

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

ORDER DENYING LIBERTY MUTUAL'S MOTION FOR LIMITED INTERVENTION

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 FEB -6 PM 2:55

FILED

RECEIVED

FEB 16 2017

SC Court of Appeals

Presiding Judge:	Hon. Deadra L. Jefferson
Liberty Mutual's Attorney:	Robert Calamari, Esq.
Plaintiff's Attorney:	John Hayes, IV, Esq.
Defendant's Attorney:	John A. Massalon, Esq.
Date of Hearing:	January 23, 2017
Court Reporter:	Ruth Weese

On January 23, 2017, this matter came before this Court for a hearing on Liberty Mutual's Second Motion for Limited Intervention, filed January 19, 2017.¹ Present at the hearing was Robert Calamari of Nelson, Mullins, Riley & Scarborough appearing for Liberty Mutual. John A. Massalon of Wills, Massalon & Allen appeared for the Wieland Defendants (John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John

¹ Liberty Mutual's First Motion for Limited Intervention was filed on October 13, 2016. The Motion was subsequently withdrawn on December 5, 2016 by Attorney Robert C. Calamari.

10/5
[Handwritten signature]

Wieland Homes, Inc., and Builders Support Services of the Carolinas). Additionally present was John Hayes, IV, attorney for Plaintiff Waverly at Hamlin Planation, who joined in with Attorney John A. Massalon in opposing the motion. Based on the foregoing, Liberty's Motion to Intervene is denied.

Liberty insured the Wieland Defendants under some twelve (12) insurance policies over twelve (12) years. This is a construction defect dispute involving over one hundred (100) townhomes at Waverly at Hamlin Plantation filed in 2013.² Liberty Mutual, a CGL insurance carrier for Wieland, hired counsel to defend Wieland under a reservation of rights beginning in May 2016. Liberty has moved to intervene into this action for the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages during the trial that began on Monday January 23, 2017.

Liberty Mutual's motion does not fall with the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. SCRCF Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impeded his ability to protect that interest. SCRCF Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have question of law for fact in common. Also, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. Liberty does not claim a statutory right to intervene, conditional or otherwise. Further, Liberty does not claim an interest in the subject matter of the

² A companion case Sills v. John Wieland Homes of the Carolinas, Inc. et al, C.A. 2014-CP-10-4335 is being tried simultaneously with the above-captioned matter. Liberty did not move to intervene in the companion case which would also be a basis to further confound the jury and to deny the motion to intervene.

2/15
AKG

dispute between the Plaintiffs and the Wieland Defendants. The purpose of Liberty's intervention request is to submit special interrogatories to the jury pertaining to the issue of insurance coverage. The undersigned is not convinced that the interest that Liberty seeks to protect is sufficient under Rule 24 because that interest is probably not ripe until such time, if ever, as the jury returns a verdict for Plaintiffs against the Wieland Defendants.

Additionally, Rule 24 does not contemplate or permit the limited intervention sought by Liberty. Liberty does not seek to participate in the trial as a party. The rule cited in Liberty's motion speaks only of intervention. Therefore, the relief requested by Liberty is not available under SCRPC Rule 24.

Nonetheless, Liberty Mutual attempts to justify its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a January 11, 2017 opinion issued by the South Carolina Supreme Court, Opinion No. 29698³; and that (2) it is only seeking intervention for the purpose of obtaining special interrogatories or a special verdict form. The Heritage majority opinion cannot fairly be read to direct or approve Liberty's last minute motion to intervene for the purpose of seeking jury interrogatories and a special verdict form, which neither the insured nor its counsel has requested.⁴ As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. This statement reflects the recognition that in South Carolina an insurer is responsible for the entire general verdict where at least one of several claims are covered. Id. However, the Heritage case does not authorize

³ It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.

⁴ The Court in Heritage references the cases of Magnum Foods, Inc. v. Cont'l Cas. Co., 3 F.3d 1491, 1498 (10th Cir. 1994) which relied upon Duke v. Hoch, 468 F.2d 973, 979 (4th Cir. 1972). Those cases speak more to the duties of insurance companies in notifying their insureds of conflicts in advance, were not construction cases, and do not direct that an insurer be permitted to intervene into a case on the eve of trial for the limited purpose of obtaining a special verdict or special interrogatories.

3085


or direct an insurer like Liberty to intervene in a case under circumstances that exist here for several reasons.

First, as noted in the dissent in Heritage, insurance companies intervening in these lawsuits and asserting a defense against coverage would seem to create an impermissible conflict of interest in violation of established South Carolina law. Id. at p. 54. Asking the Wieland Defendants to defend themselves against the Plaintiffs' claims and the efforts of their own insurance carrier simultaneously would be unfair. Counsel for the Defendants has spent considerable effort during discovery and trial preparation to formulate a defense strategy. Undoubtedly, that strategy would be disrupted if Liberty was permitted to intervene at this stage, probably to the detriment of Liberty's insured. Conversely, I find no prejudice to Liberty Mutual in denying its Motion since (1) the issues it raises are not ripe until a verdict is reached, and (2) it is not precluded from bringing a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportion damages, if any, found in this case.

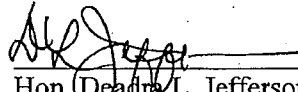
Second, the risk of jury confusion is unacceptably high. During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would be introduced during the trial which would allow the jury to decide the special interrogatories. It is safe to assume that Plaintiffs' counsel would have no interest in submitting such evidence and trial counsel for the Wieland Defendants would be ethically constrained from introducing such evidence or examining witnesses about the differences between covered and uncovered claims. That leaves Mr. Calamari as the only attorney with the interest and ability to introduce that evidence; however, Mr. Calamari does not represent a party in the case and so he

Page 5
JAG

would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence.

Therefore, Liberty's motion to intervene is denied. In summary, this "non-party" intervention, on the eve of trial, will only complicate and delay the underlying action, confuse the jury, and introduce a question of insurance coverage that is simply not the subject matter of this action.

Accordingly the motion is DENIED.



Hon. Debra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February 6, 2017
Charleston, SC
At Chambers