

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

RECEIVED

OCT 30 2017

SC Court of Appeals

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, and National Fire & Marine Insurance Company.....Appellants,

Of whom Catalina London LTD.....is 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.

**BITCO GENERAL INSURANCE CORPORATION'S
RETURN TO RESPONDENT HARBOUR COVE CONDOMINIUM
ASSOCIATION'S MOTION TO DISMISS APPEAL**

Appellant BITCO General Insurance Corporation (hereinafter "BITCO"), 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 BITCO is not a party to the underlying action, alleging that the denial of BITCO's motion to intervene was interlocutory, not a final order, and not immediately appealable. BITCO 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

BITCO is a general liability insurer of Martin Masonry, 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), BITCO filed a motion in the underlying action requesting the right to limited intervention. BITCO requested that it 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 Martin Masonry.

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 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.

BITCO 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,¹ 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 necessary”—because insofar “as the rights of the [putative intervenor] are involved, the order

¹ *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 a judgment from which an appeal might be taken....”

[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”).

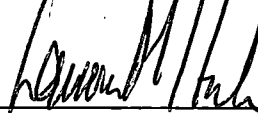
This reasoning is flawed because an order granting a motion to intervene is analogous to an “an order making a third party a defendant.” Such an order does not end a claim and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order denying intervention, in contrast with 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 BITCO'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, BITCO'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 BITCO's Motion to Intervene has the effect of being a final determination of the ability of BITCO 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 26, 2017

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Clifton Newman, Circuit Court Judge

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PROOF OF SERVICE

I hereby certify that I have this day served counsel for the opposing party(s) with a copy of the within and foregoing pleading by US Mail properly addressed to the following, to insure proper delivery to the following:

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October 26, 2017

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

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SC Court of Appeals

Re: ***The Harbour Cove Condominium Association v. Centex Homes, a Nevada
General Partnership et al.***
C.A. No.: 2014-CP-26-7634
Appellate Case No.: 2017-002154

Dear Ms. Kitchings:

Please find enclosed the original and six copies of Appellant BITCO General Insurance Corporation's Response to the Motion to Dismiss Appeal filed by the Harbour Cove Condominium Association in this matter. We have attached an extra copy, and we would appreciate your returning a file-stamped copy to us in the enclosed self-addressed stamped envelope.

Thank you very much for your assistance.

With highest regards,

HUNTER & FOSTER, P.A.


Lawrence M. Hunter, Jr.

LMH/abs

Enclosures

cc: Counsel of Record

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