

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 26 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.

**APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY'S
RETURN TO RESPONDENT THE HARBOUR COVE CONDOMINIUM
ASSOCIATION'S MOTION TO DISMISS APPEAL**

Appellant National Fire & Marine Insurance Company (“Appellant”), submits this return in opposition to the Motion to Dismiss Appeal filed by Respondent Harbour Cove Condominium Association (“Respondent”). Respondent has moved to dismiss the appeal on the grounds that Appellant was not a party, and the Order denying the motion to intervene was an interlocutory order and therefore not immediately appealable. Under the settled meaning of S.C. Code § 14-3-330(2), Appellant has a right to an immediate appeal, and the Court should therefore deny the Motion to Dismiss Appeal.

Background

Appellant issued insurance policies with commercial general liability coverage to Coastal Plaster Systems, Inc. Coastal Plaster Systems is one of many subcontractors whom the Respondent sued in a civil action concerning alleged construction defects in buildings maintained by the Respondent. Appellant is providing a defense to Coastal Plaster in the civil action pursuant to a reservation of rights concerning insurance coverage. Appellant (and other insurers) moved to intervene in the civil action for the limited purpose of requesting an allocated verdict. The Circuit Court denied the motions, and Appellant filed this appeal. Respondent has moved to dismiss the appeal as not immediately appealable.

Appellant appeals the denial of its motion to intervene 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)(“*Harleysville*”). *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 of the buildings (which may qualify as “property damage”). *Id.* at ____, 803 S.E.2d at 296. The Supreme Court in *Harleysville* held that an insurer’s right to control the litigation carried with it certain duties, including the insurer’s “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 (citing *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)).

In *Harleysville*, the Supreme Court affirmed the ruling of the Special Referee that the insurer could not allocate a general verdict between covered and non-covered damages in a subsequent declaratory judgment action concerning insurance coverage:

[T]he Special Referee found coverage under the policies was triggered because the juries' general verdicts included some covered damages. Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk.

Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, ___, 803 S.E.2d 288, 294 (2017).

The Supreme Court relied in part on *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), wherein Auto Owner Insurance Company was penalized for not having the covered versus non-covered damages allocated as part of the arbitrator's award. *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, ___, 803 S.E.2d 288, 311 n. 11 citing *See [Auto Owners] Newman*, 385 S.C. at 198, 684 S.E.2d 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 311 n.11. Accordingly, by seeking intervention, National Fire sought to fulfill what may be a duty to allocate

damages that are a basis for a verdict and to avoid the consequences of a general verdict for a subsequent action concerning insurance coverage.

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.’”). The longstanding holding of *Ex parte Johnson (Rutledge v. Tunno)* concerning

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....”

intervention and an immediate appeal remains the recognized law on this issue, and has been cited recently by the South Carolina Supreme Court and South Carolina Court of Appeals in two unpublished decisions.²

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).

Instead of citing controlling authority, Respondent 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

² *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*). The *Ex parte Wells* 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")(The *Ex parte Carter v. L.C.* 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").

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 “an order making a third party a defendant,” which does not put any party out of 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).

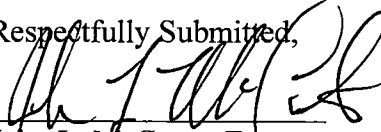
Appellant’s Right to an Immediate Appeal

The order denying Appellant’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. The question of whether Appellant has any right or obligation to intervene is inextricably intertwined with the merits of the controversy, the form of the verdict and the rights and obligations of an insurer in a subsequent action concerning insurance coverage. 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*. Appellant therefore has a right to an immediate appeal under S.C. Code § 14-3-330(2) as has been established in this State. The Court should deny Respondent’s Motion to Dismiss and permit this appeal to proceed to merits briefing.

(Signature on Next Page)

*National Fire & Marine Insurance Company et al. Appellants, v. The Harbour Cove
Condominium Association, et al. Respondents
Case No. 2014-CP-26-7634
Appeal No. 2017-002153*

Respectfully Submitted,



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**ATTORNEY FOR APPELLANT NATIONAL
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October 26, 2017

Exhibit A

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Amanda M. Blundy
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February 6, 2017

Via Federal Express and electronic mail

The Honorable Jenny Abbott Kitchings
Clerk of Court
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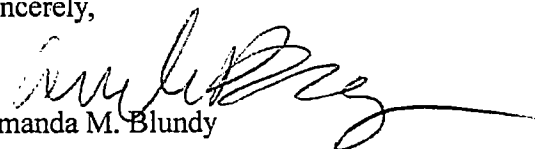
RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al
Case No.: 2013-CP-08-179

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent Beresford Commons Homeowners Association, Inc.'s Motion to Dismiss Appeal as well as this firm's check in the amount of \$25.00 for the applicable filing fee. If you would, please file this motion with the Court and return a file-stamped copy thereof to my office in the enclosed, self-addressed, stamped envelope.

