THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326
Appellate Case No. 2017-000474

Ex Parte: Liberty Mutual Fire Insurance Company,..... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome Association, Inc., ... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., ... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc. ..... Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler

Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC, ...

Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err by denying Liberty Mutual's motion for limited intervention where Liberty Mutual met the applicable tests for intervention and may lack any other mechanism to adequately protect its interests?**

II. **Did the trial court err in holding that Liberty Mutual suffered no prejudice from the denial of intervention because it could bring a separate declaratory judgment action after the verdict to obtain a ruling apportioning damages, when the current version of a South Carolina Supreme Court decision suggests otherwise?**

STATEMENT OF THE CASE[1]

Plaintiff Waverly at Hamlin Plantation Townhomes, Inc. ("Waverly Association") filed this construction defect action against Defendants John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc.; John Wieland Homes of Charleston, Inc.; and John Wieland Homes, Inc.; and Builder's Support Services of the Carolinas, Inc. (collectively, the "Wieland Entities") on June 6, 2013.[2] (Compl.; R. pp. __.) The Waverly Association seeks damages related to alleged construction defects and recovery of repair costs in connection with the Waverly at Hamlin Plantation Townhomes project. (*See id.*; R. pp. __.)

On April 17, 2014, the Wieland Entities filed an answer denying the allegations of the Complaint and asserting third party claims against Third-Party Defendants Barr Construction, Inc.; Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC; Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC; DBC Construction Services, LLC; Eli, Inc.; Gerardo Rosette Sanchez a/k/a GR Painting; Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC; The Muhler Company, Inc.; Paul M. Vasquez; and Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC (the "Third-Party Defendants"). (Answer & Third Party Complaint; R. pp. __.)

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[1] Because Liberty Mutual is not a party to the underlying action and this appeal relates to a narrow procedural issue, only the background germane to this appeal is detailed herein.

[2] The Complaint also named Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. as a Defendant.

Liberty Mutual issued twelve policies of insurance to the Wieland Entities over the course of twelve years, with coverage beginning on January 1, 2001 and continuing until March 15, 2013 (collectively, "the Liberty Policies"). (*See* Mot. to Intervene at 3; Order at 2; R. pp. __.) After the Waverly Association filed this suit, the Wieland Entities claimed status as an insured under the Liberty Policies and claimed that the duties to defend and indemnify were triggered by the suit. (*See* Mot. to Intervene at 3; R. pp. __.) Liberty Mutual then assumed the defense on behalf of the Wieland Entities under a reservation of rights. (Order at 2; R. pp. __.)

The matter proceeded through discovery and motions practice. On January 19, 2017, when it became evident that the action would likely proceed to trial, Liberty Mutual moved to intervene in order to protect its rights to obtain an allocation of the verdict between covered and non-covered claims. (*See* Mot. to Intervene at 2, 4; Transcript of Hearing on Mot. to Intervene ("Tr.") at 4:1-5:10-2; R __.) Liberty Mutual explained in the motion its reading of the Supreme Court's recent decision in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, Opinion No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21-54), *rehearing pending* ("*Harleysville*" or "Opinion No. 27698"), in which the Supreme Court appeared to indicate that insurance carriers have a duty to attempt to intervene in liability actions where they are defending under a reservation of rights in order to submit special interrogatories or a special verdict form in the liability action, which in turn could assist in allocation between covered and non-covered damages.[3] (*See* Mot. to Intervene at 2, 4; Tr. at 4:1-5:10-2; R. pp. __.)

The trial court denied Liberty Mutual's motion via Order dated February 6, 2017. (*See* Order; R. pp. __.) The trial found that Liberty Mutual was not entitled to either intervention as of

[3] Typically this means whether damages suffered by the insured are truly "property damage" as defined and understood by the policy and interpretive law.

right under Rule 24(a) or permissive intervention under Rule 24(b). (*Id.* at pp. 2-3; R. pp. __.) Specifically, the trial court concluded that the insurer's interest in obtaining such an allocation "is probably not ripe until such time, if ever," that a verdict against the insured is returned. (*Id.* at p. 3; R. pp. __.) The trial court stated that *Harleysville* "cannot fairly be read to direct or approve" such a motion and "does not authorize" intervention because allowing intervention by the insurer "would seem to create an impermissible conflict of interest in violation of established South Carolina law" and would create an "unacceptably high" risk of jury confusion. (*Id.* at pp. 3-4; R. pp. __.) The trial court concluded that there was no prejudice to the insurer in denying intervention because the allocation issue would not be ripe until after a verdict is rendered and the insurer could bring "a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages." (*Id.* at p. 4; R. pp. __.)

Liberty Mutual timely filed a Notice of Appeal of the Order denying intervention on February 21, 2017.

STANDARD OF REVIEW

"The decision to grant or deny a motion to . . . intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex Parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007).

