

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

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MAY 11 2017

SC Court of Appeals

Ex Parte:

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

In Re:

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

v.

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

**APPELLANT'S MOTION TO CERTIFY
FOR REVIEW BY THE
SUPREME COURT OF SOUTH CAROLINA**

Appellant Nationwide Mutual Fire Insurance Company (hereinafter
"Nationwide") hereby moves for certification of this appeal for review by the Supreme
Court of South Carolina pursuant to Rule 204(b), SCACR. The grounds for this motion

are that this appeal involves issues of significant public interest and legal principles of major importance. Additionally, this appeal involves questions that only this Court can decide.

In Harleysville Group Insurance v. Heritage Communities, Inc., 2017 WL 105021, Op. No. 27698 (S.C. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2), this Court held that certain liability coverage issues cannot be litigated in a separate declaratory judgment action, and instead must be litigated in the underlying tort action. Acting Justice Pleicones argued in dissent that “there is no suggestion how Harleysville could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law.” 2017 WL 105021 at *17, Shearouse Adv. Sh. No. 2 at p. 54 (Pleicones, A.J., dissenting). This appeal concerns the issue Justice Pleicones raised: Whether liability insurers are permitted to intervene in tort actions against their insureds to seek findings of fact as to coverage questions, and if such intervention is to be permitted, upon what basis and by what procedure.

Intertwined with these issues, this appeal also concerns the question of whether intervention was required, or even permitted, under prior law. In Auto Owners Insurance Company v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), this Court held that Auto Owners could not “relitigate the issue of damages” because it had the opportunity to raise the issue of covered versus non-covered damages before the arbitrator, having “represented” its insured in arbitration “made mandatory by the terms of the insurance contract.” Id. at 198 n.5, 684 S.E.2d at 547 n.5. This Court relied on Newman in Harleysville. 2017 WL 105021 at *7 n.11, Shearouse Adv. Sh. No. 2 at p.

36 n.11. An issue in this appeal is whether this holding in Newman was generally applicable so as to make liability insurers participants in underlying tort proceedings based solely on their status as liability insurers.

FACTUAL BACKGROUND

Beresford Commons Homeowners Association, Inc. (hereinafter “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”). (See Exh. A: Complaint.) 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, this Court released an opinion that dramatically altered the landscape of liability coverage law in South Carolina. See Harleyston Group Ins. v. Heritage Cmities., et al., 2017 WL 105021, Op. No. 27698 (S.C. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2). The Harleyston ruling is not yet final. However, if it becomes final, one of the many changes in the law is that, under Harleyston, it appears that liability insurers will no longer be able to litigate certain coverage issues in separate declaratory judgment actions.

Accordingly, Nationwide moved to intervene in this action on January 25, 2017 to obtain findings of fact that may be necessary for the determination of its coverage—

findings that this Court held can only be addressed in the underlying tort action. See Harleystville, 2017 WL 105021 at *7 n.11, Shearouse Adv. Sh. No. 2 at p. 36 n.11. (See Exh. B: Nationwide's Motion to Intervene.)

At the time this Court's opinion in Harleystville was released, this construction defect action was set for a date certain trial to begin on February 6, 2017. As a result, Nationwide was forced to move to intervene on the eve of trial.

Nationwide's Motion to Intervene was based upon a change in law under Harleystville. Prior to Harleystville, 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). Nationwide did not attempt to intervene in this action before Harleystville because it had filed a separate declaratory judgment action to address coverage issues. Furthermore, Nationwide had not agreed to represent its insured, Superior Solution, in an arbitration proceeding made mandatory by Nationwide's policies. Therefore, this Court's holding in Newman did not apply.

This Court's holding in Harleystville greatly expanded the applicability of Newman. This Court held that if the jury renders a general verdict in the underlying tort action, it has a preclusive effect on a liability insurer's ability to obtain findings of fact as to coverage issues, despite the fact that liability insurers are not parties to the underlying tort actions. Harleystville, 2017 WL 105021 at *7 n.11, Shearouse Adv. Sh. No. 2 at p. 36 n.11. As a result, liability insurers have no choice but to attempt to intervene in underlying tort actions in order to obtain findings of fact necessary for

determining coverage issues. Accordingly, Nationwide moved to intervene shortly after this Court's opinion in Harleysville was released.

At a pre-trial motion 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. (Exh. C: Excerpts of Transcript; Exh. D: Form 4 Order.) Nationwide's motion for clarification and/or reconsideration was denied on February 6, 2017. (See Exh. E: Motion; Exh. F: Excerpts of Transcript.) This appeal followed.

ARGUMENT

Under Rule 204(b) of the South Carolina Rules of Appellate Procedure, this Court may, upon motion of a party, certify the case for review by this Court before it has been determined by the Court of Appeals. Certification is discretionary, and is "normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." This appeal involves numerous issues of significant public interest and legal principles of major importance. It also involves conflicts in the law arising from this Court's precedent.

Under longstanding South Carolina law, insurance coverage issues are separated from tort issues. There are many reasons for this. Under the common law, plaintiffs have no right of action to proceed directly against a defendant's liability insurer. Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003). Any such right must be created by the legislature. Major, 267 S.C. at 520, 229 S.E.2d at 850; Swinton v. Chubb & Son, Inc., 283 S.C. 11, 14, 320 S.E.2d 495, 496 (Ct. App. 1984). Moreover,

insurance issues must be kept from the jury to avoid prejudicing the verdict. Bartell v. Willis Constr. Co., 259 S.C. 20, 24, 190 S.E.2d 461, 463 (1972); Rule 411, SCRE.

The issues in an action to determine liability insurance coverage are not the same as the issues in the underlying action to establish liability against the insured. In the context of construction defect actions, tort liability depends upon a finding that the builder violated applicable building codes, deviated from industry standards, or constructed housing that the builder knew or should have known posed a serious risk of physical harm. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). On the other hand, actions to determine insurance coverage turn on general rules of contract construction. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Whereas underlying tort actions are factually driven, interpretation of insurance contracts is an issue of law for the court. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

This Court has held that liability insurers may not be joined as parties in tort actions with their insured defendants. Major, 267 S.C. at 510, 229 S.E.2d at 850. This Court has also held that liability insurers may not intervene in liability actions against their insureds. Ex Parte Gov't Emp.'s Ins. Co., 373 S.C. 132, 137, 644 S.E.2d 699, 702 (2007). Accordingly, liability and coverage issues are generally determined in separate actions.

In some cases there are overlapping questions of fact. In Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011), this Court held that “negligent or defective construction

resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not." Id. at 50, 717 S.E.2d at 594. Furthermore, the legislature has enacted a statute providing that "occurrence" in commercial general liability policies must be defined to include "property damage . . . resulting from faulty workmanship, exclusive of the faulty workmanship itself." S.C. Code Ann. § 38-61-70(B)(2).

In the absence of applicable exclusions, assessing liability coverage in construction defect cases involves a factual determination of whether defectively constructed building components caused damage to otherwise non-defective building components, and how much such damage exists. This question is not at issue in the underlying tort action, which only addresses the questions of whether the building was negligently constructed, and the amount of proximately caused damages. Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Cmty., Inc., 397 S.C. 348, 363-64, 725 S.E.2d 112, 120-21 (Ct. App. 2012). However, there is some overlap between the amount of defective construction for purposes of the underlying tort action and the amount of resulting damage for purposes of determining liability coverage. This is so because liability in an indemnity contract is determined by the evidence and facts found by the factfinder in the underlying case. Griffin v. Van Norman, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990); Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 313-14, 476 S.E.2d 708, 711 (S.C. Ct. App. 1996); Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388-89 (4th Cir. 2001).