Should you have any questions or require any additional information, please don't hesitate to contact me.

Sincerely,


Amanda M. Blundy

AMB/esm

Enclosure

cc: John T. Chakeris, Esquire (w/enclosure)
J.R. Murphy, Esquire (w/enclosure) - via U.S. mail and electronic mail
Adam J. Neil, Esquire (w/enclosure) - via U.S. mail and electronic mail
Timothy J. Newton, Esquire (w/enclosure) - via U.S. mail and electronic mail
Albert A. Lacour, III, Esquire (w/enclosure) - via U.S. mail and electronic mail

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of Common Pleas**

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Nationwide Mutual Fire Insurance Company,Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,Respondent,

v.

Superior Solution, LLC,Respondent.

MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Beresford Commons Homeowners Association, Inc. (hereinafter "Beresford HOA"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellant Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide").

BACKGROUND

This appeal arises from a construction defect case commenced by Beresford HOA against various defendants, including Superior Solution, LLC. Nationwide is an insurer of Superior Solution, LLC. Nationwide filed a Motion to Intervene in the underlying action.

By Form 4 Order entered January 31, 2017, the Court stated that “Nationwide Mutual Fire Company’s Motion to Intervene on behalf of Superior Solutions, LLC filed January 26, 2017, was not heard. Motion was filed after pretrial deadline.” Subsequently, Nationwide filed a Motion for Reconsideration on February 3, 2017. This action was set for trial to begin on this date, February 6, 2017. All remaining parties to the case appeared in court to try the matter, at which time the Court reiterated to Nationwide that its Motion to Intervene had not been denied and as such, there was nothing to reconsider, but noted that the Court would consider hearing the Motion before charging the jury. At this time, the jury panel was qualified, witnesses were present in court, and on a break Nationwide filed its Notice of Appeal. The Court has informed all parties that the jury is being held until Wednesday, February 8, 2017 in hopes that it would not have to release a jury panel that has been set aside for this two-week date certain trial.

To better understand the improper nature of Nationwide’s appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Nationwide filed a written motion to intervene for the purpose of requesting a special verdict form or special interrogatories. (See *Exhibit A attached*). Nationwide is not a party to the litigation. Beresford HOA asserted no claims whatsoever against Nationwide, and Nationwide does not appear as a party in the caption of its own motion from which this appeal arises. After the filing of the motion at issue, Beresford HOA noticed the Rule 30(b)(6) deposition of Nationwide for purposes of determining and narrowing the issues related to Nationwide’s special interrogatories and any that may be requested by Beresford HOA, which Nationwide moved to quash. The Circuit Court ruled the Motion as untimely, as noted in Nationwide’s Notice of Appeal. This appeal follows.

LAW AND ANALYSIS

In order for an issue to be appealed, it must have been ruled upon by the Court. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (upholding the dismissal of an appeal as interlocutory when the appealed order was not intended to be a final ruling). "An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005) citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRPC; Rule 201(a), SCACR. A ruling which does not determine the rights of the parties in a matter is interlocutory and not immediately appealable. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573-74, 698 S.E.2d 856, 859-60 (Ct. App. 2010).

The Court did not rule on Nationwide's Motion to Intervene, it simply refused to hear it because it was filed past the pretrial deadline. There has been no appealable final judgment because there has been no judgment – no decision regarding the merits of Nationwide's Motion has been made. There has not been a judgment that determines the rights of any parties in this matter because there has not been any judgment, and a trial on the facts of the case has yet to be completed.

Further, the decision that Nationwide's Motion to Intervene was not timely does not give Nationwide any rights to stay the case, and permitting this appeal will prejudice Beresford HOA's rights. Nationwide filed a declaratory judgment action against its insured, Superior Solution, LLC, to determine insurance coverage in February of 2016, and coincidentally, has taken this exact position when Beresford HOA attempted to

appeal a ruling of Nationwide placing their own insured in default. Citing directly from Nationwide's brief:

Finally, allowing this appeal to go forward prejudices Nationwide's rights. This declaratory judgment action was filed in February 2016. The underlying case is set for trial the first week of February 2017.

Nationwide's Reply Memorandum in Support of Motion to Dismiss Appeal dated December 19, 2016 in United States Court of Appeals, Fourth Circuit

Nationwide acknowledges the trial date in the brief to the United States Court of Appeals, Fourth Circuit and discusses the prejudice an appeal would have on their right as the insurance company. However, Respondent, the Beresford Commons Homeowners Association, has been waiting since 2013 to bring this case to a resolution, which may be jeopardized with Nationwide's attempt to appeal a decision by the Court that is interlocutory and not appealable.