ARGUMENT

As set forth below, the *Harleysville* decision created uncertainty regarding an insurer's ability to protect its right to obtain an allocation between covered and non-covered damages in a liability action against its insureds. *Harleysville* suggests that an insurer should move to intervene in the liability action to protect its rights, but gives no guidance on how an insurer may vindicate its rights if the trial court refuses to permit intervention (or if the permitted intervention fails to

fairly determine allocation between covered and non-covered damages). Here, Liberty Mutual moved to intervene in an attempt to comply with this directive, but the trial court refused to allow intervention. Accordingly, Liberty Mutual comes to this Court requesting review and reversal of the trial court order, and clarity on how it may protect its right to ensure that it is not forced to pay damages not covered by the applicable policies.

As an initial matter, Liberty Mutual agrees with the rehearing arguments and positions of the Petitioner and supporting *amici* in the *Harleysville* case currently pending before the South Carolina Supreme Court. One of the arguments advanced by the Petitioner in the rehearing briefing is that the Supreme Court should grant rehearing and permit allocation of an underlying general verdict between covered and non-covered damages in declaratory judgment proceedings. Liberty Mutual agrees that whether a liability verdict contains damages that are covered or non-covered should, if not easily ascertainable under the facts or by way of stipulation, be determined in a subsequent declaratory judgment action between the insurer and the insured. However, in this matter, Liberty Mutual must operate under the assumption that the *Harleysville* decision will stand as drafted.

If the *Harleysville* opinion stands as drafted, Liberty Mutual respectfully proposes that the Court adopt the following framework for addressing this issue. First, the Court should find that if the underlying case lends itself to easy allocation between covered and non-covered damages, the trial court should consider whether to permit limited intervention. If the trial court permits limited intervention, the defendant/insured and the insurer should either stipulate to an allocation or work together to craft a special verdict form permitting the jury to answer questions regarding allocation, assuming no prejudice results to any party. However, this Court should find that if trial court denies intervention, or if the trial court declines to permit the submission of a special verdict form

addressing the insurer's and the insured's allocation issues, or if the insurer or insured show that either would be prejudiced by a limited intervention, due to, *inter alia*, restrictions on the ability to present evidence or arguments, then the insurer and insured may engage in subsequent litigation regarding allocation. Otherwise, in a general verdict setting, insurers will be improperly forced to pay damages not covered by their policies, resulting in a judicial expansion of the scope of coverage not contemplated by the insurer or insured at the time of contract.

An in depth look at the Supreme Court's decision in *Harleysville* is necessary to fully explain the quandary faced by Liberty Mutual in this matter. *Harleysville* was a declaratory judgment action brought by Harleysville Group Insurance to determine coverage under Commercial General Liability insurance policies issued by it after its insureds were found liable for damages in underlying liability matters. *See* Opinion No. 27698 at 23-24.

In *Harleysville*, the Special Referee's final orders held that "Harleysville made a conscious decision not to intervene in the underlying action[s] and took no action to seek an allocated verdict by informing the trial court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury." (*See Harleysville* Consolidated Record on Appeal ("*Harleysville* CR") at 0037 & 0086.)[4] The Special Referee then concluded that "Harleysville's failure to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds." (*Harleysville* CR at 0058 & 0107.)

[4] It is well established that a court may "take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); *see also Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (same).

Additionally, the Special Referee's Order found that Harleysville's request for the court to allocate between covered and non-covered damages in the declaratory action was an attempt to "relitigate" the issues decided in the underlying liability action. (*Harleysville* CR at 54-55, 59.) Therefore, the Special Referee refused to make an allocation of the general verdict between covered and non-covered damages, resulting in Harleysville's liability for the entire verdict.[5] This was the case even though the Special Referee acknowledged that the verdict included damages not covered by the Harleysville policies. (*Harleysville* CR at 53.)

These rulings were affirmed *in toto* by Opinion No. 27698. The Court in *Harleysville*, however, did not address the inherent problems created by the Special Referee's rulings on these issues. By affirming the Special Referee with regard the intervention/allocated verdict issue, without addressing how insurers could adequately protect their rights, Opinion No. 27698 created a state of uncertainty in this area of the law. It is unclear what an insurer must do in the underlying action in order to preserve allocation of damages issues; whether and how an insurer can arrange for special interrogatories or a special verdict in the underlying trial to resolve allocation issues; or whether any such actions are possible without creating an impermissible conflict between the insurer and the insured. As noted by former Chief Justice Pleicones in his dissent in *Harleysville*, "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." Opinion No. 27698 at 54 (Pleicones, J., dissenting) (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)). Further, Opinion No. 27698 does not answer what the insurer can do when a trial court denies the insurer's attempt to intervene.

[5] The Special Referee did reduce the verdict to reflect Harleysville's "time-on-the-risk," but this did not change that Harleysville was liable for both covered and non-covered claims.

Harleysville, therefore, in its current form,[6] led directly to the dilemma facing Liberty Mutual in this matter.

I. The Trial Court Improperly Refused to Permit Liberty Mutual to Intervene on a Limited Basis under the Current Version of the *Harleysville* Opinion.