This Court has adopted a framework for determining the binding effect of one action on another. In South Carolina Property and Casualty Insurance Guaranty

Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991), this Court adopted the Restatement (Second) of Judgments rule for the use of offensive collateral estoppel. Id. at 213, 403 S.E.2d at 627. Under this rule, only a party to a prior action or a one in privity with a party to a prior action can be precluded from relitigating an issue by collateral estoppel. Carrigg v. Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001). Privity exists when one party is “so identified in interest with another that he represents the same legal right.” Id. “Privity deals with a person’s relationship to the subject matter of the previous litigation, not to the relationships between the entities.” Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998). “To be in privity, a party’s legal interests must have been litigated in the prior proceeding.” Id. Collateral estoppel only applies if the party to be estopped had a full and fair opportunity to litigate the issue in the first action. Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). This rule is imposed to protect the constitutional due process rights of the party to be estopped. Richburg v. Baughman, 290 S.C. 431, 435, 351 S.E.2d 164, 434 (1986).

Under the Restatement rule, an indemnitor may be precluded from relitigating an issue if the indemnitor defended or should have defended the indemnitee. Restatement (Second) of Judgments § 57(1) (1982). However, when there is a conflict of interest between the indemnitor and the indemnitee, the indemnitor is not bound. Restatement (Second) of Judgments § 57(2) (1982). This Court has held that the binding effect of a judgment against an insured does not extend to matters outside the scope of an insurance contract. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 86, 145 S.E.2d 523, 525 (1965). “To hold otherwise would be to estop the Insurance Company by the acts of

parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court” Id. For this reason, insurers are allowed to reserve their defenses for a subsequent suit. Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 800 (4th Cir. 1949).

This Court has held that liability insurers must defend if the underlying complaint creates a possibility of coverage. Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co., 274 S.C. 468, 470, 265 S.E.2d 38, 40 (1980). Failure to defend may subject an insurer to a bad faith claim. Therefore, when conflicts of interest arise between liability insurers and their insureds, carriers generally reserve their rights and split the coverage from the defense. Counsel retained to defend the insured is ethically bound to represent the insured. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365 (4th Cir. 2005). Insurers retain separate coverage counsel to represent them in the separate action to determine coverage issues.

This Court’s opinion in Harleysville conflicts with this prior legal framework in numerous respects. Harleysville, 2017 WL 105021 at *7 n.11, Shearouse Adv. Sh. No. 2 at p. 36 n.11. This Court held that Harleysville could not seek an allocation of covered versus non-covered damages in a separate coverage action, and that the dilemma was of Harleysville’s own making. Id.

This holding conflicts with the rule that liability and coverage are determined in separate actions. It conflicts with the rule that liability insurers may not be joined in actions to establish the liability of their insureds. This Court simply ignored longstanding precedent governing issue preclusion and its associated Due Process implications. Furthermore, this Court held that Harleysville was bound by the results of

the underlying proceeding after indicating that a conflict of interest existed between Harleysville and its insured, thus violating Sims.

This signaled a seismic shift in South Carolina jurisprudence regarding liability coverage issues and how they are determined. Harleysville appears to abandon the longstanding common-law rule and to align South Carolina with direct action states, despite former precedent holding that such an action can be taken only by the legislature. Major, 267 S.C. at 520, 229 S.E.2d at 850; Swinton v. Chubb & Son, Inc., 283 S.C. 11, 14, 320 S.E.2d 495, 496 (Ct. App. 1984).

The two cases this Court cited in Harleysville did not forecast such a sweeping change in South Carolina law. In Newman, this Court held that Auto-Owners could not relitigate the issue of damages because it “represented [its insured] in binding arbitration, made mandatory by the terms of the insurance contract.” Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. This Court held that Auto-Owners “had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator” Id. at 198, 684 S.E.2d at 547. Thus, Newman’s holding was based upon a factual determination that Auto-Owners was a party to the underlying arbitration proceeding. Whether Auto-Owners was actually a party to the underlying action is irrelevant. This Court’s holding was not based upon issue preclusion because it found as a matter of fact that Auto-Owners was a party to the underlying litigation, and that finding was apparently never challenged. Therefore, Newman does not appear to overrule this Court’s direct holding, only two years earlier, that insurers may not intervene in underlying tort actions. Ex Parte Gov’t Emp’s. Ins. Co., 373 S.C. at 137, 644 S.E.2d at 702.

The other case this Court cited does not deal with coverage for construction defects. In Owners Insurance Co. v. Clayton, this Court held that coverage existed because one of two theories of liability was covered. Id. at 560, 614 S.E.2d at 614.

Clayton addressed substantively different policy language. The policy at issue in Clayton covered certain causes of action, including defamation. Id. at 560, 614 S.E.2d at 614. There was no qualifying language in that policy provision limiting coverage for defamation claims to certain types of injuries or damage.

Coverage for construction defects does not follow the same analysis because, under the policy language and longstanding law, coverage exists for only a portion of the damages awarded for negligent construction—those damages awarded for resulting damage, as opposed to defective construction. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594; see also C.D. Walters Constr. Co., Inc. v. Fireman’s Ins. Co. of Newark, N.J., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (holding that “the comprehensive general liability policy does not cover faulty workmanship, but rather faulty workmanship which causes an accident”). This distinction is not merely required by the policy language and case law, it is mandated by statute. S.C. Code Ann. § 38-61-70(B). This Court must presume that statutes were not futile acts, but were intended to accomplish something. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). Thus, the fact that a general verdict was rendered in the underlying construction defect case does not “answer the coverage question” as it does with defamation claims. See Clayton, 364 S.C. at 560, 614 S.E.2d at 614.

Therefore, Harleysville appears to represent a significant change in the law by making Newman generally applicable and converting South Carolina into a direct action

state, at least in certain respects. This Court should certify this appeal to clarify its holding in Newman. Only this Court can rule on whether Newman required insurers to intervene in the underlying case. Additionally, Harleysville does not directly address intervention—it merely holds that insurers waive their rights under insurance contracts by failing to request an allocated verdict in the underlying case. Harleysville, 2017 WL 105021 at *7 n.11, Op. No. 27698 (Shearouse Adv. Sh. No. 2 at p. 36 n.11).

If Newman and/or Harleysville impose a rule that insurers must obtain an allocation of covered versus non-covered damages in the underlying case, many questions are left unanswered which have confused both bench and bar. What about the rule prohibiting the intermingling of coverage with underlying tort issues? What about the precedent prohibiting insurers from intervening? What about the inevitable conflicts of interest such a rule creates for counsel defending the insured? What about the insurer's due process rights?

Furthermore, what is the procedural mechanism for implementing a rule that liability carriers must obtain an allocation of covered damages in the underlying case? What is the scope of the intervention? What issues are withdrawn from the jurisdiction of the coverage action when a separate declaratory judgment action has been instituted to determine coverage? In Harleysville, this Court held that a liability insurer must sacrifice its interests to those of its insured. 2017 WL 105021 at *5, Shearouse Adv. Sh. No. 2 at p. 32. How is an insurer to accomplish that while simultaneously asserting its own interests in obtaining an allocated verdict in the same proceeding? Only this Court can decide such questions.