While Nationwide is relying on the recent case law, *Harleysville Group Ins. v. Heritage Cmities, Inc., et al.*, 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017)(Shearhouse Adv. Sh. No. 2 at 21, 36 n.11) in order to justify its failure to file a Motion to Intervene in a timely manner, there is no case law prior to the *Harleysville* case preventing it from doing so. In fact, there is no case law in South Carolina that overturns *Auto Owners Insurance Co. Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) and the concept of allowing a carrier to intervene in this type of case has been fully briefed by another carrier who intervened in this exact matter. Nationwide and Beresford HOA's counsel have been litigating this coverage matter since February 10, 2016, when the declaratory judgment action was filed. The coverage issues have been at issue for a year and Nationwide could have filed a Motion to Intervene in this action at any time prior to the eve of trial. Specifically, Nationwide could have moved to intervene immediately

after the *Harleysville* decision, but chose to wait more than two weeks to file its Motion. In fact, Selective Insurance Company moved to intervene prior to even filing a coverage action, which was granted by Judge Nicholson. Selective moved to intervene in October 2016 in time to have a hearing and a determination prior to trial.

On these grounds, the Court's determination that the Motion was untimely and would not be heard is not a final judgment as to all the claims or parties, and is not an immediately appealable interlocutory order.

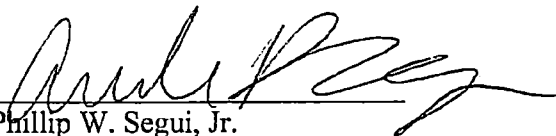
As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

As such, Nationwide appeal must be dismissed as an impermissible interlocutory appeal.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Beresford HOA respectfully requests an Order of this Honorable Court dismissing Appellant Nationwide's Appeal in its entirety.

**FOR RESPONDENT BERESFORD
COMMONS HOMEOWNERS
ASSOCIATION, INC.:**



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February 6, 2017
Mount Pleasant, South Carolina

- AND -

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CERTIFICATE OF SERVICE


I hereby certify that I have this day served counsel for the opposing party(s) with one (1) copy of the foregoing "Motion to Dismiss Appeal" by *electronic mail* and by depositing a copy of same in the *United States mail* in an envelope properly addressed to the following, with adequate postage thereon to insure proper delivery to the following:

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This 6th day of February, 2017.

BY:



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Exhibit B

The South Carolina Court of Appeals

Ex Parte:

Nationwide Mutual Fire Insurance Company, Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,
Respondent,

v.

Superior Solution, LLC, Respondent.

Appellate Case No. 2017-000202

ORDER

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.


FOR THE COURT

Columbia, South Carolina

cc:

John Robert Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire
Phillip Ward Segui, Jr., Esquire
Amanda Morgan Blundy, Esquire

FILED

March 7, 2017

Albert A. Lacour, III, Esquire
The Honorable Kristi Lea Harrington

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

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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,

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PROOF OF SERVICE

I certify that I have served Appellant National Fire & Marine Insurance Company's Return to Respondent The Harbour Cove Condominium Association's Motion to Dismiss Appeal on parties by depositing a copy of it in the United States Mail, postage prepaid, on October 26, 2017 addressed to their attorneys of record, listed as follows:

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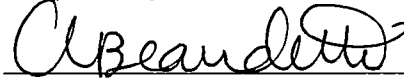
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*National Fire & Marine Insurance Company et al. Appellants, v. The Harbour Cove
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Case No. 2014-CP-26-7634
Appeal No. 2017-002153*

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "A Beaudette", written over a horizontal line.

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October 26, 2017

RECEIVED
OCT 26 2017
SC Court of Appeals

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
1015 Sumter Street
Columbia, South Carolina 29202

RE: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company

Harbour Cove Condominium Association, et al., v. Centex Homes, et al.
Civil Action No.: 2014-CP-26-07634
Appellate Case No. 2017-002153

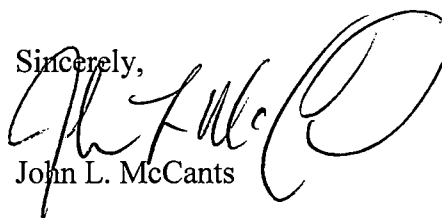
Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of National Fire & Marine Insurance Company's Return to Respondent Harbour Cove Condominium Association's Motion to Dismiss Appeal along with the Proof of Service. Please return a filed stamped copy of the Return to Respondent Harbour Cove Condominium Association's Motion to Dismiss Appeal and Proof of Service with the courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Sincerely,



John L. McCants

cc: Phillip W. Segui, Jr.
Amanda Blundy

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