

February 22, 2017

Via U.S. Mail and Electronic Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
jkitchings@sccourts.org

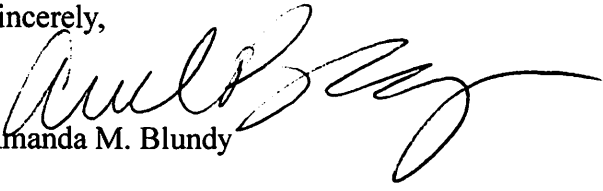
RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al
Case No.: 2013-CP-08-179

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of the Respondent Beresford Commons Homeowners Association, Inc.'s Reply to Nationwide Mutual Fire Insurance Company's Return to Motion to Dismiss Appeal. If you would, please file the Reply 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/jl

Enclosure

cc: John T. Chakeris, Esquire (w/enclosure) - via electronic mail
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
Timothy J. Newton, Esquire (w/enclosure) - via U.S. mail and electronic mail
Albert A. Lacour, III, Esquire (w/enclosure) - via electronic mail

**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

Ex Parte:

Nationwide Mutual Fire Insurance Company,Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,Respondent,

v.

Superior Solution, LLC,Respondent.

**RESPONDENT BERESFORD COMMONS HOMEOWNERS ASSOCIATION,
INC.'S REPLY TO NATIONWIDE'S RETURN TO MOTION TO DISMISS
APPEAL**

COMES NOW the above-named Respondent Beresford Commons Homeowners Association, Inc. (hereinafter "Beresford HOA"), by and through its undersigned counsel, submits the following Reply to Nationwide Mutual Fire Insurance Company's (hereinafter "Nationwide") Return in Opposition to Motion to Dismiss the Appeal.

Beresford HOA asserted in its Motion to Dismiss Nationwide's Appeal that the trial court did not make a ruling on the Motion to Intervene as it was untimely and specifically noted to Nationwide that they could reassert their motion at the time the jury would be charged. On these grounds, Beresford HOA moved to dismiss the appeal as interlocutory and therefore, the Court of Appeals does not have jurisdiction to hear this appeal.

Nationwide asserts several positions in its Return to the Motion to Dismiss Appeal which must be corrected for this Court. The trial of this matter did not begin. As stated in Beresford HOA's Motion to Dismiss, the trial court did not rule on the Motion to Intervene. Therefore, the Motion to Reconsider was not heard either as the trial court reiterated there was nothing to "reconsider" as it was not ruled upon. The trial court gave leave to Nationwide to re-assert its motion to intervene during the charge conference after the trial of the case. However, during the qualification of the jury panel, Nationwide filed its Notice of Appeal to the South Carolina Court of Appeals. A jury was not selected and the trial did not begin. The trial court did not want to waste judicial resources and move forward with the trial of this case should the Court of Appeals entertain the appeal. The hearing transcript has been requested and will be filed upon receipt.

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. Beresford HOA believes the Court of Appeals does not have jurisdiction to hear this interlocutory appeal. Nationwide's Motion was untimely and therefore, there is no evaluation to be made by this Court.

Nationwide's arguments are misplaced in that they cite cases relating to Motions to Intervene being denied (*Nationwide's Return to Motion to Dismiss*, p. 5) There is a clear distinction between these cases and instant action where the Motion to Intervene were not ruled upon. Nationwide argues that their rights would be affected should they not be allowed to intervene. However, Beresford HOA has significant rights that would be affected should Nationwide be allowed to intervene in this late stage of the case.

As stated in Nationwide's Opposition to their Motion to Intervene, should the trial court allow Nationwide to intervene, Beresford HOA's Due Process rights would be violated at this stage in the case. The Court must balance the rights of the parties and in allowing Nationwide to become a party to this action under Rule 24(a), the Beresford HOA has certain procedural due process rights to be able to question the party's representative, present evidence to the jury, gather information prior to trial and present alternative views to the jury based on Nationwide's special interrogatories. The Beresford HOA is entitled to conduct discovery with other parties and present the necessary evidence to the jury, including calling a representative of Nationwide to the trial of this matter. By asking interrogatories or a special jury verdict form, it stands to reason that Beresford HOA would have to introduce evidence and then argue to the jury as to how it should complete the verdict form or answer interrogatories, as would be done in any trial with any verdict form or interrogatories. Beresford HOA would also like the opportunity to present special interrogatories to the jury if Nationwide is afforded this opportunity. Evidence needs to be developed to create these special interrogatories. With no explanation of why such questions and arguments were being made, the jury would be