The denial of Liberty Mutual's motion to intervene, even after the filing of Opinion No. 27698, illustrates the predicament insurers now face when defending their insureds in construction defect liability cases. Here, Liberty Mutual attempted to do precisely what the *Harleysville* decision suggested that it should to preserve its right to an allocated verdict: intervene in this liability action in order to submit special interrogatories. The trial court denied Liberty Mutual's motion, leaving it with seemingly no ability to obtain allocation between damages covered by its policies and those that are not covered.

A. Principles Governing Intervention under South Carolina Law.

Rule 24 of the South Carolina Rules of Civil Procedure governs intervention. The Supreme Court has interpreted this rule "to ***permit liberal intervention*** particularly where . . . judicial economy will be promoted by declaring the rights of all parties who may be affected." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) (emphasis added). Accordingly, a court "should consider the practical implications of a decision denying or allowing intervention." *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. 313, 138, 644 S.E.2d 699,702 (2007). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." *Id.* "A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Id.* (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "A real party in interest . . . is one who has a real, actual, material or

[6] Again, Liberty Mutual notes that rehearing is pending in *Harleysville* at the time of the filing of this initial brief.

substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

1. Intervention as a Matter of Right.

Pursuant to Rule 24(a) a party may intervene as of right: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(a), SCRCP.

As the Supreme Court has explained, a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (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. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Whether the proposed intervenor's interest warrants intervention "must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court." *Id.* at 190, 394 S.E.2d at 714. Additionally, the test "further requires that the prospective intervenor demonstrate that without its intervention, the disposition of the case may impair or impede its ability to protect its interest." *Id.* at 190, 394 S.E.2d at 715. "To meet that requirement, a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene." *Id.*

Finally, the burden for showing that the asserted interests will not be adequately represented by the existing parties, while on the applicant, is "minimal and the applicant need only show that the representation of his interests 'may be' inadequate." *Id.* at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972)). Courts look to the following factors to determine whether existing representation is inadequate: "(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent." *Id.*

2. Permissive Intervention.

The South Carolina Rules of Civil Procedure also contemplate permissive intervention under certain circumstances. Under Rule 24(b), permissive intervention is appropriate: "(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b), SCRCP. "To warrant intervention under Rule 24(b) an applicant should ordinarily show he is charged with a public duty requiring him to intervene, or he has a claim or defense involving a question of law or fact in common with the main action." *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). "A mere general interest in the subject matter of the litigation is not sufficient." *Id.*

B. The Trial Court Abused its Discretion by Denying Intervention under *Harleysville*.

Rule 24 permits "liberal intervention," particularly where judicial economy will be promoted by allowing intervention. *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714. In

this matter, judicial economy would be furthered, assuming the current form of *Harleysville* remains the same, by permitting Liberty Mutual to intervene.

Each of the four Rule 24(a)(2) factors are met. First, the motion to intervene was timely made. Liberty Mutual moved to intervene at the time contemplated by *Harleysville*. Liberty Mutual had no direct interest in the case, aside from providing counsel to represent its insured's interests pursuant to its duty to defend, until it was evident that the matter would proceed to trial. At that point, Liberty Mutual's interest in obtaining an allocated verdict arose, under *Harleysville* as it stands now, and it timely sought to intervene.

Next, Liberty Mutual has a clear interest relating to the property or transaction which is the subject of the action. To the extent the underlying verdict contained damages that were not property damages and to the extent such was not ascertainable under the evidence submitted in the underlying action, Liberty Mutual has an interest in obtaining an allocated verdict. Otherwise, Liberty Mutual could be potentially be required to pay non-covered damages, as was the case in *Harleysville*.

Third, Liberty Mutual is situated such that disposition of this action without addressing the allocation issue would impede or impair its ability to protect its interest. As previously noted, if allocation is not accomplished in the underlying proceedings, it is uncertain whether it can be done in a subsequent coverage action. *Harleysville* suggests that it cannot.

Finally, the current parties would not adequately protect Liberty Mutual's interests. The insured's unwillingness to protect Liberty Mutual's interests is clearly evidenced by the memorandum it filed opposing Liberty Mutual's motion to intervene. (*See* Mem. in Opp'n to Mot. to Intervene; R. pp. __.) The plaintiff Waverly Association likewise has no motivation to assist the opposing party's insurer. At the hearing on Liberty Mutual's motion, counsel for the Waverly

Association and counsel for the Wieland Entities both argued that Liberty Mutual should not be permitted to intervene. (*See* Tr. at 12:6-16:8; R. pp. __.) In light of this opposition to Liberty Mutual's motion, the existing parties will almost certainly not "make all of the intervenor's arguments," and are not "capable and willing to make sure arguments." *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 715. Liberty Mutual would offer a different knowledge, experience, and perspective on the proceedings that would otherwise be absent. *See id.*

Therefore, assuming the current form of *Harleysville* stands, the four factors for intervention as of right are met. Liberty Mutual should have been permitted to intervene as of right, or at minimum, the trial court should have allowed limited permissive intervention. The trial court thus abused its discretion by denying Liberty Mutual's motion. As stated herein, the remedy for this error should be the acknowledgement of Liberty Mutual's right to address these allocation issues in subsequent declaratory judgment litigation.

