial 803-454-1242  
newton@murphygrantland.com

February 3, 2017

Honorable Mary P. Brown, Clerk  
Berkeley County Clerk of Court  
300 California Avenue  
P.O. Box 219  
Moncks Corner, SC 29461-0219

Re: Beresford Commons HOA, Inc. vs. Penuel Construction, LLC aka Superior, et al.  
Civil Action No.: 2013-CP-08-00179  
Claim No.: 61 39 AC 221437  
Insured: Penuel Construction, LLC  
Our File No.: 1150-0740

Dear Ms. Brown:

Enclosed please find herewith for filing with the Court the original and one (1) copy of the **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND BY NATIONWIDE MUTUAL FIRE INSURANCE COMPANY WITH RESPECT TO COVERAGE FOR SUPERIOR SOLUTION LLC** in the above-referenced matter. I would appreciate your filing the original and returning a clocked copy to me in the envelope provided. By copy of this letter I am serving same on all counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to read 'TJN', with a long horizontal line extending to the right.

Timothy J. Newton

TJN/sb  
Enclosures

cc: All Counsel of Record (via email)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION NO: 2013-CP-08-00179

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
BRAZIL VINYL SIDING, VINICIUS  
ARAUJO A/K/A VINICIUS ARAUJO  
FREITAS, LUCAS RODRIGUEZ  
BARCELOS, GUILHERMERME DOS  
SANTOS, RENATO SECOMANDI D/B/A  
NEW CANAAN CARPENTRY, DONALD  
LEE D/B/A VINYL SIDING SPECIALISTS,

**REPLY MEMORANDUM  
IN SUPPORT OF  
MOTION FOR RECONSIDERATION  
AND/OR TO ALTER OR AMEND  
BY NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY  
WITH RESPECT TO COVERAGE FOR  
SUPERIOR SOLUTION LLC**

RONEDUES VENTURA D/B/A  
 PROVIDENCIA SIDING, NICHOLAS  
 OWENS, WELINTON REZENDE, LEVI  
 ARRUDA, ARGENTINO JOSE CAMPOS,  
 WELLEN RESENDE BUENO, CHARLES  
 BOWSWER D/B/A CBW SERVICES,  
 MARCIO NUNES DA SILVA, JOSE  
 GERALDO DOS REIS, MILTON DIAS  
 D/B/A MILTON DIAS SIDING, AND  
 LEANDRO DE PAULO ARAUJO, TOM'S  
 VINYL SIDING, UNIVERSAL FOREST  
 PRODUCTS, INC., UNIVERSAL FOREST  
 PRODUCTS EASTERN DIVISION, INC.  
 N/K/A UFP EASTERN DIVISION, INC.,  
 UNIVERSAL FOREST PRODUCTS  
 SHOFFNER, LLC, GUY C. LEE BUILDING  
 MATERIALS, LLC, BENJAMIN MORA  
 D/B/A MORA CONSTRUCTION  
 BENJAMIN MORA CONSTRUCTION,  
 LLC, BUILDERS' FIRSTSOURCE-  
 SOUTHEAST GROUP, LLC, JAMES W.  
 WENTLING, AIA, R.B.A., INC. D/B/A  
 LIFESTYLE U.S.A. DESIGN, LIFESTYLE  
 DESIGN USA, LTD., CTS OF  
 SUMMERSVILLE, INC. F/K/A CAROLINA  
 TRUSS SYTEMS, INC., GRADE A LAND  
 SERVICES, LLC, SALUDA HILL, INC.  
 MARCINIAK CONSTRUCTION CO., INC.  
 CAROLINA LANDSCAPE GROUP, INC.,  
 PLANTATION SCAPES, INC. AND M AND  
 J SIDING AND CONSTRUCTION, LLC,

Defendants.

Applicant, Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide")  
 submits the following Reply Memorandum in support of its Motion for Reconsideration and/or to  
 Alter or Amend this Court's Order denying its Motion to Intervene on a limited specified basis.<sup>1</sup>

<sup>1</sup> Plaintiffs' withdrawal of its requested discovery and cancellation of the Rule 30(b)(6)  
 deposition of Nationwide mooted Nationwide's Motion for Reconsideration of this Court's  
 Order denying Nationwide's Motion for a Protective Order.

For the reasons that follow, Plaintiffs' arguments should be rejected and Nationwide's Motion should be granted.

As a preliminary matter, Nationwide did not assert new arguments in its Motion for Reconsideration. As indicated in its Memorandum attached to its Motion, Nationwide was not aware of this Court's deadline for motions until after Nationwide's Motion to Intervene was filed.