A review of the record in this appeal will illustrate the confusion of both the parties and the trial court as to how to proceed after Harleysville. This case was set for trial. A separate declaratory judgment action was pending to determine coverage issues. (Exh. A: Complaint.) The trial judge in this action had informed the parties that pre-trial motions would not be considered after a certain date. Nationwide was uncertain as to what actions the law demanded, and as to what relief to request.

What Nationwide actually requested was limited intervention to draft and submit special interrogatories or a special verdict form to the jury. (Exh. B: Motion to Intervene.) It is unclear how the jury can be expected to make factual findings on coverage issues when no evidence, testimony, or arguments will be presented to support such a finding. See Rule 49, SCRPC (providing that special interrogatories must be “necessary to a verdict”). Nevertheless, this appears to be what Harleysville requires.

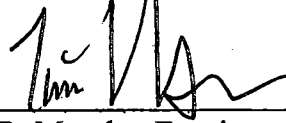
The plaintiffs in the underlying case noticed the Rule 30(b)(6) deposition of Nationwide after Nationwide moved to intervene. (See Exh. C: Transcript.) Does Harleysville require the trial court to re-open discovery? Does Harleysville subject an insurer to discovery in the underlying case? Furthermore, does Harleysville allow an insurer to affirmatively conduct discovery in the underlying case? Can Nationwide hire an expert to inspect the property and provide first-hand testimony as to what is faulty work and what is resulting damage? Again, only this Court has the authority to decide.

Finally, the basis for the trial court’s ruling was that Nationwide missed the deadline for filing pre-trial motions. (Exh. C: Transcript.) How can a non-party be bound by the terms of a scheduling order of which it had no notice, particularly when there is a change in law?

For the above reasons, Nationwide respectfully requests that this Court certify this case for review. This appeal involves numerous issues of significant public interest, legal principles of major importance, and vexing legal questions that only this Court can decide. Therefore, in the interest of judicial economy, Nationwide hereby moves to certify this appeal to the Supreme Court pursuant to Rule 204(b), SCACR.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys Nationwide Mutual Fire
Insurance Company

May 11, 2017

Other Counsel of Record:

Mr. Phillip Ward Segui Jr.
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

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CASE NUMBER: 2:16-cv-423-PMD

Nationwide Mutual Fire Insurance Company,

Plaintiff,

v.

Superior Solution, LLC a/k/a Superior Solutions,
LLC, Peniel Construction Group LLC a/k/a
Peniel Construction, LLC, Portrait Homes -
South Carolina, LLC, Portrait Homes-Beresford
Commons LLC, Pasquinelli Homebuilding, LLC,
Beresford Commons Homeowners Association,
Inc., and Joseph Costantini and Susan M.
Costantini, on behalf of themselves and others
similarly situated,

Defendants.

**COMPLAINT
(Declaratory Judgment)
(Non-Jury)**

The Plaintiff seeks declaratory relief to determine the rights of the parties. Plaintiff, Nationwide Mutual Fire Insurance Company (“Nationwide”), complaining of the Defendants above-captioned, would respectfully allege and show as follows:

JURISDICTION

1. Nationwide is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Ohio; Nationwide is authorized to transact business and write insurance policy in the State of South Carolina.

2. Upon information and belief, Defendant Superior Solution, LLC a/k/a Superior Solutions, LLC (hereinafter “Superior Solution”) is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

3. Upon information and belief, Defendant Peniel Construction Group LLC a/k/a Peniel Construction, LLC (hereinafter “Peniel”) is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

4. Upon information and belief, Defendant Portrait Homes - South Carolina LLC is a limited liability company organized and existing under the laws of the State of Illinois with its principal place of business in Illinois.

5. Upon information and belief, Defendant Portrait Homes-Beresford Commons LLC is a limited liability company organized and existing under the laws of the State of Illinois with its principal place of business in Illinois.

6. Upon information and belief, Defendant Pasquinelli Homebuilding, LLC is a limited liability company organized and existing under the laws of the State of Illinois with its principal place of business in Illinois.

7. Upon information and belief, Defendant Beresford Commons Homeowners Association, Inc. (hereinafter "Beresford Commons HOA") is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

8. Upon information and belief, Defendants Joseph Costantini and Susan M. Costantini are owners of a townhome located at 241 Kelsey Boulevard, Charleston, in The Beresford Commons Homeowners Association, Inc., Berkeley County, South Carolina, are citizens and residents of the State of South Carolina, and are class representatives in underlying construction defect litigation involving Beresford Commons for which coverage under Nationwide's policies has been sought.

9. This action is brought under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. and Rule 57, Fed. R. Civ. P.; there is a real and justiciable controversy between the parties, and by these proceedings Nationwide asks this Court to inquire into and declare the rights and obligations of the parties hereto arising out of the facts set forth below.

10. The amount in controversy exceeds Seventy Five Thousand and No/100 (\$75,000.00) Dollars, exclusive of interests and costs, and there is complete diversity of citizenship; therefore, this Court has jurisdiction to hear this matter under 28 U.S.C. §1332(a)(1).

FACTUAL ALLEGATIONS

11. Nationwide issued contractors liability policy number 61 AC 762-152-3001, to “Superior Solutions LLC.” The policy was in effect from November 18, 2005 to November 18, 2006. A copy of this policy (hereinafter “Nationwide 2005-06 policy”) is attached as Exhibit A.

12. Plaintiff issued a renewal policy with the same policy number to “Superior Solutions LLC.” The policy was in effect from November 18, 2006 to November 18, 2007. A copy of this policy (hereinafter “Nationwide 2006-07 policy”) is attached as Exhibit B. Both policies are collectively referred to as “the Nationwide policies.”

13. By endorsement effective May 17, 2007, the named insured on the Nationwide 2006-07 policy was changed to “Penuel Construction LLC.” No entity by the name of “Penuel Construction LLC” exists in South Carolina, but, upon information and belief, “Penuel Construction LLC” may be the same entity as “Peniel Construction Group, LLC.”

14. Upon information and belief, neither Penuel Construction LLC nor Peniel Construction Group, LLC were named as defendants in the underlying construction defect litigation. However, these entities may have a relationship with Superior Solution, LLC a/k/a Superior Solutions, LLC (hereinafter “Superior Solution”) such that they may face liability in the underlying lawsuit or have an interest in coverage for the claims at issue in this matter.

15. Between November 18, 2005 and May 17, 2007, the Nationwide policies insured Superior Solution for certain risks under the insuring agreement, and excluded certain risks through policy exclusions. Nationwide craves reference to the policies for all of the terms, conditions, and provisions therein and incorporates them by reference herein.

16. Under Business Liability coverage, the Nationwide policies only cover “bodily injury” and “property damage” caused by an “occurrence,” as those terms are defined by the policies and South Carolina law. The policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The policies define

“property damage” as “[p]hysical injury to tangible property,” including all resulting loss of use of that property.

17. Under Endorsement ACP-0123 (05-04), coverage under the Nationwide policies only applies if the “property damage” first “manifests” during the policy period. As defined, “manifests” means that the damage or injury is either discovered or reasonably should be discovered by the insured or some other person.