C. Analogous South Carolina Case Law Supports Intervention.

South Carolina courts have not directly addressed the situation presented in this action. However, two cases where the court permitted intervention are analogous and support intervention in this matter. First, *Berkeley Electric* involved a dispute between Berkeley Electric Cooperative and the Town of Mount Pleasant regarding the applicability of a franchise agreement between them to the extension of service to a newly annexed subdivision. 302 S.C. at 188, 394 S.E.2d at 713. South Carolina Electric and Gas ("SCE&G") moved to intervene, asserting it had a right to serve this area, but the trial court denied the motion. *See id.* at 189, 394 S.E.2d at 714. The Supreme Court reversed and found that SCE&G should have been allowed to intervene.

The *Berkeley Electric* Court noted that SCE&G had a financial interest in the dispute, as an adverse ruling would destroy any investments SCE&G made under the belief it was the rightful

supplier. *Id.* at 190, 394 S.E.2d at 715. As the Court explained, a party need only demonstrate that disposition of the case ***may*** impair or impede its ability to protect its interests, not that it would be bound in a res judicata sense. *Id.* The party must only show that "it would have difficulty adequately protecting its interests if not allowed to intervene." *Id.* The Court further stated that a declaration by the trial judge finding that Berkeley Electric could supply the new subdivision would, "as a practical matter, prevent SCE&G from serving customers that it believe[d] it was legally entitled to serve" and impair its ability to protect investments made. *Id.* at 191, 394 S.E.2d at 715. It would also be very difficult for SCE&G to collaterally attack an adverse ruling. *Id.* Finally, SCE&G's interests would not have been adequately represented by the existing parties as its objectives conflicted with the objectives of both parties to the litigation. *Id.* Therefore, for all of these reasons, the Court found that intervention should have been permitted.

Second, in *Thomasson v. Ocean Point Golf, Inc.*, 300 S.C. 29, 386 S.E.2d 282 (Ct. App. 1989), the Court of Appeals affirmed the granting of a bank's motion to intervene in a dispute between a lessor and lessee of a golf course over course dues, where the lessee pledged the course dues as collateral for a loan from the bank. *Id.* at 30-31, 386 S.E.2d at 283-84. On appeal, the lessor asserted that the bank should not have been permitted to intervene. The Court disagreed, finding that the disposition of the dispute over the dues would impair or impede the bank's ability to protect its interest in its collateral. *See id.* at 33, 386 S.E.2d at 285. The parties failed to make a convincing argument that the bank's interests would not be impaired or that its interests would be adequately represented by the other parties in the suit. *Id.* Thus, there was no error in granting intervention.

Here, Liberty Mutual also has a financial interest in the outcome of the underlying litigation. If the jury does not allocate between covered and non-covered damages, Liberty Mutual

would potentially be forced to pay the entirety of any general verdict. This would substantially impair Liberty Mutual's rights. As *Berkeley Electric* recognized, intervention is appropriate in such a case.

D. Several Courts from other Jurisdictions have Permitted Limited Intervention under Analogous Facts.

Finally, several cases from other jurisdictions—that are on all fours procedurally to this matter—have permitted intervention.[7] For example, in *ADT Servs. AG v. Brady*, No. 10-2107, 2014 WL 4415955 (W.D. Tenn. Sept. 8, 2014), the district court granted an insurer's motion to intervene for the limited purpose of being heard regarding special interrogatories it proposed to submit to the jury. *Id.* at *1. The case was a liability action brought by an injured party against the insured. *See id.* The insurer stated that its proposed interrogatories would request that the jury indicate which of the six claims it awarded damages on and whether it found the defendant/insured's actions to be willful, intentional, deliberate, false, or malicious. *Id.* The insurer explained that these findings would be "relevant to the court's interpretation of [insurer's] insurance contracts with [insureds]." *Id.* at *2. The insureds, however, opposed the motion, claiming that it would create an impermissible conflict of interest. *Id.* at *2. Nevertheless, the

[7] Note that other cases have declined to permit intervention under similar facts. *See, e.g., Frank Betz Assocs., Inc. v. J.O. Clark Constr., L.L.C.*, No. CIV.A 3:08-CV-00159, 2010 WL 2375871, at *2 (M.D. Tenn. June 4, 2010) ("[T]he Court's research reveals that the various courts that have considered an insurer's request to intervene have reached different conclusions, based in large part upon the different factual scenarios presented.") (collecting cases). However, several of the cases denying intervention turned on the fact that the insurer's rights were fully protected and could be vindicated in a subsequent coverage action. *See, e.g., Cmty. Vocational Sch. of Pittsburgh, Inc. v. Mildon Bus Lines, Inc.*, No. CV 09-1572, 2017 WL 1376298, at *8 (W.D. Pa. Apr. 17, 2017) (finding that there was "no reason to believe that a decision in favor of plaintiff [in the liability action] will prevent [the insurer seeking to intervene] from adequately presenting its chosen defense in the coverage action"); *Frank Betz*, 2010 WL 237581, at *2 (noting that the insurer had not filed a declaratory action regarding coverage and had not indicated "why a declaratory judgment action would not efficiently and effectively dispose of the dispute with its insureds").

court found that permissive intervention was appropriate for the limited purpose of proposing special interrogatories.