confused and would speculate as to what was going on. It would be a violation of Due Process if Beresford HOA does not have the ability to cross-examine this witness and present evidence. *Vora v. Lexington Med. Ctr.*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) “Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 10011, 25 L.Ed.2d 287 (1970). Pursuant to the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution, the Beresford HOA should be allowed to present evidence relating to Nationwide’s request to intervene. *Olson v. S.C. Dep’t of Health & Env’tl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 503 (Ct. App. 2008).

In response to these arguments before the trial court, it is Beresford HOA’s recollection that during the February 6, 2017 hearing, Nationwide asserted that this type of discovery **can** be conducted in the federal declaratory judgment action. However, the Beresford HOA has attempted to depose a representative of Nationwide in the declaratory judgment action where Nationwide is the named Plaintiff of the case and this request was denied. (See email correspondence dated February 15, 2017 from Nationwide and Beresford HOA’s counsel relating to the deposition of Nationwide attached as **Exhibit A**; Proposed topic list of the deposition of Nationwide in the declaratory judgment action attached as **Exhibit B**.) Nationwide is denying Beresford HOA the opportunity to gather this evidence in the underlying case before this Court OR the declaratory judgment action. However, Nationwide wants to be involved in the underlying construction defect

case and now would like to be involved in the trial of the case. Furthermore, Nationwide feels they are entitled to all of the documents, deposition transcripts, expert reports, and evidence from the underlying construction case in their declaratory judgment action. If Nationwide is afforded all of these rights, including the right to intervene, Beresford HOA has their Due Process rights that must be protected.

The Beresford HOA has due process rights to be able to evaluate Nationwide's position, reservations of rights correspondence, and the application of the facts of the case to the particular policy endorsements at issue in this case. The discovery of this information is tethered to the question of whether Nationwide should be allowed to intervene. The Court should not allow Nationwide cannot circumvent the rules of discovery and due process rights by intervening in a vacuum. While Beresford HOA understands the Court of Appeals is not determining these underlying issues and simply whether the appeal is properly before this Court, Beresford HOA believes the underlying issues and logistics of this intervention are connected to Nationwide's arguments about the mode of trial.

Nationwide was not and has not been deprived of a substantial right of the mode of trial as stated in their Return to the Motion to Dismiss. Nationwide advised the trial court they would not even be present for the trial and was not planning on staying for the trial, but wanted to submit their special interrogatories. Furthermore, the trial court gave them the opportunity to move for intervention prior to the charge conference. While the Beresford HOA believes this would not allow the necessary discovery and cross-examination of the Nationwide representative to take place, it is evidence that

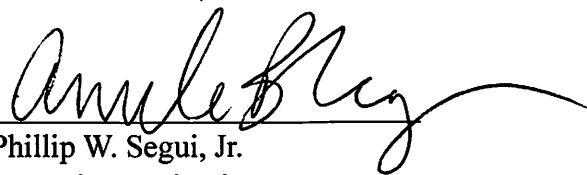
Nationwide's arguments are misplaced. Nationwide has represented to the trial court they do not want to participate in trial, yet argues to this Court that they would not be afforded the opportunity to reassert the motion or "participate in trial" and hear the evidence from the trial.

As such, Nationwide's 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.:**



Phillip W. Segui, Jr.

Amanda M. Blundy

SEGUI LAW FIRM, PC

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ablundy@seguilawfirm.com

February 22, 2017

Mount Pleasant, South Carolina

- AND -

John T. Chakeris

THE CHAKERIS LAW FIRM

231 Calhoun Street

Charleston, SC 29401

(843) 853-5678

Email: john@chakerislawfirm.com

From: **Tim J. Newton** TNewton@murphygrantland.com
Subject: RE: Nationwide v. Beresford
Date: February 15, 2017 at 4:35 PM
To: **Amanda Blundy** ablundy@seguilawfirm.com



Amanda,

This is bad faith-type discovery. At this point, Portrait has been dismissed and Superior Solution defaulted. The only issue is the legal interpretation of the insurance contract. Therefore, Nationwide objects to this deposition as irrelevant.