18. The Nationwide policies contain exclusion a., entitled “Expected or Intended Injury,” which excludes from coverage for “‘property damage’ expected or intended from the standpoint of the insured.”

19. The Nationwide policies contain the following exclusions:

B. EXCLUSIONS

* * *

This insurance does not apply to:

k. “Property damage” to:

* * *

(5) That particular part of real property on which you . . . are performing operations, if the “property damage” arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

* * *

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

20. The Nationwide policies define “products-completed operations hazard” to mean all “bodily injury” and “property damage” arising out of Superior Solutions’ work except for work that has not yet been completed or abandoned.

21. The Nationwide policies contain exclusion m., entitled “Damage to Your Work,” which excludes from coverage “‘Property damage’ to ‘your work’ arising out of it or any part of it and included in the ‘products-completed operations hazard.’”

22. The Nationwide policies contain exclusion o., which excludes from coverage “Damages claimed for any loss, cost or expense . . . incurred . . . for the . . . repair, replacement, adjustment, removal or disposal of . . . ‘Your work’ . . . If such . . . work . . . is withdrawn . . . from use . . . because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it.”

23. Under an endorsement entitled “Fungi or Bacteria Exclusion,” the Nationwide policies exclude coverage for “bodily injury” and “property damage” caused by or related to mold or mildew.

24. By endorsement, Pasquinelli Management LLC and Portrait Homes South Carolina LLC were made additional insureds under the Nationwide policies, but only with respect to “bodily injury” or “property damage” caused, in whole or in part, by Superior Solutions’ work. However, both endorsements contain the following exclusion:

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to “bodily injury” or “property damage” occurring after:

1. All work . . . has been completed; or
2. That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

25. Upon information and belief, Defendant Beresford Commons HOA filed an action in the Court of Common Pleas for Berkeley County styled as follows: Beresford Commons

Homeowners Association, Inc. vs. Portrait Homes-South Carolina, LLC, et al., Civil Action number 2013-CP-08-00179 (“the Underlying HOA Case”). A copy of the Sixth Amended Complaint in the Underlying HOA Case is attached as Exhibit C. All of the allegations in the Sixth Amended Complaint in the Underlying HOA Case are incorporated herein by reference.

26. Upon information and belief, the Beresford unit owners filed a class action in the Court of Common Pleas for Berkeley County styled as follows: Joseph Costantini and Susan M. Costantini, on behalf of themselves and others similarly situated vs. Portrait Homes-South Carolina, LLC, et al., Civil Action number 2013-CP-08-00180 (“the Underlying Class Action”). A copy of the Sixth Amended Complaint in the Underlying Class Action is attached as Exhibit D. All of the allegations in the Sixth Amended Complaint in the Underlying Class Action Case are incorporated herein by reference. The Underlying HOA Case and the Underlying Class Action are hereinafter collectively referred to as “the Underlying Cases”.

27. Among the defendants in the Underlying Cases are Portrait Homes-South Carolina, LLC, Portrait Homes-Beresford Commons, LLC, and Pasquinelli Homebuilding, LLC (hereinafter collectively “Portrait Homes”). The complaints in the Underlying Cases allege that Portrait Homes performed the development, construction, repairs, and modifications to the Beresford Commons property.

28. Superior Solution is also named as a defendant in the Underlying Cases. Superior Solution was allegedly responsible for installation of the siding onto the townhomes in the Beresford Commons project.

29. The plaintiffs in the Underlying Cases allege that the exteriors and common areas of the townhomes at the Beresford Commons project were defectively constructed, resulting in water intrusion, rot, and deterioration.

30. The plaintiffs in the Underlying Cases asserted causes of action for negligence, breach of warranty, and unfair trade practices against Portrait Homes and Superior Solution.

31. In their unfair trade practices causes of action, the plaintiffs in the Underlying Cases allege that “[t]he Defendants’ knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.”

32. Upon information and belief, Portrait Homes asserted cross-claims against Superior Solution in the Underlying Cases. Portrait Homes alleged it subcontracted with Superior Solution to perform certain subcontracted work. Portrait Homes asserted causes of action in its cross-claims in both Underlying Cases for indemnity, breach of contract, breach of warranty, and negligence upon against numerous subcontractors, including Superior Solution. Copies of the Sixth Amended Answer and Cross-claims in each Underlying Case are attached as Exhibits E and F.

33. Superior Solution sought liability coverage under the Nationwide policies after being served with the pleadings in the Underlying Cases.

FOR A FIRST DECLARATION

34. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 33 as if fully set forth herein verbatim.

35. Some or all of the alleged damage in the Underlying Cases is for defective work and/or economic loss only, and not “property damage” caused by an “occurrence” as defined in the policy.

36. Therefore, the Plaintiff is entitled to a declaration that the Nationwide policies do not provide coverage for the damages in the Underlying Case to the extent they seek recovery for economic loss or faulty work only.

FOR A SECOND DECLARATION

37. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 36 as if fully set forth herein verbatim.

38. The damage alleged by the plaintiffs in the Underlying Cases did not “manifest” during the policy period as required by the Nationwide policy language.

39. Therefore, the Plaintiff is entitled to a declaration that the Nationwide policies do not provide coverage for the damages awarded in the Underlying Cases.

FOR A THIRD DECLARATION

40. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 39 as if fully set forth herein verbatim.

41. Some or all of the plaintiffs' claims in the Underlying Cases are for damage intended or expected by the insured.

42. Therefore, the Plaintiff is entitled to a declaration that the Nationwide policies do not provide coverage for the claims asserted in the Underlying Cases to the extent they are for damage intended or expected by the insured.

FOR A FOURTH DECLARATION

43. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 42 as if fully set forth herein verbatim.

44. Liability for any alleged property damage caused by Superior Solutions' negligence that occurred prior to completion of its work is excluded by exclusions k.(5) and (6) in the Nationwide policies.

45. Liability for any alleged property damage caused by Superior Solutions' negligence to Superior Solutions' work that occurred after Superior Solutions' work was completed is excluded by the "Your Work" exclusion.

46. Therefore, the Plaintiff is entitled to a declaration that the Nationwide policies do not provide coverage for any alleged damage to Superior Solutions' work in the Underlying Case.

FOR A FIFTH DECLARATION

47. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 46 as if fully set forth herein verbatim.

48. Liability for the alleged defective work in the Underlying Case is excluded by

exclusion o.

49. Therefore, the Plaintiff is entitled to a declaration that the Nationwide policies do not provide coverage for any alleged defective work in the Underlying Case.

FOR A SIXTH DECLARATION

50. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 49 as if fully set forth herein verbatim.

51. Any damage caused by or related to mold is excluded under the Nationwide policies.

52. Therefore, the Plaintiff is entitled to a declaration that any mold damage in the Underlying Cases is not covered.

FOR A SEVENTH DECLARATION

53. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 52 as if fully set forth herein verbatim.

54. Penuel Construction LLC and Peniel Construction Group, LLC are not insureds under the Nationwide 2005-06 policy.

55. Penuel Construction LLC and Peniel Construction Group, LLC are not insureds under the Nationwide 2006-07 policy for any period prior to May 17, 2007.

56. Superior Solution is not an insured under the Nationwide 2006-07 for the period from May 17, 2007 until expiration of the policy on November 18, 2007.