Second, the determination whether Nationwide waived its right to intervene due to inadequacies in its reservation of rights correspondence to Superior Solution LLC is not before this Court. As Plaintiffs acknowledge in their memorandum in opposition, Nationwide's coverage for Superior Solution LLC with respect to this action is the subject of a separate action pending in federal court. Nationwide Mut. Fire Ins. Co. v. Superior Solution, LLC, et al., 2:16-cv-00423-PMD.

**I. Nationwide's Motion to Intervene was timely.**

Plaintiff's argument that no authority prior to Harleysville Group Insurance v. Heritage Communities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11), prevented Nationwide from moving to intervene should be rejected. The case upon which Plaintiffs rely, Auto Owners Insurance Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), stands for the proposition that an insurer is bound by the findings in the proceeding to establish liability against the insured *when the insurer is a participant in that proceeding*.

In Newman, the court held that "*Auto-Owners* had the opportunity to raise this matter when the issue of damages was litigated before the arbitrator . . . ." Id. at 198, 684 S.E.2d at 547 (emphasis added). In a footnote, the court indicated that "*Auto-Owners* represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract." Id. n.5 (emphasis

added). The court further indicated that “[w]hen the arbitrator determined damages, *Auto-Owners* did not seek review or otherwise contest the damages award.” Id.

As Nationwide demonstrated in its Memorandum in support of this Motion, insurers do not represent insureds in tort actions to establish liability. Instead, they retain defense counsel to represent the insured defendant. Defense counsel is the agent of the insured, not the liability carrier. Generally, liability carriers are not participants in tort proceedings to establish liability. However, in Newman the insurer apparently directly participated in the construction defect proceeding before the arbitrator and directly represented its insured, Trinity. Thus, Newman addressed a very unique factual situation.

Newman is not applicable to this case because Nationwide is not a participant in this action. Rather, Nationwide seeks to intervene to become a participant because of new case law that appears to hold that insurers *must become participants* in order to establish certain facts for the record. Harleysville, 2017 WL 105021 at \*7 (holding that a general verdict in the tort action “answers the coverage question” and prevents the issue from being litigated in the coverage action). In other words, Harleysville takes the next step of removing certain issues from the purview of coverage actions when they are intertwined with issues in the underlying tort action.

The fact that another insurer, Selective Insurance Company of the Southeast (hereinafter “Selective”) moved to intervene does not establish that the law at the time required intervention by a liability insurer. As Plaintiffs acknowledge, Nationwide filed a declaratory judgment action on February 10, 2016, approximately a year ago, seeking a declaration as to its coverage. To counsel’s knowledge, Selective did not file a separate action to litigate coverage. Because parallel proceedings to determine Nationwide’s coverage were pending, there was no reason for Nationwide to also seek to intervene in this action.

Moreover, nothing in Newman indicates that insurers are *required* to intervene in order to establish facts for a coverage determination. Rather, Newman holds that when the insurer is a participant, it is bound by its own failure to request special interrogatories or a special verdict in order to establish facts for a later declaratory judgment action. Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5.<sup>2</sup>

At a minimum, Newman is ambiguous as to what precisely an insurer must do in order to establish facts for coverage purposes when they are intertwined with issues in the underlying tort action. As discussed in Nationwide's Motion to Intervene and Motion for Reconsideration, there were numerous reasons to interpret Newman narrowly to avoid conflicts with longstanding South Carolina law. Certainly, nothing in Newman indicates that when a parallel coverage action is pending, an insurer must also intervene in the underlying tort action in order to establish facts for the coverage action. Therefore, Newman should not be construed to have established a rule that liability insurers must intervene in underlying tort actions.<sup>3</sup>

Therefore, Nationwide's Motion to Intervene was timely due to a change in law. Pursuant to Rule 24(a), SCRPC, this Court lacks discretion to deny Nationwide's timely motion to intervene.

**II. This Court erred in holding that Nationwide is bound by the scheduling order.**

As Nationwide understands it, this Court denied Nationwide's Motion to Intervene due to a deadline in a scheduling order. Coverage counsel for Nationwide has never seen this scheduling

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<sup>2</sup> This Court's Order granting Selective's Motion to Intervene indicates that Auto-Owners was not a participant in the underlying proceeding at issue in Newman. (Order filed Jan. 23, 2017 at pp. 4-5.) This finding was made without any supporting authority, and it contradicts the express terms of the Supreme Court's opinion, which holds that Auto-Owners was a participant. The actual facts of Newman are irrelevant because it was Auto-Owners' responsibility to correct the factual record if the Supreme Court was mistaken.

<sup>3</sup> Significantly, Selective is the only insurer that attempted to intervene in this action prior to Harleysville. Moreover, Judge Nicholson's Order was issued after Harleysville on January 23, 2017. Nationwide moved to intervene three days later on January 26, 2017.

order, and Plaintiffs represent in their Memorandum in Opposition that no such scheduling order exists. Regardless, any such deadline cannot be binding on Nationwide because Nationwide was not a participant, and therefore had no prior notice of this Court's deadline.