As the court explained, the risk of prejudice to the defendant/insured was low. The insurer merely sought to have the jury delineate which claims it awarded damages for and how much, and indicate whether the insureds' actions involved certain types of willful behavior. *Id.* at *3. The court would serve as an intermediary for said interrogatories, and the parties would be heard on them outside the presence of the jury. *Id.* Furthermore, the insured was represented by its own independent counsel, and the insurer was not seeking to sit at counsel table, be introduced to the jury, or conduct any argument in the jury's presence. *Id.* Finally, the defendant/insured was free to place any objections to the proposed interrogatories on the record and the court would retain the discretion to decline to utilize any proposed interrogatories. *Id.*

Similarly, in *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41 (D. Nev. 1984), the court also allowed limited intervention. In that case, an insurer moved to intervene for the limited purpose of submitting proposed special interrogatories so that the jury's basis for any verdicts would "make possible a division of the money damages between covered and non-covered acts of the insureds." *Id.* at 43. The court noted that the insurer was not permitted to intervene as of right, as it was not seeking to actually participate in the trial or litigate its coverage. *Id.* at 44. The court found, however, that permissive intervention was appropriate. *Id.* Any delay in considering special interrogatories proposed by the insurers would not be significant. *Id.* Moreover, the court maintained the discretion to reject the proposed special interrogatories in the event it determined that they would compromise the interests of the insureds. *See id.* Finally, the court noted that "the possibility that relitigation of the same issue may be avoided is a strong reason to permit

intervention." *Id.* Therefore, the court granted the motion for limited intervention, noting that it would consider proposed special interrogatories at the appropriate time. *See id.* at 44-45.

In *Thomas v. Henderson*, 297 F. Supp. 2d 1311 (S.D. Ala. 2003), the court also permitted limited intervention under comparable facts. As the court explained, the insurer had filed a separate declaratory judgment action against its insureds, and:

> Absent an itemized jury verdict in this case, resolution of the coverage issues at stake in the declaratory judgment action could be complicated considerably, as there would be no way to distinguish among the types of claims and damages embraced by any damages award the jury might render.

Id. at 1327. Additionally, even if a general verdict could be "separately disaggregated in the declaratory judgment action, 'the possibility that relitigation of the same issue may be avoided is a strong reason to permit intervention.'" *Id.* (quoting *Fidelity*, 102 F.R.D at 44). Although there was a "slight possibility of delay or prejudice" if the insurer was permitted to intervene, including the possibility that a conflict of interest might arise, these concerns could be "minimized through imposition of procedural safeguards." *Id.* For example, the court noted that even though the insurer would have the right to propose special interrogatories, permitting intervention did not imply that the court would be obligated to submit them to the jury. *Id.* Additionally, the insurer would not be permitted to compromise the interests of its insureds. *Id.* Lastly, the insurer would not be allowed to litigate coverage or policy interpretation issues in the liability action or interfere with its insured's defense. *Id.*

Finally, two decisions from Ohio state courts also found that an insurer should be permitted to intervene on a limited basis in a liability action against its insured. In *Schmidlin v. D & V Enterprises*, No. 76287, 2000 WL 709039 (Ohio Ct. App. June 1, 2000), an insurer sought limited intervention in an action brought by an injured party against its insured to determine the applicable

policy limits, which varied based on the type of claim. *Id.* at *1. The trial court, however, denied the motion as untimely. *Id.* at *1. The appellate court reversed, noting that the circumstances of the case weighed in favor of limited intervention. First, the insurer's financial exposure would depend on the legal basis upon which the plaintiff obtained a verdict against the insured, and only the jury could answer that question. *See id.* at *5. The court acknowledged that the insurer could have filed a separate declaratory judgment action, but that such action "still would be dependent on the outcome" of the underlying case. *Id.* Additionally, a separate declaratory action would be ineffective because the legal basis for a verdict against the insured "could be determined only by jury interrogatories submitted" in the underlying case. *Id.* Only the insurer had an interest in obtaining such a determination. *See id.* Finally, issues determined in the underlying matter "may be given preclusive effect in a later proceeding," which further weighed in favor of intervention. *See id.*; *but see Gehm v. Timberline Post & Frame*, 861 N.E.2d 519, ¶ 15 (Ohio 2007) (noting that where a party has sought and been denied intervention, "collateral estoppel will not prohibit future litigation of similar issues"). Limited intervention "was the only practical means to allow all legal claims to be decided efficiently and consistently in one proceeding." *Id.*

