THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-06573
Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-02146

In Re Motions to Intervene in:

The Harbour Cove Condominium Association, Plaintiff,
v.
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., Defendants,

and

Beach Villas at Ocean Keyes Property Owners Association, Inc., Plaintiff,
v.
Ocean Keyes Development, LLC, Keye Construction Co., Inc., Russell P. Baltzer, First Exteriors, LLC, CareFree Exteriors Inc., Coastal Stucco, Inc., Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con., Inc., Builders FirstSource-Southeast Group, LLC, Steel Homes International, Inc., Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC, Benchmark Steel Service, LLC and Dietrich
Building Systems n/k/a Clark Western Dietrich Building Systems, LLC, Defendants,

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Ocean Keyes Development, LLC and Keye Construction Co., Inc., Third-Party Plaintiffs,
v.

Renaissance Steel Installation, LLC f/k/a Renaissance Steel, LLC n/k/a Innovative Steel Technologies, Benchmark Steel Erectors, and Total Construction, LLC, Third-Party Defendants.

Of whom Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company as successor in interest to Clarendon America Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, Canopius US Insurance, Inc., and American Empire Surplus Lines Insurance Company are the Appellants,

AND

The Harbour Cove Condominium Association, Beach Villas at Ocean Keyes Property Owners Association, Inc., Ocean Keyes Development, LLC, Keye Construction Co., Inc., and Russell P. Baltzer are the Respondents.

MOTION TO TRANSFER CASE TO THE SUPREME COURT

Pursuant to Rule 204(b), SCACR, National Fire & Marine Insurance Company ("National Fire"), moves to certify the case for immediate review by this Court.

Transferring a case to this Court "is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. This Court has granted certification in appeals, either on the motion of a party or the Court's own motion, presenting recurring questions affecting liability insurers and policyholders with respect to construction defect litigation. *See Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017) ("*Harleysville*"); *Bennett and Bennett Construction, Inc. v. Auto-Owners Insurance Company*, 405 S.C. 1, 747 S.E.2d 426 (2013); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013); *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011); *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman"); and *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). This Court has also certified cases

involving insurers' attempts, in other contexts, to intervene in lawsuits to protect their interests. *Ex parte Gov't Employee's Ins. Co. ("GEICO")*, 373 S.C. 132, 134, 644 S.E.2d 699, 700 (2007).

National Fire and five other insurers moved to intervene in the civil action styled *Harbour Cove Condominium Association, et al. v. Centex Homes, et al.*, Civil Action No. 2014-CP-26-7634 ("*Harbour Cove*") due to the uncertainty stemming from *Harleysville* and to avoid the consequences of a general verdict to an insurer as discussed *infra*. The Circuit Court entered its order denying the motions to intervene. National Fire has appealed the order to seek clarification regarding its rights and obligations under South Carolina law. The appeals present at least two questions that are recurring in construction defect civil actions and will continue to recur:

1. Does a liability insurer have a right or obligation to intervene in an underlying construction defect action to request an allocated verdict under *Harleysville*?
2. What are an insurer's appeal rights if a trial court denies its request to intervene for the limited purpose of requesting an allocated verdict under *Harleysville*?

National Fire seeks certification so that the Court can resolve the issue over *Harleysville*'s meaning; and National Fire can avoid the consequences of a general verdict in the *Harbour Cove* civil action for a later action concerning insurance coverage.

Uncertainty Regarding *Harleysville*

Harleysville addressed coverage in 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"). 420 S.C. at 335, 803 S.E.2d at 296. In requiring the insurer to pay for both types of repair costs, the 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 342, 803 S.E.2d at 299.

The Court further stated, " '[t]he 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.'" *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). In a footnote, the Court stated:

> In addition to finding [the insurer'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 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).

Id. at 343 n.11, 803 S.E.2d at 300 n.11.

National Fire's Motions to Intervene

National Fire sought intervention in the *Harbour Cove* civil action in which National Fire was defending Coastal Plaster Systems, Inc. under reservations of rights. Before moving to intervene, National Fire advised Coastal Plaster Systems in writing that, because of the potential for a general verdict, the insured could itself submit a special verdict form or special interrogatories seeking an allocation of damages between covered and uncovered damages. National Fire sought intervention for the limited purpose of requesting an allocated verdict; and to avoid the consequences of a general verdict that happened to the insurers in *Harleysville* and *Newman.*

The Circuit Court denied the insurers' motions for intervention. In the *Harbour Cove* action, the Circuit Court held:

> 1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of

Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." *Ex parte* Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (*quoting* Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in GEICO, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the ... project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the ... project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Harbour Cove Order Denying Motion of Insurers for Limited Intervention, p.3-4 (Oct. 12, 2017) (attached as Exhibit A).