57. Therefore, the Plaintiff is entitled to a declaration that coverage under the Nationwide 2006-07 policy applies to Superior Solution only during the period from November 18, 2006 through May 16, 2007.

FOR AN EIGHTH DECLARATION

58. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 57 as if fully set forth herein verbatim.

59. Portrait Homes is an additional insured under the Nationwide policies, but only for

completed operations claims.

60. The Underlying Cases seek recovery for “property damage” that occurred after Superior Solution’s work at the Beresford Commons project was completed.

61. Therefore, the Plaintiff is entitled to a declaration that Portrait Homes is not an additional insured with respect to the claims asserted in the Underlying Cases.

FOR A NINTH DECLARATION

62. Plaintiff repeats, re-alleges, and incorporates the preceding paragraphs as if fully set forth herein verbatim.

63. Plaintiff is entitled to a declaration that it has no duty to defend or indemnify Defendants Superior Solution or Portrait Homes in the Underlying Cases because there is no coverage for the allegations made in the Underlying Cases.

WHEREFORE, Plaintiff requests that this honorable Court inquire into these matters and declare that the Nationwide policies do not provide coverage for the damages alleged to have been caused by the acts of Superior Solution or Portrait Homes, and that therefore, Plaintiff does not owe either Superior Solution or Portrait Homes a defense or indemnification in the Underlying Cases for the claims asserted them, together with its costs and disbursements incurred and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/J.R. Murphy

J. R. Murphy, Esquire (Fed. I.D. #3119)

Timothy J. Newton, Esquire (Fed. I.D. #9807)

4406-B Forest Drive (29204)

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Plaintiff **Nationwide Mutual Fire Insurance Company**

Columbia, South Carolina
February 10, 2016

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: tnewton@murphygrantland.com other: _____
--	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Intervene
Estimated Time Needed: 30 minutes Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- 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 Plaintiff / Defendant

January 25, 2017
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: _____
- EXEMPT: (check reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - 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: _____
- Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE _____

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: TOM

Date Filed: _____

- MOTION FEE COLLECTED: 25.00
- CONTESTED - AMOUNT DUE: _____

FILED
 JAN 26 PM 12:13
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

25.00
TOM

2/5

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

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,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-0179

**NOTICE OF MOTION AND
MOTION TO INTERVENE BY
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY
FOR THE LIMITED PURPOSE OF
SUBMITTING A SPECIAL VERDICT FORM
OR SPECIAL INTERROGATORIES**

TSM
2017 JAN 26 PM 12:13
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

TOM

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 SERVICE,
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 SYSTEMS, 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 24(a)(1), SCRPC, or, in the alternative, pursuant to Rule 24(b)(2), SCRPC, Applicant, Nationwide Mutual Fire Insurance Company, hereby moves to intervene in this action for the limited purpose of submitting a special verdict form or special interrogatories to the jury.

Nationwide Mutual Fire Insurance Company (“Nationwide”) is entitled to intervention as a commercial general liability (“CGL”) carrier for Defendant SUPERIOR SOLUTION, LLC (“Superior Solution”), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. Superior Solution is a named insured under two CGL policies (hereinafter collectively “the Policies”) issued by Nationwide. Policy number 61 AC 762-152-3001 was in effect from November 18, 2005 to November 18, 2006. A renewal policy was issued with the same policy number, and that coverage was in effect until May 17, 2007, when the named insured on the policy was changed to reflect another entity that is not named as a defendant in this action. Copies of the Policies are attached as Exhibits A and B, respectively.

2. The Policies only cover “sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ . . . to which this insurance applies.” (Exh. A and B, Form ACP-0007 (6-05), ¶ A.1.a.)

3. The Policies only apply to “property damage” if it is caused by an “occurrence.” (Id. at ¶ A.1.b.(1)(a).)

4. The policies define “property damage” as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ F.16.a.) “Occurrence” is defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.” (Id. at ¶ F.12.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered “property damage” caused by an “occurrence,” satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for “‘property damage’ to ‘your work’ arising out of it or any part of it. . . .” (Exh. A and B, Form ACP-0007 (6-05), ¶ B.1.m.) This exclusion applies to completed operations claims. The exception for subcontractor work does not apply because there is no evidence that Superior Solution used subcontractors to complete its work. Accordingly, any damage to Superior Solution’s work that is caused by Superior Solution’s negligence is excluded.

7. Upon information and belief, the plaintiff in this matter intends to present evidence of defective construction by Superior Solution at the trial of this action.

8. To the extent damages are awarded against Superior Solution for defective construction that has not caused damage to building components outside of Superior Solution’s scope of work, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

9. The contractual terms of the Policies and South Carolina law require an allocation between damages awarded because of defective workmanship and damages awarded because of resulting damage to building components outside of Superior Solution’s scope of work.

10. Nationwide contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. 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).

11. The Supreme Court’s holding in Harleysville represents a fundamental change in South Carolina law.

12. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702. Harleysville appears to contradict this prior understanding.

13. The Harleysville court cited two cases in support of its holding. Neither of these cases presented an absolute bar to litigating factual issues intertwined with underlying tort actions in a separate coverage action.

14. The first case, Owens Insurance Co. v. Clayton, 364 S.C. 555, 561-62, 614 S.E.2d 611, 614-15 (2005), is inapplicable because it addressed a general verdict based upon more than one cause of action. Because one of the causes of action (defamation) was covered, the court held that the damages awarded were covered. Id. Owens does not stand for the proposition that simply because some damages are covered, the entire judgment is covered, despite policy language to the contrary.

15. The second case cited in Harleysville involved an arbitration proceeding in which the insurer was apparently a participant. See Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). The court indicated that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract." Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. In construction defect litigation, liability carriers typically do not "represent" their insureds in proceedings held pursuant to arbitration agreements in insurance policies. Therefore, the Newman holding appeared to be limited to the special facts and circumstances of that case until Harleysville.

16. Therefore, Harleysville represents a significant change in South Carolina law. Because the opinion appears to hold that insurers are barred from litigating factual issues that are intertwined with the underlying tort litigation in separate coverage actions, liability insurers now have no choice but to move to intervene in the underlying tort litigation. A holding that insurers lack standing to intervene would deny insurers a forum in which to litigate such coverage issues, thus violating due process.

17. Accordingly, Nationwide hereby moves to intervene in this action for the limited purpose of participating in the drafting of a special verdict form or submitting special interrogatories to the jury regarding the amount of any damages award that is for defective work as opposed to resulting damage to building components outside Superior Solution's scope of work.

18. Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRPC, must: (1) establish timely intervention; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004).

19. Nationwide's motion to intervene is timely. As discussed above, grounds did not exist for seeking intervention until the Harleysville opinion was released on January 11, 2017.

20. Nationwide has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Nationwide can obtain an allocation as to the amount of covered damages under the Policies.

21. Nationwide is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court has held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of

covered damages. Harleysville, 2017 WL 105021 at *7 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

22. Nationwide is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the plaintiff and Superior Solution are aligned against the interest of Nationwide. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bounty State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

23. Accordingly, Nationwide has satisfied all of the elements for intervention of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

24. In the alternative, Nationwide also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

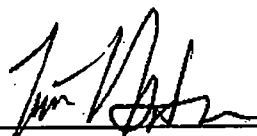
25. Nationwide's motion to intervene is made for the limited purpose of presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered

and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

26. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of determining the form of the verdict to be submitted to the jury, and intervention will not impact the ability of the original parties to present their claims and/or defenses at trial.