The other Ohio case, *Tomcany v. Range Const.*, No. 2003-L-071, 2004 WL 2801671 (Ohio Ct. App. Sept. 30, 2004), was a construction defect case. *See id.* at *1. In *Tomcany*, the defendant's insurer sought to intervene as of right two months prior to trial to "ascertain whether the [plaintiffs'] various claims would be covered under appellant's policy, as the policy did not provide coverage" for some of the claims. *Id.* at *2. The insurer sought to submit interrogatories to the jury on "coverage issues raised in [its] reservation of rights letter." *Id.* The insurer contended that if it was not permitted to intervene and the jury returned a general verdict, it might be barred by collateral estoppel from denying coverage for the verdict. *Id.* The trial court denied the motion,

but the court of appeals reversed, finding that this was an abuse of discretion. As the court explained, it was apparent that the insurer had an interest in the litigation that was not adequately represented by the parties. *See id.* at *4. The plaintiffs and the insured had a common interest in obtaining a general verdict because it would foreclose the insurer from ascertaining the legal basis of the jury's verdict and prevent it from denying coverage. *Id.* Moreover, as the *Tomcany* court explained, if the insurer was not permitted to intervene, it would impair its ability to protect its interests, as the insurer "would theoretically be limited to a declaratory judgment action to determine coverage." *Id.* at *5. This mechanism would be "ineffective because the legal basis for a verdict in favor of the [plaintiffs] could only be determined by jury interrogatories submitted in the liability action." *Id.* A general verdict without interrogatories "might bar [the insurer] from denying coverage for the verdict." *Id.*

As these cases establish, limited intervention is appropriate in circumstances like the present matter. Accordingly, under the current form of *Harleysville*, the trial court abused its discretion by refusing to allow Liberty Mutual to intervene. Again, Liberty Mutual asserts the appropriate remedy for the error would be the allowance of subsequent declaratory judgment litigation to address the covered versus non-covered damages issues.

II. The Trial Court erred by Finding that Liberty Mutual can Obtain Allocation of the Verdict in a Subsequent Declaratory Judgment Action under the Current version of *Harleysville*.

In the event that an insurer's motion to intervene is denied, as it was in this case, substantial prejudice could arise. Here, the trial court's finding here that the insurer should not have moved for intervention and ***could*** obtain allocation in a subsequent declaratory judgment directly conflicts with the Special Referee's ruling to the ***contrary*** in *Harleysville*. The trial court's determination that intervention should be denied since Liberty Mutual has the right to determine allocation in

subsequent declaratory judgment proceedings is inconsistent with the current version of *Harleysville*. Liberty Mutual happens to agree with the trial court's rationale, but is constrained to assert that it is erroneous under *Harleysville* as it presently stands.

A. Other Jurisdictions Permit Allocation of a General Verdict in a Subsequent Declaratory Action.

Other courts have recognized that an underlying verdict is not preclusive relating to issues of covered versus non-covered damages, and that subsequent declaratory judgment litigation is permissible. The Petitioner in *Harleysville* continues to assert this position in urging rehearing.

An Indiana court explicitly held that a general verdict in a liability action that does not distinguish between covered and non-covered damages does not bar the insurer from later obtaining such a distinction "in a subsequent action, such as a proceedings supplemental." *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 883 (Ind. Ct. App. 2006). The *Keltner* court noted that "[a] proceedings supplemental would offer an occasion for presenting evidence and argument regarding a fair approximation of the division of damages between those awarded" for covered versus non-covered damages. *See id.* As the court explained, "[t]his might be determined by examining the evidence and argument of counsel presented during the underlying trial or by the presentation of additional evidence." *Id.* Thus, the insurer's protection of its interests would not be impaired by the entry of a general judgment against its insured. *Id.*

Under Florida law, if the insured succeeds in showing that "the judgment includes elements for which an insurer is liable and also elements beyond the coverage of the policy, the burden of apportioning or allocating these damages is on the party seeking to recover from the insurer." *Arnett v. Mid-Continent Cas. Co.*, No. 8:08-CV-2373-T-27EAJ, 2010 WL 2821981, at *5–6 (M.D. Fla. July 16, 2010). In *Arnett*, the parties contended that this was impossible in light of the underlying general verdict. *Id.* The court explained, however, that the insured would be relieved

of its burden if the insurer failed to advise the insured of the availability of a special verdict and the divergence of interest between the insurer and insured regarding obtaining an allocation. *Id.* The court noted that obtaining an allocated verdict is in the insured's interest in light of the burden imposed on it regarding allocation, because the "inevitable consequence of a general verdict is a 'catastrophic total loss of coverage.'" *Id.* Contrast this with the insurer, which has an interest in using a general verdict form "when an action involves elements of both covered and non-covered damages." *Id.*