National Fire and the other moving insurers filed notices of appeal, and the Circuit Court stayed the *Harbour Cove* civil action accordingly. In the *Harbour Cove* civil action, the condominium association moved in the Court of Appeals to dismiss the insurers' appeals—broadly contending, contrary to *Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 207–08, 41 S.E. 308, 309 (1902), that an order denying intervention is not an immediately appealable order. *See* Exhibit B (motion) and Exhibit C (National Fire's memorandum in opposition).

Appropriateness of Certification

Uncertainty regarding *Harleysville*'s meaning, and the legal consequences to an insurer for a general verdict, compelled National Fire to seek intervention in the *Harbour Cove* civil action. National Fire prefers to leave all coverage questions for a subsequent action, and it believes that any reference to insurance coverage would be improper and prejudicial before the jury. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd,* 385 S.C. 421, 685 S.E.2d 595 (2009). But until this Court resolves uncertainty regarding its holding in *Harleysville*, insurers will continue to seek intervention to request allocated verdicts to avoid the consequences of a general verdict to an insurer.[1]

The Circuit Court cited *Sims*, *supra*, in its Order for the proposition that "to avoid impermissible conflict determining coverage issues, this state requires a separate action." Order ¶ 4. Its orders also cited *In re GEICO*, *supra*, as disfavoring intervention by insurers in non-insurance cases. The issue is that these holdings resemble the *Harleysville* dissent. Citing *Sims*, the dissent in *Harleysville* stated: "[m]oreover, there is no suggestion how [the insurer] could have

[1] *See, e.g., Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179. In that case, the Court of Appeals denied the plaintiff association's motion to dismiss the appeal, while allowing the parties to raise appealability issues in their briefs. The case has not been addressed on the merits and, although it is still pending, the parties have notified the Court of Appeals of a settlement.

intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law." *Harleysville*, 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, Acting Justice, dissenting).

The *Harleysville* majority did not address the tension between its holding and *Sims* or *In re GEICO*. The majority opinion stated that an insurer has a "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." 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum*, 36 F.3d at 1498). But *Harleysville* did not involve the situation where an insurer advises its insured of the option to seek a special verdict and the insured does not request one. *Harleysville* did not provide definitive procedures or guidance on what party must allocate damages in the underlying action for subsequent coverage litigation.

The Court's citation to *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), would indicate that the insurer discharges any duty by advising the insured that the decision belongs to the insured: "Once [the insurer's] counsel disclosed the situation, the insureds, represented by their own retained counsel, would be entitled to make the decision whether to seek an allocated verdict." *Duke*, 468 F.2d at 979. If the insured decides against an allocated verdict, the insured (or its successor) will bear the "burden ... to prove the precise [covered] portion of the unallocated verdict" in a subsequent coverage action. *Id.* at 977. Still, *Duke* did "not explore the situation in which the insured does not have his own counsel." *Id.* at 979 n.4. In such a situation, it stands to reason that the construction defect plaintiffs' awareness of the potential for an allocated verdict—and their resulting ability to request an allocated verdict themselves—would cure any potential problem. *See Harleysville*, 420 S.C. at 337, 803 S.E.2d at 297 (noting that association succeeded to defunct insured's rights following entry of final judgment). This situation too would be consistent with the

majority rule in the United States that where a judgment includes elements for which an insured is liable and also elements beyond coverage of the policy, the burden of apportioning those damages is on the party seeking to recover from the insurer. *Duke*, 468 F.2d at 977 citing *Universal Underwriters Ins. Corp. v. Reynolds*, 129 So.2d 689, 691 (Fla. Ct. App. 1961).

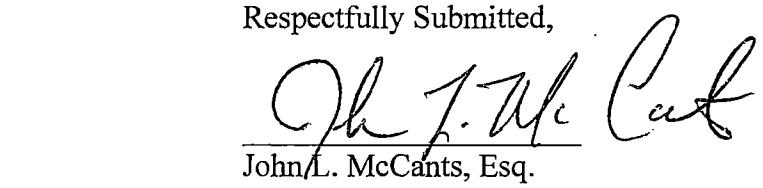
Even if such conclusions are implicit in *Harleysville*, they are not explicit. If National Fire and the other insurers had not moved to intervene, and then appealed from the order denying intervention, the trials would have gone forward to unallocated verdicts. It makes eminent sense to resolve these issues regarding *Harleysville*'s meaning before trial, and the most efficient way to resolve *Harleysville*'s meaning and the legal consequences for an insurer is certification under Rule 204(b).