Nationwide respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of participating in the drafting of a special verdict or submitting special interrogatories to the jury in order to obtain findings of fact necessary for an allocation between covered and non-covered damages under the Policies. The grounds for this Motion are set forth above. Nationwide's proposed special interrogatories are attached.

MURPHY & GRANTLAND, P.A.



Timothy J. Newton, Esquire
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100; ext. 1242
(803) 782-4140 (facsimile)
Email: tnewton@murphygrantland.com

*Attorneys for Nationwide Mutual Fire Insurance
Company*

Columbia, South Carolina
January 25, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION NO: 2013-CP-08-0179

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

**PROPOSED
SPECIAL INTERROGATORIES
SUBMITTED BY
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY**

LEE D/B/A VINYL SIDING SPECIALISTS,
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 SERVICE,
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.

1. If the jury finds in favor of Plaintiff and against Superior Solution, LLC and awards damages, indicate the amount of the damages that are for removal and replacement of the defective work of Superior Solution, LLC: \$ _____.

2. If the jury finds in favor of Plaintiff and against Superior Solution, LLC and awards damages, indicate the amount of the damages proximately caused by Superior Solution, LLC's

negligence that are for damage to building components that are outside of Superior Solution's scope of work: \$_____.

The amount indicated in response to Special Interrogatory #1 plus the amount indicated in response to Special Interrogatory #2 should equal the total damages awarded against Superior Solution, LLC.

MURPHY & GRANTLAND, P.A.

Timothy J. Newton, Esquire
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100; ext. 1242
(803) 782-4140 (facsimile)
Email: tnewton@murphygrantland.com

*Attorneys for Nationwide Mutual Fire Insurance
Company*

Columbia, South Carolina
January __, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

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,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-00179

CERTIFICATE OF SERVICE

15
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2017 JAN 26 PM 12:13

FILED

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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 SYSTEMS, 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 January 25, 2017, I have served a copy of the foregoing Notice of Motion and Motion to Intervene by Nationwide Mutual Fire Insurance Company for the Limited Purpose of Submitting a Special Verdict Form or Special Interrogatory in connection with the above-referenced case by electronic mail and U.S. mail where indicated to:

Phillip W. Segui, Jr., Esquire
Amanda M. Blundy, Esquire
Segui Law Firm, LLC
864 Lowcountry Blvd. Suite A
Mt. Pleasant, SC 29464

psegui@seguilawfirm.com
ablundy@seguilawfirm.com

John T. Chakeris, Esquire
The Chakeris Law Firm
P.O. Box 397
Charleston, SC 29402
john@chakerishlawfirm.com

J. Collier Jones, Esquire
Blanton O'Neal, Esquire
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29402
Collier.jones@hoodlaw.com
Blanton.oneal@hoodlaw.com

Julian K. Allen, Esquire
Allen Law
P.O. Box 12429
Charleston, SC 29422
julian@allenlawsc.com

Shanna M. Stephens, Esquire
Katherine C. Miars, Esquire
Danielle Wegener, Esquire
Danielle Wegener, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402-0087
sstephens@arlawsc.com
kmiars@arlawsc.com

Steven L. Smith, Esquire
Smith Closser, P.A.
P.O. Box 40578
Charleston, SC 29423-0578
ssmith@scnlaw.com

Jeff Ross, Esquire
Philip P. Cristaldi, Esquire
Jeff Ross Law, LLC
1100 Queensborough Blvd, Suite 201
Mt. Pleasant, SC 29464
jross@jeffrosslaw.com
pcristaldi@jeffrosslaw.com

Lee E. Dixon, Esquire
Jonathan Roquemore, Esquire
Hedrick Gardner Kincheloe & Garafalo, LLP
P.O. Box 11267
Columbia, SC 29211
ldixon@hedrickgardner.com
jroquemore@hedrickgardner.com

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

Bachman S. Smith, IV, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
bsmithiv@hsblawfirm.com

Dale Lang, Esquire
Brown & Brehmer
1720 Main Street, #201
Columbia, SC 29201
edl@brownandbrehmer.com

Michael Freeman, Esquire
Griffith, Sharp & Lipfert, LLC
P.O. Drawer 570
Beaufort, SC 29901
mfreeman@griffithsharp.com

David Alfani, Esquire
Adam Guetzow, Esquire
Hinshaw & Culbertson, LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
dalfani@hinshawlaw.com
aguetzow@hinshawlaw.com

Bradford W. Cranshaw, Esquire
Trey Nicolette, Esquire
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202
bcranshaw@griercoxandcranshaw.com
tnicolette@griercoxandcranshaw.com

R. Michael Etheridge, Esquire
Matthew T. Hemingway, Esquire
Sarah Wetmore, Esquire
Kathy Carlsten, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
methridge@carlockcopeland.com
mhemingway@carlockcopeland.com
swetmore@carlockcopeland.com
kcarlsten@carlockcopeland.com

Ian W. Freeman, Esquire
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
iwf@p-tw.com

Bonum S. Wilson, III, Esquire
Brandon T. Resser, Esquire
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29422
bwilson@wilsonheyward.com
breeser@wilsonheyward.com

Finley Clarke, Esquire
Clark Johnson Peterson McLean, P.A.
620 West Evans Street
Florence, SC 29501
fclarke@cjpmlaw.com

Stephen P. Hughes, Esquire
Howell, Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
sphughes@hgpa.com

Joseph S. McCue, Esquire
Collins and Lacy
1330 Lady Street, 6th Floor
Columbia, SC 29201
jmccue@collinsandlacy.com

David C. Cleveland, Esquire

Lauren Vriesinga, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
dcleveland@clawsonandstaubes.com
lauren@cslaw.com

S. Markey Stubbs, Esquire
Jon Asbill, Esquire
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Columbia, SC 29204
mstubb@brblegal.com
jasbill@brblegal.com

Ryan Gilsenan, Esquire
Scott Forster, Esquire
Womble Carlyle Sandrige & Rice
5 Exchange Place
Charleston, SC 29401
rgilsenan@wcsr.com
sforster@wcsr.com

Timothy P. Alcorn, Esquire
Alcorn Law, P.C.
3806 Belilinger Way
Missouri City, TX 77459
tpalcorn@yahoo.com

E. Glenn Elliott, Esquire
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
P.O. Drawer 1931
Florence, SC 29503
ege@aikenbridges.com

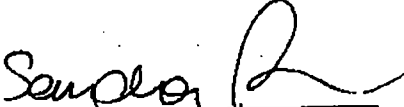
Jonathan J. Anderson, Esquire
Curtis B. Martin, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29401
janderson@arslawsc.com
cmartin@arslawsc.com

Andrew F. Lindemann, Esquire
Davison & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202

alindemann@dml-law.com

Mr. Jose Castillo
11227 Eastfield Road
Huntersville, NC 28078

Mr. Charlest Bowser
23 Guerry Circle
Goose Creek SC 29445


Sandra R. Branson

Columbia, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY) 2013-CP-08-00179, 180

Beresford Commons HOA, Inc.,)
)
Plaintiff,) Transcript of Record
)
vs.) January 31, 2017
)
Penuel Construction, LLC, a/k/a)
Superior, et al.,)
)
Defendants.)