In *Arnett*, the record did not contain any evidence suggesting that such a disclosure was made to the insured. *Id.* at *6. Therefore, the insured was relieved of this "impossible burden" of proving the precise amount awarded for covered damages. *Id.* The declaratory judgment court was then tasked with determining "as best [it] can the allocation which the jury would have made had it been tendered the opportunity to do so." *Id.* (quoting *Duke v. Hoch*, 468 F.2d 973, 984 (5th Cir. 1972)). The court noted that the underlying trial record did not permit a meaningful allocation, and thus material issues of fact remained as to the proper allocation of damages. *Id.* This required a trial on that issue in the declaratory action. *Id.*; *see also Mid-Continent Cas. Co. v. C-D Jones & Co. Inc*, No. 3:09CV565/MCR/CJK, 2013 WL 12081104, at *5 (N.D. Fla. Aug. 6, 2013) (under similar facts, noting that the trier of fact in the coverage action would "determine what allocation the jury would have made if it had been given an opportunity to do so" based on the trial record, but the insureds would be permitted to present additional expert evidence, to which the insurers could present rebuttal evidence); *Employers Ins. of Wausau v. Lavender*, 506 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 1987) (noting that "it is true that the question of insurance coverage can be determined in subsequent litigation," but also approving of the parties' suggestion that the insurer

be permitted to intervene in the liability action "for the limited purpose of preparing jury instructions and a special interrogatory verdict for submission to the jury").

In a Fifth Circuit case originating from Florida, the court also reached this same result. *See Duke v. Hoch*, 468 F.2d 973, 980 (5th Cir. 1972). The *Duke* court explained that if an insurer fails to sufficiently advise its insured of the desirability of obtaining an allocated verdict, the burden shifts to the insurer. *Id.* at 980, 984. The court noted that if the insurer could not show it discharged its responsibility regarding allocation, the court "will face the issue of attempting retrospectively to allocate the damages awarded." *Id.* at 984. The burden, or the "risk of non-persuasion" will lie with the insurer, but the insured will still have the burden of producing a quantity of evidence fit . . . to form a reasonable basis for the [judgment]" *Id.* (quoting IX Wigmore, *The Law of Evidence* § 2485 (3d ed. 1940)). "The primary source of evidence will be, of course, the transcript of the merits trial, containing the evidence on which the jury based its verdict," and the trial judge will be tasked with "establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so." *Id.* If the court cannot make a meaningful allocation based on the underlying evidence and trial transcript, the parties "should have the right to adduce additional evidence." *Id.*

The Fourth Circuit also recognized that an underlying judgment is not preclusive in *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Bakker*, 917 F.2d 22, 1990 WL 156528 (4th Cir. 1990) (unpublished table decision). In *Bakker*, an insurer sought to intervene in a liability action against its insured in order to submit special interrogatories for the jury to resolve a potential coverage question, but the trial court denied the motion. *Id.* at *1. The insurer appealed, contending that it would be precluded from "subsequent litigation of its insurance obligations." *Id.* The court, however, agreed with the trial court's determination that the insurer's "interest to resolve insurance

coverage issues would not be prejudiced, because open issues, if any, could be litigated at a later time." *Id.*

The Tenth Circuit reached a similar result in *Automax Hyundai S., L.L.C. v. Zurich Am. Ins. Co.*, 720 F.3d 798 (10th Cir. 2013). As the *Automax* court explained, where there is a general verdict in an underlying liability action possibly consisting of covered and non-covered claims, the question "becomes who bears the burden for allocating the judgment between the covered and noncovered claims." *Id.* at 807 (quoting Allan D. Windt, *Ins. Claims & Disputes* § 6:27 (2013)). Where both covered and non-covered causes of action are alleged, the insurer, if it is controlling the insured's defense, "must request a special verdict to disentangle the facts relevant to its indemnification of the insured." *Id.* In other words, the burden is on the insurer since it could "obtain an escape from responsibility merely by failing to request a special verdict or special interrogatories," and thus "'damages are presumed to be covered' unless the insurer can demonstrate an appropriate allocation." *Id.* (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). If the insurer fails to request a special verdict or fails to provide a defense at all, in both situations the insurer would bear the burden of allocation. *Id.* However, the insurer can shift the burden to the insured by informing the insured that it would be in its best interest to request a special verdict. *Id.* at 807 n.2. The *Automax* court found that where the insurer fails to obtain a special verdict or wrongfully refuses to defend and a general verdict is rendered, the insurer should still have the opportunity to satisfy its burden in a subsequent declaratory action. *See id.* at 809-10.

The Southern District of New York also handled this issue in the same way. In *Uvino v. Harleysville Worcester Ins. Co.*, No. 13 CIV. 4004 (NRB), 2015 WL 925940, at *8 (S.D.N.Y. Mar. 4, 2015), the insurer moved to intervene for the purpose of requesting special interrogatories

to avoid a coverage allocation dispute and "therefore made known [to the insured] both the availability of the interrogatories and the parties' divergence of interests." *Id.* Thus, the insurer complied with its responsibilities to its insured such that the burden of proving allocation would not shift to it. *Id.* However, the court found that the insurer was not entitled to summary judgment in the coverage action due to a genuine issue of fact, and noted that the insureds could proceed to trial on the issue of allocation, "at which they can attempt to show what portion of the general verdict returned by the jury, if any, is attributable to covered claims." *Id.*