**III. An order denying a motion to intervene is immediately appealable.**

Plaintiffs' position that orders denying motions to intervene are interlocutory is simply incorrect. It has long been the rule in South Carolina that orders denying a motion to intervene are immediately appealable. Rutledge v. Tunno, 63 S.C. 205, 41 S.E. 308, 309 (1902); see also Ex Parte Wells, 2012 WL 10906587 at \*1 n.1 (S.C. Sup. Ct. Mar. 7, 2012) (unpublished opinion). Appellate courts in South Carolina have decided cases appealed from denials of motions to intervene on a number of occasions. See Ex Parte Horry County State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004); Ex Parte Gov't Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). The authority upon which Plaintiffs rely is not controlling because it addresses an appeal from the *granting* of a motion to intervene, which is not dispositive of the rights of the party seeking intervention. Dorn v. Cohen, 418 S.C. 126, 139, 791 S.E.2d 313 (Ct. App. 2016).

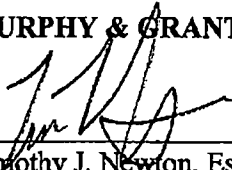
Finally, Plaintiffs' comments with regard to the pending coverage action are irrelevant. However, since the issue has been raised, a brief explanation is appropriate. Nationwide filed the coverage action in federal court a year ago. However, that case is still in its early stages because of Plaintiffs' own litigation tactics. When Nationwide took a default judgment against Superior Solution, LLC, which did not appear in that action, *Plaintiffs* appealed the default judgment against *Superior Solution LLC* to the Fourth Circuit. In moving to dismiss, Nationwide represented that it was prejudiced by Plaintiffs' conduct because in that case, the order appealed from was interlocutory, and the appeal had the effect of delaying the coverage action. The Fourth Circuit granted Nationwide's Motion to Dismiss.

**CONCLUSION**

Nationwide requests that this Court reconsider and/or clarify its Order denying Nationwide's Motion to Intervene for the reasons set forth above. This Court failed to take into account a recent change in law that directly affected Nationwide's rights and duties with respect to intervention. Nationwide, as a non-party, is not bound by the scheduling order in this case of which it had no prior notice. Moreover, Nationwide requests clarification as to whether this Court's Order refusing to hear its Motion to Intervene is a final order denying its motion.

Respectfully submitted,

**MURPHY & GRANTLAND, P.A.**



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**Attorneys for Nationwide Mutual Fire Insurance  
Company**

Columbia, South Carolina  
February 3, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION NO: 2013-CP-08-00179

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

**CERTIFICATE OF SERVICE**

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
BRAZIL VINYL SIDING, VINICIUS  
ARAUJO A/K/A VINICIUS ARAUJO  
FREITAS, LUCAS RODRIGUEZ  
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 SHOFFNER, LLC, GUY C. LEE BUILDING  
 MATERIALS, LLC, BENJAMIN MORA  
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 DESIGN USA, LTD., CTS OF  
 SUMMERVILLE, INC. F/K/A CAROLINA  
 TRUSS SYTEMS, INC., GRADE A LAND  
 SERVICES, LLC, SALUDA HILL, INC.  
 MARCINIAK CONSTRUCTION CO., INC.  
 CAROLINA LANDSCAPE GROUP, INC.,  
 PLANTATION SCAPES, INC. AND M AND  
 J SIDING AND CONSTRUCTION, LLC,

Defendants.

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys  
 for Nationwide Mutual Fire Insurance Company, do hereby certify that on February 3, 2017, I  
 have served a copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION  
 FOR RECONSIDERATION AND/OR TO ALTER OR AMEND BY NATIONWIDE  
 MUTUAL FIRE INSURANCE COMPANY WITH RESPECT TO COVERAGE FOR  
 SUPERIOR SOLUTION LLC** in connection with the above-referenced case by electronic mail  
 and U.S. mail where indicated to:

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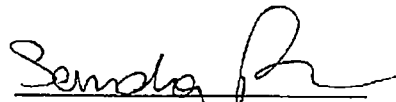
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Sandra R. Branson

Columbia, SC

# Exhibit F

**Tim J. Newton**

---

**From:** Harrington, Kristi L. Law Clerk (Elizabeth D. Wil <kharringtonlc@sccourts.org>  
**Sent:** Saturday, February 04, 2017 3:48 PM  
**To:** Amanda Blundy  
**Cc:** Albert A. Lacour, III; Tim J. Newton; Josephine Lyons  
**Subject:** RE: Beresford/Constantini (2013-CP-01-179 & 2013-CP-01-180)

Thank you, Ms. Blundy. I am now in receipt.

Mr. Newton, Judge Harrington has advised that you may plan to be present Monday morning, 2/6, at 9:00 AM for further proceedings on the Motion to Alter/Amend.