B E F O R E:

Honorable Kristi Lea Harrington
Berkeley County Courthouse
Moncks Corner, South Carolina

A P P E A R A N C E S:

Amanda Blundy, Esquire
Phillip Segui, Jr., Esquire
Attorneys for Beresford Commons
Homeowners Association; Constantini

Caroline Niland, Esquire
Attorney for Portrait

Albert A. Lacour, III, Esquire
Attorney for Superior Solution, LLC

Jeffrey A. Ross, Esquire
Attorney for United Siding Specialists, Inc.,
And Tom's Vinyl Siding

Hillary Meyer, Esquire
Attorney for American Residential Services

Brandon Reeser, Esquire
Attorney for Nicholas Owens

1 office.

2 THE COURT: Okay.

3 MS. BLUNDY: And he said he would let me know as soon as
4 that is firmed up.

5 THE COURT: All right. All right.

6 MR. NEWTON: Your Honor, Tim Newton for Nationwide.

7 THE COURT: Yes, sir.

8 MR. NEWTON: We have -- we probably have missed the
9 deadline, but we have an emergency motion because my client
10 was noticed for a deposition this Friday. So I did want to
11 see if we could get that --

12 THE COURT: This upcoming Friday?

13 MR. NEWTON: Yeah. As, as in the third. Yes. It was
14 noticed on this past Friday. So I did want to at least get
15 that before Your Honor. I, I believe we had -- we had filed a
16 motion to intervene on a limited basis. I'm not sure whether
17 that was in before the deadline because I just got copied on
18 all these e-mails yesterday.

19 THE COURT: All right. Who is asking to depose your
20 client?

21 MR. NEWTON: The Plaintiffs, Your Honor.

22 MS. BLUNDY: Yes, Your Honor, Mr. Newton who represents
23 Nationwide, an insurer is not a party to the action and they
24 moved to intervene. After -- and just depending on what Your
25 Honor if they granted the motion to intervene --

1 THE COURT: So Judge Nicholson granted Selective the
2 right to intervene. Did he also grant Nationwide the right to
3 intervene?

4 MS. BLUNDY: Nationwide didn't move to intervene till
5 last week after the status conference.

6 THE COURT: All right.

7 MR. SEGUI: And, and our deposition is preempted in the
8 sense that if Your Honor were to consider their late motion
9 and were to grant their right to intervene, then we wanted to
10 have a deposition noticed in case that happened, but if, if
11 Your Honor does not grant it we don't need a deposition.

12 THE COURT: The motion hasn't been filed, so I'm not
13 going to --

14 MR. NEWTON: Not, not correct. Both of our motions were
15 filed. I, I believe one was filed --

16 THE COURT: When were they filed?

17 MR. NEWTON: The motion to intervene on a limited basis
18 was filed last week based on the Harleysville case.

19 THE COURT: After my deadline that I imposed?

20 MR. NEWTON: Your Honor, I don't know about a deadline
21 because this --

22 THE COURT: Counsel, this is a 2013 case. You've asked
23 for a date certain back in July and so that's why you set the
24 deadline to avoid all of this, so that the case is clean and
25 streamlined.

1 MR. NEWTON: Your Honor --

2 THE COURT: I'm not going to continue. That's the
3 deadline. The deadline's the deadline. So your motion to
4 quash the subpoena in essence is granted because there's no,
5 there's no reason for it at this point.

6 MR. CHAKERIS: If they're not intervening we don't want a
7 deposition, Your Honor.

8 THE COURT: All right. So your motion is granted, all
9 right, even though it was not timely filed.

10 MR. NEWTON: What about our motion to intervene?

11 THE COURT: I'm not hearing that.

12 MR. NEWTON: Okay.

13 THE COURT: All right. It was not timely filed. Thank
14 you.

15 MR. NEWTON: But, but let me just throw in one thing that
16 I don't think it was, it was --

17 THE COURT: I've already ruled. So if you're going to --
18 if, if you're going down that road I'm not going to entertain
19 that.

20 MR. NEWTON: Okay.

21 THE COURT: Yes.

22 MR. LINDEMANN: Good morning, Your Honor, may it please
23 the Court? Andrew Lindemann for Selective Insurance Company.
24 As Your Honor has already heard Judge Nicholson did grant our
25 motion to intervene and issued an order. I got it Friday. I

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,

PLAINTIFF(S)

LLC, ET AL.

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 11(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

17 JAN 31 PM 4:49
 CLERK OF COURT
 COUNTY OF BERKELEY
 S.C.

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 attys



MURPHY & GRANTLAND, P.A.

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

Timothy J. Newton

TJN/sb
Enclosures

cc: All Counsel of Record (via email)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

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
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CERRATO, AMERICAN RESIDENTIAL
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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,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-00179

**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
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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
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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.¹

¹ 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.5.²

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.³

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

² 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.

³ 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).

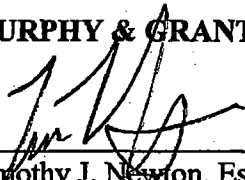
Finally, Plaintiffs' comments with regard to the pending coverage action are irrelevant. However, since the issue has been raised, a brief explanation is appropriate. Nationwide filed the coverage action in federal court a year ago. However, that case is still in its early stages because of Plaintiffs' 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.



Timothy J. Newton, Esquire
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100; ext. 1242
(803) 782-4140 (facsimile)
Email: tnewton@murphygrantland.com

**Attorneys for Nationwide Mutual Fire Insurance
Company**

Columbia, South Carolina
February 3, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

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,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-00179

CERTIFICATE OF SERVICE

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.

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:

Phillip W. Segui, Jr., Esquire
Amanda M. Blundy, Esquire
Segui Law Firm, LLC
864 Lowcountry Blvd. Suite A

Mt. Pleasant, SC 29464
psegui@seguilawfirm.com
ablundy@seguilawfirm.com

John T. Chakeris, Esquire
The Chakeris Law Firm
P.O. Box 397
Charleston, SC 29402
john@chakerishlawfirm.com

J. Collier Jones, Esquire
Blanton O'Neal, Esquire
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29402
Collier.jones@hoodlaw.com
Blanton.oneal@hoodlaw.com

Julian K. Allen, Esquire
Allen Law
P.O. Box 12429
Charleston, SC 29422
julian@allenlawsc.com

Shanna M. Stephens, Esquire
Katherine C. Miars, Esquire
Danielle Wegener, Esquire
Danielle Wegener, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402-0087
sstephens@arlawsc.com
kmiars@arlawsc.com

Steven L. Smith, Esquire
Smith Closser, P.A.
P.O. Box 40578
Charleston, SC 29423-0578
ssmith@scnlaw.com

Jeff Ross, Esquire
Philip P. Cristaldi, Esquire
Jeff Ross Law, LLC
1100 Queensborough Blvd, Suite 201
Mt. Pleasant, SC 29464
jross@jeffrosslaw.com
pcristaldi@jeffrosslaw.com

Lee E. Dixon, Esquire
Jonathan Roquemore, Esquire
Hedrick Gardner Kincheloe & Garafalo, LLP
P.O. Box 11267
Columbia, SC 29211
ldixon@hedrickgardner.com
jroquemore@hedrickgardner.com