If the Court grants certification, it can address the associations' procedural and jurisdictional objections as part of merits briefing. The associations' various objections boil down to the proposition that *Harleysville* does not contemplate insurers intervening to request allocated verdicts, and that National Fire's motion for intervention and subsequent appeal did not assert rights protected by the rules governing intervention and immediate appeals. In other words, the procedural and jurisdictional objections are intertwined with the substantive question of what *Harleysville* means. Whether framed as a substantive or a procedural question, an opinion by this Court would bring necessarily clarity regarding *Harleysville*.

For these reasons, National Fire moves pursuant to Rule 204(b), SCACR for certification by the Supreme Court for immediate review of the case.

(Signature on Next Page)

Respectfully Submitted,



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ATTORNEY FOR APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY

November 13, 2017

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Harbour Cove Condominium Association, et al., Plaintiffs, v. Centex Homes, et al., Defendants.	)	Civil Action No.: 2014-CP-26-7634 ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "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. "A real party in interest ... is one who has a real, actual, material or 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.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." *Ex parte* Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (*quoting* Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in GEICO, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

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Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

Exhibit B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

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, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company.....Appellants,

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 Interiots, 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,

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MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Harbour Cove Condominium Association (hereinafter "Respondent Harbour Cove"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellant National Fire & Marine Insurance Company (hereinafter "Appellant National Fire").

BACKGROUND

This appeal arises from a construction defect case commenced by Respondent Harbour Cove against various defendants. Appellant National Fire is an insurer of defendant Coastal Plaster Systems, Inc. Appellant National Fire filed a Motion to Intervene in the underlying action on July 27, 2017. By Order entered October 13, 2017, the Court ruled that Appellant National Fire's Motion to Intervene was denied. Appellant National Fire filed its Notice of Appeal immediately thereafter. This action was set for trial to begin on October 16, 2017.

To better understand the improper nature of Appellant's appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Appellant filed a written motion requesting a special verdict form or special interrogatories. However, Appellant is not a party to the litigation. Respondent Harbour Cove asserted no claims whatsoever against Appellant, and Appellant does not appear as a party in the caption of its own motion from which this appeal arises. This appeal follows.

LAW AND ANALYSIS

The South Carolina Court of Appeals may only entertain appeals of final orders. S.C. Code Ann. § 14-3-330 (1991). If there is some further act of the court which must be done in order to determine the rights of the parties, an order is interlocutory. *Mid-State*

Distribts. V. Century Imps., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993) (citing *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884)) (a ruling on a Motion to Dismiss under Rule 12(b)(2) has no real finality because it leaves open issues for trial and is interlocutory and therefore not appealable). An order that determines issues of law while leaving open questions of fact is not a final order. *Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012) (citing *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)) (an order containing provisions where the court remanded a matter for further proceedings was not a final order and not appealable). Specifically, the South Carolina Supreme Court has analyzed the issue of whether an appeal of a ruling on a Motion to Intervene was permissible, and concluded it was an improper interlocutory appeal. *Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 319-20 (*See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449, S.E.2d 580, 580 (1994).) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory and was therefore not immediately appealable).

The Court's ruling on Appellant's Motion to Intervene is not an appealable final order as the entirety of the trial on the facts of the case has yet to commence and several factual issues remain. Respondent, the Harbour Cove Condominium Association, and its residents have been waiting since 2014 to bring this case to a resolution, which may be jeopardized with Appellant's attempts to appeal a decision by the Court that is interlocutory and not appealable.

On these grounds, the Court's denial of Appellant's Motion is not a final judgment as to all the claims or parties and furthermore, 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, Appellant's appeal must be dismissed.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Harbour Cove respectfully requests an Order of this Honorable Court dismissing Appellant National Fire's appeal in its entirety.

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October 16, 2017
Mount Pleasant, South Carolina

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Exhibit C

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

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*)

Respectfully Submitted,

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October 26, 2017

Exhibit A

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February 6, 2017

Via Federal Express and electronic mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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jkitchings@sccourts.org

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, SCRCP; 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 Cmties, 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 ASSOCATION, INC.:

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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.

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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:
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Timothy J. Newton, Esquire
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Amanda Morgan Blundy, Esquire

FILED
March 7, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail and/or regular mail, postage prepaid to the following counsel of record:

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