Two Texas federal district court cases also reached similar results. First, in *Soc'y of Professionals in Dispute Resolution, Inc. v. Mt. Airy Ins. Co.*, No. CIV.A.3:97-CV-0071-D, 1997 WL 711446, at *7–8 (N.D. Tex. Nov. 7, 1997), the court noted that apportionment most frequently becomes an issue where the insurer breaches its duty to defend. *Id.* at *7. The court explained that although prior cases found that an insurer is bound by the judgment where it refuses to defend, they also acknowledge that "the insurer does not necessarily owe the insured a duty to pay all damages assessed." *Id.* Rather, the damages recited either in a judgment or settlement of the underlying lawsuit "must be apportioned between claims covered by the policy and those that are not." *Id.* The insured bears the burden under Texas law of apportioning damages between coverage and non-coverage. *Id.*; *see also Willcox v. Am. Home Assur. Co.*, 900 F. Supp. 850, 856 (S.D. Tex. 1995) (finding that the underlying verdict must be apportioned between covered and non-covered claims, as "indemnification is proper only when the claims settled are shown to be within the scope of policy coverage").

Alabama has also explicitly recognized that an insurer is not barred from litigating coverage issues in a declaratory judgment action after the resolution of the underlying claims against its insured. *Mut. Assur., Inc. v. Chancey*, 781 So. 2d 172, 175 (Ala. 2000). In *Mutual*

Assurance, an insurer moved to intervene in a liability matter against its insured, arguing that it had an "absolute right" to submit special interrogatories in that case. *Id.* at 174. The *Mutual Assurance* court disagreed with the insurer's argument that a declaratory action would be dismissed because it would raise an issue already presented in the underlying action, noting that "the threshold issue of coverage in a potential declaratory-judgment action by Mutual Assurance and the issues presented in this underlying action against the insureds are not the same." *Id.* at 175. Thus, "a declaratory-judgment action to determine the coverage issue would not be foreclosed." *Id.*

It appears that Ohio requires that an insurer first make an effort at limited intervention, but if that fails, then subsequent declaratory judgment litigation is permitted. Ohio recognizes that if a party seeks to intervene and it is denied, "collateral estoppel will not prohibit future litigation of similar issues." *Gehm v. Timberline Post & Frame*, 861 N.E.2d 519, ¶ 15 (Ohio 2007); *see also John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 315 F.R.D. 169, 174 (S.D.N.Y. 2016) (applying Ohio law and noting that if an insurer moves to intervene and it is denied, "Ohio law is clear that there is no collateral estoppel effect"). Therefore, if an insurer seeks intervention and it is denied, it is not "estopped from litigating its claims in another case." *Gehm*, 861 N.E.2d at ¶ 15. As the court explained in *John Wiley*, at most Ohio law "requires that an insurer make a motion to intervene" to avoid preclusion. *Id.* If the motion is denied, then those concerns are alleviated.

All of these cases directly support that allocation of a verdict rendered in an underlying liability action may be made between covered and non-covered claims in a subsequent declaratory judgment action. The Petitioner urged the Supreme Court to adopt this position in the *Harleysville* rehearing petition. Where an insurer is not a party to a liability action against its insured, and a verdict is rendered that relates to both covered and non-covered claims, the insurer should have

the right to obtain allocation of the verdict. Otherwise the scope of coverage is impermissibly expanded beyond what the parties contemplated at the time of contract. This conflicts with South Carolina policy, which disfavors such a result. *Cf. S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001) ("[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties."); *Alverson v. Minn. Mut. Life Ins. Co.*, 287 S.C. 432, 434, 339 S.E.2d 140, 142 (Ct. App. 1985) ("Waiver cannot create coverage and cannot bring into existence something not covered in the policy.").

B. The Trial Court's Intervention Ruling was Erroneous, and the Remedy is that Liberty Mutual Should be Permitted to Litigate Allocation Issues in Subsequent Declaratory Judgment Proceedings.

Assuming the *Harleysville* opinion remains unchanged after rehearing is considered, the trial court's intervention ruling was in error. Liberty Mutual asserts that in such a scenario, the remedy should be as exists under the above-explained Ohio law—since Liberty Mutual sought intervention, and because it was denied, Liberty Mutual has a right to litigate allocation issues in subsequent declaratory judgment proceedings.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's denial of Liberty Mutual's motion for limited intervention, and find that the remedy for the error is that Liberty Mutual is permitted to litigate allocation issues in subsequent declaratory judgment proceedings.

Signature on Following Page

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May 24, 2017

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326
Appellate Case No. 2017-000474

Ex Parte: Liberty Mutual Fire Insurance Company, ... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome Association, Inc.,..... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc.,..... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc. ..... Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez

Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC,..... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Liberty Mutual Fire Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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May 24, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., et al.
Civil Action No. 2013-CP-10-03326
Appellate Case No. 2017-000474
NMRS File No. 00350.01785

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of the brief and designation.

Very truly yours,

Blake T. Williams

Blake T. Williams

BTW:lpw
Enclosures
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