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

Bachman S. Smith, IV, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
bsmithiv@hsblawfirm.com

Dale Lang, Esquire
Brown & Brehmer
1720 Main Street, #201
Columbia, SC 29201
edl@brownandbrehmer.com

Michael Freeman, Esquire
Griffith, Sharp & Llipfert, LLC
P.O. Drawer 570
Beaufort, SC 29901
mfreeman@griffithsharp.com

David Alfini, Esquire
Adam Guetzow, Esquire
Hinshaw & Culbertson, LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
dalfini@hinshawlaw.com
aguetzow@hinshawlaw.com

Bradford W. Cranshaw, Esquire
Trey Nicolette, Esquire
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202
bcranshaw@griercoxandcranshaw.com

tnicolette@griercoxandcranshaw.com

R. Michael Etheridge, Esquire
Matthew T. Hemingway, Esquire
Sarah Wetmore, Esquire
Kathy Carlsten, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
methridge@carlockcopeland.com
mhemingway@carlockcopeland.com
swetmore@carlockcopeland.com
kcarlsten@carlockcopeland.com

Ian W. Freeman, Esquire
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
iwf@p-tw.com

Bonum S. Wilson, III, Esquire
Brandon T. Resser, Esquire
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29422
bwilson@wilsonheyward.com
breeser@wilsonheyward.com

Finley Clarke, Esquire
Clark Johnson Peterson McLean, P.A.
620 West Evans Street
Florence, SC 29501
fclarke@cjpmlaw.com

Stephen P. Hughes, Esquire
Howell, Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
sphughes@hgpa.com

Joseph S. McCue, Esquire
Collins and Lacy
1330 Lady Street, 6th Floor
Columbia, SC 29201
jmccue@collinsandlacy.com

David C. Cleveland, Esquire
Lauren Vriesinga, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
dccleveland@clawsonandstaubes.com
lauren@cslaw.com

S. Markey Stubbs, Esquire
Jon Asbill, Esquire
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Columbia, SC 29204
mstubbs@brblegal.com
jasbill@brblegal.com

Ryan Gilsenan, Esquire
Scott Forster, Esquire
Womble Carlyle Sandrige & Rice
5 Exchange Place
Charleston, SC 29401
rgilsenan@wcsr.com
sforster@wcsr.com

Timothy P. Alcorn, Esquire
Alcorn Law, P.C.
3806 Belinger Way
Missouri City, TX 77459
tpalcorn@yahoo.com

E. Glenn Elliott, Esquire
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
P.O. Drawer 1931
Florence, SC 29503
ege@aikenbridges.com

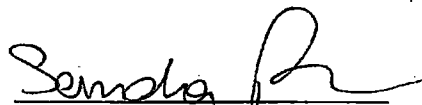
Jonathan J. Anderson, Esquire
Curtis B. Martin, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29401
janderson@arlawsc.com
cmartin@arlawsc.com

Andrew F. Lindemann, Esquire
Davison & Lindemann, P.A.
P.O. Box 8568

Columbia, SC 29202
alindemann@dml-law.com

Mr. Jose Castillo
11227 Eastfield Road
Huntersville, NC 28078

Mr. Charlest Bowser
23 Guerry Circle
Goose Creek SC 29445


Sandra R. Branson

Columbia, SC

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON
) PLEAS
 2 COUNTY OF BERKELEY) CASE NO. 2013-CP-08-179

3 BERESFORD COMMONS)
 HOMEOWNERS ASSOCIATION,)
 4 INC.,) Transcript of Record
)
 5 Plaintiffs,)
)
 6 vs.) Date: February 6, 2017
)
 7 JOSEPH COSTANTINI AND)
 SUSAN M. COSTANTINI, ET)
 8 AL.,)
)
 9 Defendants.

10 * * * * *

11
 12
 13 B E F O R E:
 14 The Honorable Kristi L. Harrington

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 17
 18
 19
 20 * * * * *

21
 22 Denise J. Lauder, RPR
 23 Ninth Judicial Circuit
 24
 25

1 at this point, but for that reason I would say
2 maybe shouldn't be allowed. But then, Your
3 Honor -- and I throw this out too, and I know it
4 adds to your burden a little bit, but it shouldn't
5 be -- I don't want anything submitted to the jury
6 as part of the initial verdict. I think that's
7 where the prejudice could happen.

8 I think if we receive a verdict and we
9 send them back with special interrogatories after
10 they've made the verdict, then I think that lessens
11 the chance of prejudice to my client.

12 And I guess the last thing is -- and
13 this is sort of contrary to what I said at first.
14 Your Honor, the last thing I want to do is try this
15 case twice. And I think that argument or that
16 position is basically aligned with the Court's
17 need, or desire, to make good use of judicial
18 resources; and, certainly, you don't want us back
19 in here trying this case again in a year.

20 So that's another great consideration
21 which might mitigate -- might be a reason to go the
22 other way with the decision. That's something we
23 all need to be aware of.

24 THE COURT: At this time, I, again, am
25 denying your motion to intervene. Counsel, I

1 suggest that you be here and monitor the progress.
2 I do not think that you need to physically be here,
3 if that's not your choice, but if you wish to renew
4 and be present when I'm doing my charge conference,
5 you are welcome to do so. But at this time, my
6 initial ruling stands. I'm not allowing you to
7 intervene.

8 MR. NEIL: Thank you, Your Honor.

9 THE COURT: All right. So I think that
10 handles all of our pretrial motions; is that
11 correct?

12 MS. BLUNDY: Yes, for the Plaintiffs,
13 Your Honor.

14 Your Honor, it's been handled, but I
15 guess we didn't finish it, the partial approval?

16 THE COURT: Are you ready to go
17 forward on that?

18 MR. LACOUR: Yes, Your Honor. I've had
19 a chance to read it and I understand it tracks what
20 was done the first time pretty much precisely, so
21 we have no reason to object to the approval of the
22 second round of partial settlements.

23 THE COURT: Do we have the proposed
24 order? Have you e-mailed the proposed order?

25 MS. BLUNDY: I believe we have somebody

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

MAY 11 2017

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

Case No. 2013-CP-08-00179

MAY 11 2017

SC Court of Appeals

Ex Parte:

Nationwide Mutual Fire Insurance Company,Appellant,

In Re:

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

v.

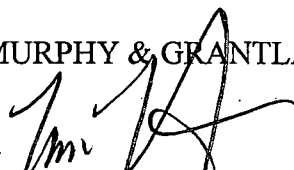
Superior Solution, LLC,Respondent.

CERTIFICATE

I, Timothy J. Newton, Esquire, attorney for Appellant, certify that the Appellant's Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire

P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys Nationwide Mutual Fire
Insurance Company

May 11, 2017

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

Case No. 2013-CP-08-00179

MAY 11 2017

SC Court of Appeals

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 Motion to Certify for Review by the Supreme Court of South Carolina, via regular and electronic mail, on May 11, 2017, to its attorneys of record to the following attorneys of record:

Mr. Phillip Ward Segui Jr.
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

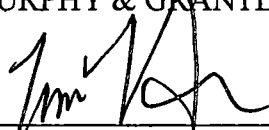
Attorneys for Beresford Commons Homeowners Association, Inc.

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

Attorney for Superior Solution, LLC

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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

J.R. Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys Nationwide Mutual Fire
Insurance Company

May 11, 2017