We will be in Courtroom E - the large courtroom on the wing of the building.

Thank you,

Elizabeth D. Wiles  
Law Clerk  
The Honorable Kristi Lea Harrington  
The Circuit Court of South Carolina  
Ninth Judicial Circuit  
300-B California Avenue  
Moncks Corner, SC 29461  
Phone: (843) 719-4480  
Fax: (843) 719-4724  
Email: [kharringtonlc@sccourts.org](mailto:kharringtonlc@sccourts.org)

Chambers Policy Regarding Documents Sent: Please send any proposed orders, motions, or memoranda in hard copy to Judge Harrington's mailbox in the Clerk's office of either Berkeley or Charleston County. Judge Harrington's policy is to sign all approved orders by close of business on Friday of the week the order is received. If you cannot confirm with the Clerk's office that your order has been signed and filed within one week of submission, please call (843) 719-4480.

I may be in Court from 9:00 AM - 5:00 PM. If you need immediate assistance and cannot reach me, please contact Judge Harrington's Administrative Assistant, Tasha Kotz, at [kharringtonsc@sccourts.org](mailto:kharringtonsc@sccourts.org) or call our office.

-----Original Message-----

**From:** Amanda Blundy [<mailto:ablundy@seguilawfirm.com>]  
**Sent:** Friday, February 3, 2017 7:53 PM  
**To:** Harrington, Kristi L. Law Clerk (Elizabeth D. Wiles) <[kharringtonlc@sccourts.org](mailto:kharringtonlc@sccourts.org)>  
**Cc:** Albert A. Lacour, III <[alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com)>; Tim J. Newton <[tnewton@murphygrantland.com](mailto:tnewton@murphygrantland.com)>; Josephine Lyons <[jlyons@seguilawfirm.com](mailto:jlyons@seguilawfirm.com)>  
**Subject:** Re: Beresford/Constantini (2013-CP-01-179 & 2013-CP-01-180)

Elizabeth - I did not send you the pre-trial brief earlier as I did not hit send on the email and I just found it! However, it is essentially the same thing the Court received two weeks ago except I took out the parties we settled with. Therefore, there is no different information.  
I apologize this did not go out sooner! My paralegal just sent and copying counsel on it as well as this email.  
Thank you.  
Amanda

~~~~ CONFIDENTIALITY NOTICE ~~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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IN THE STATE OF SOUTH CAROLINA

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In the Court of Appeals

FEB 16 2017

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

SC Court of Appeals

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Ex Parte:

Nationwide Mutual Fire Insurance Company, .....Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,.....Respondent,

v.

Superior Solution, LLC, .....Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Return in Opposition to Respondent Beresford Commons Homeowners Association, Inc.'s Motion to Dismiss Appeal, via regular and electronic mail, on February 16, 2017, to its attorneys of record, Mr. Phillip Ward Segui Jr. and Ms. Amanda Morgan Blundy, Segui Law Firm, 864 Lowcountry Blvd., Ste A, Mt. Pleasant, SC 29464 and Mr. John T. Chakeris, Chakeris Law Firm, 231 Calhoun St., Charleston, SC 29401. I have also served the Return upon Superior Solution, LLC, via regular and electronic mail, to its attorney of record, Albert A. Lacour, III, Clawson & Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492, on February 16, 2017,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'J.R. Murphy', is written over a horizontal line.

---

J.R. Murphy, Esquire  
Adam J. Neil, Esquire  
Timothy J. Newton, Esquire  
P.O. Box 6648  
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(803) 782-4100  
Attorneys Nationwide Mutual Fire  
Insurance Company



MURPHY & GRANTLAND, P.A.

Timothy J. Newton  
Direct dial 803-454-1242  
newton@murphygrantland.com

February 16, 2017

RECEIVED

FEB 16 2017

SC Court of Appeals

**HAND DELIVERED**

The Honorable Jenny Abbot Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: Beresford Commons HOA, Inc. vs. Penuel Construction, LLC aka Superior, et al.  
Civil Action No.: 2013-CP-08-00179  
Claim No.: 61 39 AC 221437  
Insured: Superior Solution, LLC  
Our File No.: 1150-0740

Dear Ms. Kitchings:

Please find enclosed the original, and ten (10) copies of the Appellant's Return in Opposition to Respondent Beresford Commons Homeowners Association, Inc.'s Motion to Dismiss Appeal in the above-referenced matter. I would appreciate your filing the original and returning the clocked copies by individual delivering same.

As always, I thank you and your staff for all the help and assistance you repeatedly provide with regard to these matters.

Sincerely,

Timothy J. Newton

TJN/sb  
Enclosures

cc: All Counsel of Record (via email)

Telephone 803-782-4100 • Facsimile 803-782-4140  
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