

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

RECEIVED

OCT 26 2017

SC Court of Appeals

Case No. 2014-CP-26-07634

Ex Parte: Selective Insurance Company of South Carolina, Appellant,

In re: The Harbour Cove Condominium Association, Respondent,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, 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.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc., A&A Stucco Inc.; Coastal Plaster Systems, Inc.; Coastal Plastering Systems, Inc.; and Mike Phillips, Respondents,

v.

Centex Homes, a Nevada General Partnership, Respondent,

v.

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American Residential Services, Inc.; Builders FirstSource — Atlantic Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Top Notch Painters; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; Bond Group. Inc.; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc.; Azimuth Consultants, and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants, BCI, Inc., Com Tech, Model Home Interiors, Inc., Crescent Architects, LLC, Taylor Made Builders, Inc. Respondents.

**SELECTIVE INSURANCE COMPANY'S
RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL**

Appellant Selective Insurance Company (hereafter "Selective"), submits this return in opposition to the Motion to Dismiss Appeal filed by Respondent Harbour Cove Condominium Association ("the Association"). The Association has moved to the dismiss the appeal on the grounds that Selective was not a party, and the Order denying the motion to intervene was an interlocutory order and not a final order and therefore not immediately appealable. Under the

settled meaning of S.C. Code § 14-3-330(2), Selective has a right to an immediate appeal, and the Court should therefore deny the Motion to Dismiss Appeal.

Background

This matter addresses insurance coverage issues related to a construction defect matter pending in the Fifteenth Judicial Circuit. Selective issued policies to Martin Masonry, Inc., (hereafter “Martin”) which is one of many subcontractors that the Association brought claims against for alleged construction defects. Selective is defending Martin under a reservation of rights. The Association is the plaintiff and seeks damages relating to construction defect issues. The Appellants herein are the subcontractor’s insurance carriers who sought to intervene for the limited purpose of obtaining a verdict that categorized damages into costs of property damage and costs of repairing defective workmanship. Selective is seeking a verdict in the underlying action that allows it to pay for covered damages. The Association opposes the motion because it seeks to make Selective pay for covered and non-covered damages. Now the Association seeks to dismiss the appeal in hopes of obtaining a general verdict that it will later argue is one hundred percent covered because no steps were taking to allocate into covered and non-covered categories. Selective submits that this matter is ripe for appeal because the verdict must be allocated.

Procedural History

Selective moved to intervene in the underlying action which was denied. Selective appeals the denial to seek clarification regarding its rights and obligations, following the Supreme Court’s ruling in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017).

Legal Analysis

Selective, and the other insurance carriers, seek to appeal the Order of Judge Clifton Newman, dated October 13, 2017. Selective believes that it has standing to appeal based on the

Supreme Court’s decision in *Harleysville* and South Carolina Code Annotated § 14-3-330. “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 or discontinues the action” is immediately appealable. S.C. Code Ann. § 14-3-330. A person has a right to intervene in an action “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.” S.C. Rules Civ. Pro. 24(a)(2). The Court of Appeals of South Carolina has specifically found that an order denying a motion to intervene is immediately appealable. *Ex Parte Carter v. L.C.*, No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. Jan. 13, 2017) (citing *Rutledge v. Tunno*, 63 S.C. 205, 207–08, 41 S.E. 308, 309 (1902)); see *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

Harleysville addressed coverage for a construction defect action seeking both the cost to repair faulty workmanship itself (which is not covered “property damage”) and the cost to repair resulting damage to otherwise non-defective components (which may qualify as “property damage”). *Id.* at 803, S.E.2d at 296. In requiring the insurer to pay for both types of repair costs, the Supreme Court held that the insurer’s reservation of rights “letters were not sufficiently specific to put [its insured] on notice of [the insurer’s] specific defenses, particularly as to the need for an allocated verdict.” *Id.* at 803, S.E.2d at 297.

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.* at 803,

S.E.2d at 299 (internal quotations and citations omitted). The Court additionally noted that in “addition to finding Harleysville’s attempted reservation of rights to be insufficient, 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.

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 precisely 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 [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) (citing *Johnson/Rutledge*) (please note that this is opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), 8(d)(2), SCACR”); *Ex parte Carter v. L.C.*, No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. filed January 13, 2017) (citing *Johnson/Rutledge* with favor that “an order denying a motion to intervene is immediately appealable”) (please note that this is

¹ *Johnson/Rutledge*, 63 S.C. at 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 identically 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....”

opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), SCACR”).