Tim N.



Murphy & Grantland, P.A.
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From: Amanda Blundy [mailto:ablundy@seguilawfirm.com]
Sent: Wednesday, February 15, 2017 3:18 PM
To: Tim J. Newton <tnewton@murphygrantland.com>
Subject: Re: Nationwide v. Beresford

Yes.

Sent from my iPhone

On Feb 15, 2017, at 3:16 PM, Tim J. Newton <tnewton@murphygrantland.com> wrote:

This is for the DJ?

<image001.png>

Murphy & Grantland, P.A.
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EXHIBIT A

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Please be advised that this e-mail and any files transmitted with it are confidential attorney-client communications or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

From: Amanda Blundy [<mailto:ablundy@seguilawfirm.com>]
Sent: Wednesday, February 15, 2017 2:46 PM
To: Tim J. Newton <tnewton@murphygrantland.com>
Cc: John@chakerislawfirm.com chakeris <John@chakerislawfirm.com>; Phillip Segui <psegui@seguilawfirm.com>; Josephine Lyons <jlyons@seguilawfirm.com>
Subject: Nationwide v. Beresford

Good afternoon Tim,
I have attached a topic list for the 30b6 deposition of Nationwide. I would like dates for April if possible. Please give me dates within a week or so and I will send the notice.
Thank you.
Amanda

**ADDENDUM TO
NOTICE OF DEPOSITION 30(b)(6)
EXHIBIT A**

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Nationwide Mutual Fire Insurance Company, shall designate one or more officers, directors, managing agents or such other persons who consent to testify on your behalf, as to the following matters on which examination if requested:

1. Your company's knowledge of your insurance policies issued to Superior Solution, LLC and/or Georgia A. Ribeiro and/or Penuel Construction Group, LLC ("The Policies"), and all matters relating to these policies.
2. Your company's knowledge of any information related to policy premium rates for The Policies including the setting of rates, payment of premiums, and any change(s) in rates.
3. Your company's knowledge of any information related to the underwriting of The Policies.
4. Your company's knowledge of all applications for policy coverage made by Superior Solution, LLC and/or Georgia A. Ribeiro and/or Penuel Construction Group, LLC.
5. Your company's knowledge of any written or verbal communications with Superior Solution, LLC and/or Georgia A. Ribeiro and/or Penuel Construction Group, LLC, or individuals acting on behalf of Superior Solution, LLC and/or Georgia A. Ribeiro and/or Penuel Construction Group, LLC, related to The Policies.
6. Your company's knowledge of attempts made to put your company on notice of the underlying lawsuits, Berkeley County Case Nos. 2013-CP-08-179 and 2013-CP-08-180, any investigations performed on the underlying claims, and basis for any reservations of rights or denial of indemnity or defense.
7. Your knowledge of all coverage evaluations performed relating to the Nationwide Mutual Fire Insurance Company's claims underlying in the lawsuits, including the result of said evaluation, any notices issued to the insured and the granting and denial of defense coverage and/or indemnity coverage.
8. All efforts you made to resolve the underlying claims.
9. Your handling of the underlying claims.
10. Your knowledge of the basis for your assertions in your pleadings and discovery responses in this case.
11. Your knowledge of the basis for the applicability of any policy exclusion related to Beresford Commons HOA's claims in the underlying lawsuits, Berkeley County Case Nos. 2013-CP-08-179 and 2013-CP-08-180.
12. Your company's knowledge regarding the documents produced in response to this Notice.
13. The amount of Beresford Commons HOA's claims in the underlying lawsuits, Berkeley County Case Nos. 2013-CP-08-179 and 2013-CP-08-180, that you believe are covered by the Policies.

EXHIBIT B

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 "Reply to Return to 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:

J.R. Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire
P.O. Box 6648
Columbia, SC 29260
jmurphy@murphygrantland.com
aneil@murphygrantland.com
tnewton@murphygrantland.com

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

This 22nd day of February, 2017.

BY:



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