

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

RECEIVED

The Honorable Clifton B. Newman, Circuit Court Judge

NOV 02 2017

SC Court of Appeals

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, National Fire & Marine Insurance Company and Clarendon National Insurance Company Successor in Interest by Merger to Clarendon America,..... Appellants,

Of whom American Empire Surplus Lines Insurance Company,.....an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc .....Respondents.

**AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY'S  
RETURN TO RESPONDENT HARBOUR COVE CONDOMINIUM  
ASSOCIATION'S MOTION TO DISMISS APPEAL**

Appellant American Empire Surplus Lines Insurance Company, (hereinafter "American

Empire"), hereby responds to the Motion to Dismiss Appeal filed by Respondent Harbour Cove Condominium Association ("the Association"). The Association has moved to dismiss the appeal on the grounds that American Empire is not a party to the underlying action, alleging that the denial of American Empire's motion to intervene was interlocutory, not a final order, and not immediately appealable. American Empire responds that under established precedent and S.C. Code § 14-3-330(2), the right to appeal this order is immediate, for which reason the Court should deny the Association's Motion to Dismiss.

### **Background**

American Empire is a general liability insurer of RWG, Inc.<sup>1</sup> (hereinafter "RWG") one of the defendants in the underlying construction defect litigation. Pursuant to the Supreme Court's opinion in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), American Empire filed a motion in the underlying action requesting the right to intervene. American Empire joined in arguments made by the other carriers in a similar position to be allowed to participate in jury charges to the extent necessary to preserve evidence that will be necessary for determination of whether any verdict in the case is covered under the insurance policies it issued to RWG.

In *Harleysville*, the Supreme Court stated that the "right to control the litigation carries with it certain duties, including the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Id.* 803 S.E.2d at 299 (internal quotations and citations omitted). The Court additionally stated that "the Special Referee also found 'the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict' as to the negligent construction, breach of warranty, and breach

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<sup>1</sup> American Empire issued a CGL policy to RWG, Inc., only. The Plaintiff in the action alleges that RWG, Inc. is the successor in interest, the successor by merger, amalgamated, or affiliated with other defendants – Right Way Construction, Inc., Right Way Group, Inc. and RWGR, Inc., and American Empire disputes that allegation.

of fiduciary duty claims, and the Special Referee refused to 'engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making.' See [*Auto Owners v.] Newman*, 385 S.C. [187] at 198, 684 S.E.2d [541] at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award)." *Harleysville*, 420 S.C. at n.11, 803 S.E.2d at 300 n.11.

American Empire therefore moved to be allowed to participate in the underlying action in order to preserve the record on the components of any general verdict, as contemplated by *Harleysville*. When that motion was denied, this appeal followed.

### **Governing Law on the Right to Immediate Appeal**

"An order affects a substantial right and *is immediately appealable* when it (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action .... " *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added).

Interpreting the same statutory language,<sup>2</sup> the Supreme Court held that an order denying a motion to intervene was immediately appealable—even though "the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be

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<sup>2</sup> *Johnson/Rutledge*, 63 S.C. 205, 41 S.E. at 309 ("Section 11 of the Code provides that the supreme court shall have exclusive jurisdiction to review upon appeal \*\*\* an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken."). The current statute, S.C. Code Ann. Section 14-3-330, provides under (2): "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ... (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken...."

necessary"—because insofar "as the rights of the [putative intervenor] are involved, the order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken." *Ex parte Johnson (Rutledge v. Tunno)*, 63 S.C. 205, 41 S.E. 308, 309 (1902). *See also* 15 S.C. Jur. Appeal and Error § 23 South Carolina Jurisprudence (September 2017 Update) ("The refusal of a petition to intervene is directly appealable [i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken."); *Ex parte Wells*, No. 2012-MO-002, 2012 WL 10906587, at \*1 & n.1 (S.C. Sup. Ct. filed March 7, 2012) (allowing immediate appeal of an order denying a request to intervene in an abuse and neglect action).

### **Argument**

In its motion to dismiss, the Association cites cases which hold that "an order *granting* a motion to intervene is not immediately appealable." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) (emphasis added); *see Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 320 (Ct. App. 2016) (order adding a party was not immediately appealable where it "had the effect of an order granting a motion to intervene").

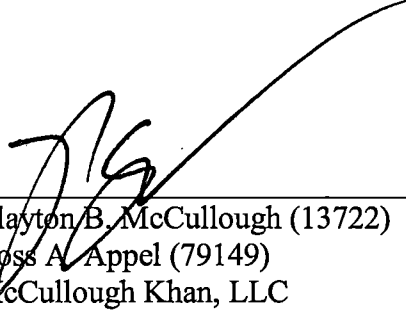
This reasoning is flawed because an order granting a motion to intervene is analogous to an "an order making a third party a defendant." Such an order does not end a claim and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order denying intervention, in contrast with an order denying intervention, is an order that "determines the action," that "prevents a judgment from which an appeal might be taken, or that "discontinues the action" as to the intervenor or any other party. *See* S.C. Code § 14-3-330(2).

The order denying American Empire's motion to intervene "in effect determine[d] the

action and prevent[ed] a judgment from which an appeal might be taken," within the meaning of *Johnson/Rutledge*, 63 S.C. at 205, 41 S.E. at 309. If not allowed to participate as requested, American Empire's ability to preserve evidence necessary to determine how the terms and conditions of its insurance policies should be applied to any eventual verdict will be eliminated.

Under these facts, the order denying American Empire's Motion to Intervene has the effect of being a final determination of the ability of American Empire to determine the components of a general verdict. It is therefore immediately appealable under S.C. Code § 14-3-330(2). The Court should deny the Association's Motion to Dismiss and permit this appeal to proceed.

October 30, 2017



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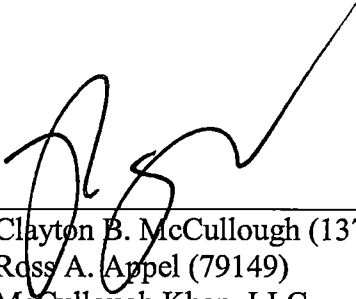
v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc .....Respondents.

**PROOF OF SERVICE**

I, Ross A. Appel of McCullough Khan, LLC, do hereby certify that I have served the **Response to Motion to Dismiss** on counsel for Respondents, as well as other parties' counsel, by depositing the same in the United States Mail, properly posted on October 30, 2017

addressed as follows to counsel of record:



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SC Court of Appeals

South Carolina Court of Appeals  
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Post Office Box 11629  
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**Re: *Harbour Cove Condominium Assoc. vs. Centex Homes, et al.***  
**Civil Action No.: 2014-CP-26-7634**  
**Appellate Case No.: 2017 \_\_\_\_\_**

Dear Mr. Kitchings:

Please find enclosed an original and seven copies of American Empire Surplus Lines Insurance Company's Return to Harbour Cove Condominium Association's Motion to Dismiss and Proof of Service in the above referenced matter. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

Please do not hesitate to contact me should you have any questions or concerns. With kind regards, I remain


Sincerely yours,

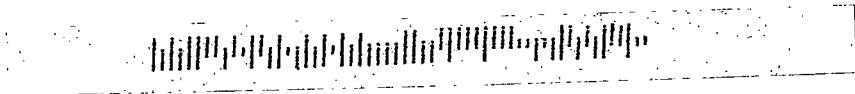
McCULLOUGH KHAN, LLC

Ross A. Appel

RAA:dd  
Enclosures



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