Instead of citing this controlling authority, the Association cites cases holding 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”). An order granting a motion to intervene is analogous to “an order making a third party a defendant,” which does not put any party of out court and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order permitting intervention, in contrast with an order denying intervention, is not 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).

Other jurisdictions recognize the immediate right to appeal the denial of a motion to intervene. *See, e.g., Johnson v. House*, 155 S.E. 199, 200 (Ga. 1930) (the Georgia court held that the refusal to allow an individual to intervene is a final judgment as to that individual); *Carter v. Smith*, 170 S.W.3d 402, 407 (Ky. Ct. App. 2004), *review denied*, (Sept. 14, 2005) (the Kentucky court held that the denial of a motion to intervene as a matter of right was immediately appealable); *In re Richard*, 921 N.E.2d 535, 536 (Mass. 2010) (the Massachusetts court held that an order denying intervention as of right is immediately appealable, and that the court would also consider an accompanying denial of a request for permissive intervention); *Berg v. Nelson*, 2016 UT App 16, 366 P.3d 860, 861 (Utah Ct. App. 2016) (the Utah court “recognize[d] a limited exception to the final judgment rule for an appeal of an order denying a motion to intervene”).

Selective's Right to an Immediate Appeal

The order denying Selective'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 41, S.E. at 309. Selective therefore has a right to an immediate appeal under S.C. Code § 14-3-330(2) as has been established in this State.

In a case pending before this Court, an insurer appealed the denial of an intervention motion, and the homeowner's association moved to dismiss. *See* Motion to Dismiss Appeal, *Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179 (filed Feb. 6, 2017) (attached as Exhibit A). There, the homeowners association argued that the order was not immediately appealable under *Johnson/Rutledge* because the circuit court found the motion untimely and did not rule on the merits. *Id.* Even with that added argument against jurisdiction, this Court ordered: "The motion to dismiss is denied at this time. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs" Order, *Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179 (Mar. 7, 2017) (attached as Exhibit B).

In the present matter, the Circuit Court ruled on the merits, and therefore the case is clear that the denial of the motion to intervene is immediately appealable. *See Ex parte Johnson (Rutledge v. Tunno), supra.* The question of whether Selective has any right or obligation to intervene is inextricably intertwined with the merits of the controversy, which turns on what *Harleysville* means. The Court should deny the Association's Motion to Dismiss and permit this case to proceed to merits briefing.

Prayer

Selective respectfully requests that this Honorable Court denies The Association's motion to dismiss the appeal.

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by MEC w/
express written
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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In re: The Harbour Cove Condominium Association, Respondent,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, 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.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc., A&A Stucco Inc.; Coastal Plaster Systems, Inc.; Coastal Plastering Systems, Inc.; and Mike Phillips, Respondents,

v.

Centex Homes, a Nevada General Partnership, Respondent,

v.

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American

Residential Services, Inc.; Builders FirstSource — Atlantic Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Top Notch Painters; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; Bond Group. Inc.; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc.; Azimuth Consultants, and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants, BCI, Inc., Com Tech, Model Home Interiors, Inc., Crescent Architects, LLC, Taylor Made Builders, Inc. Respondents.

Proof of Service

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Selective Insurance Company of South Carolina, do hereby certify that I have ensured the service on all counsel in this action with copies of Appellant Selective Insurance Company's Return to Respondent's Motion to Dismiss Appeal to the following address(es) via electronic mail:

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by MEC w/
express written
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October 26, 2017

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OCT 26 2017
SC Court of Appeals

Hand Delivered

The Honorable Jenny Abbot Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
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RE: The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnership, et al.
Civil Action No.: 2014-CP-26-07634
Appellate Case No.: 2017-002155
NMRS File No.: 32161.01512

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant Selective Insurance Company of South Carolina's Response in Opposition to Respondent Harbour Cove Condominium Association's Motion to Dismiss the Appeal. Please file this response with the Court and return a file stamped copy to our courier. Please contact me should you have any questions.

By copy of the letter I am hereby serving all counsel of record a copy of same.

Very truly yours,

Bob Calamari

Robert C. Calamari

*by MEC w/
express written
consent*

RCC:dp

Enclosures

cc: All Counsel of Record (via email only w/enclosure)